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**GERALD McLAUGHLIN**  
U. S. Circuit Judge







THE  
FEDERAL REPORTER.

VOLUME 135.

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IN THE  
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**JUDGES**

OF THE

**UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.**

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<sup>1</sup> Appointed Circuit Judge February 23, 1905.

<sup>2</sup> Appointed February 23, 1905.

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\* Appointed March 17, 1905.

\* Resigned March 11, 1905.

\* Appointed March 14, 1905.



Hon. FRANCIS J. WING, District Judge, N. D. Ohio <sup>6</sup>.....Cleveland, Ohio.  
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 Hon. JOHN E. McCALL, District Judge, W. D. Tennessee <sup>9</sup>.....Memphis, Tenn.

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 Hon. JOHN E. CARLAND, District Judge, South Dakota.....Sioux Falls, S. D.  
 Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.  
 Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

<sup>6</sup> Resigned February, 1905.

<sup>7</sup> Appointed to succeed Francis J. Wing.

<sup>8</sup> Died December 17, 1904.

<sup>9</sup> Appointed January 17, 1905.

<sup>10</sup> Resigned February 28, 1905.

<sup>11</sup> Appointed Circuit Judge March 18, 1905.

<sup>12</sup> Became Circuit Judge.

<sup>13</sup> Appointed March 18, 1905.

<sup>14</sup> Appointed March 17, 1905.

<sup>15</sup> Appointed March 6, 1905.

<sup>16</sup> Resigned January 9, 1905.

<sup>17</sup> Appointed to succeed Romanzo Bunn.

<sup>18</sup> Died April 24, 1905.

## NINTH CIRCUIT.

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Hon. WM. W. MORROW, Circuit Judge.....	San Francisco, Cal.
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Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....	Seattle, Wash.

<sup>10</sup> Appointed by Act of March 2, 1905.

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# CASES

## ARGUED AND DETERMINED

IN THE

### UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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#### POST v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1905.)

No. 1,352.

#### 1. POST OFFICE—USE OF MAILS TO DEFAUD—ELEMENTS OF OFFENSE.

Where, in an indictment for using the mails in furtherance of a scheme or artifice to defraud, the only charge of fraud or bad faith was that defendant advertised to practice mental healing, and received pay to treat patients "when she did not intend to administer any treatment," the mere averment that she was engaged in the business of mental healing does not state a scheme or artifice to defraud, within Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873 [U. S. Comp. St. 1901, p. 8697], but the gist of the offense as charged in such indictment is that she did not intend, when she so advertised and received money, to give the treatment for which she was paid, and such averment must be proved to warrant a conviction.

[Ed. Note.—Use of mails to defraud, see note to *Timmons v. United States*, 30 C. C. A. 86.]

#### 2. SAME—PRACTICE OF MENTAL HEALING—GOOD FAITH.

Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873 [U. S. Comp. St. 1901, p. 8697], making it a criminal offense to use the mails in furtherance of a scheme or artifice to defraud, does not make any discrimination, with respect to the right to the use of the postal establishment of the United States by persons whose vocation is healing, between those who profess to cure by the use of mental science and those who use drugs; and, in a prosecution thereunder for such use of the mails, the question of the defendant's good faith is the cardinal question. If she practiced in good faith, without the intention to defraud, she is not guilty, although in fact the theory and practice followed were worthless; but if, without belief in her practice, and with knowledge that her representations regarding it were false, she made them to defraud, the fact that mental healing is a lawful vocation does not prevent conviction.

#### 3. SAME—BURDEN OF PROOF.

The burden of proof in a criminal case is never upon the accused to prove innocence, or to disprove evidence offered to establish crime. In a prosecution for the use of the mails to carry out a scheme to defraud in the practice of mental healing, it being charged in the indictment that the defendant's promises to heal were impossible of performance, and evidence having been received on both sides of that issue, it was error to instruct the jury that the burden rested on the defendant to prove to their satisfaction that she possessed such power.

**4. CRIMINAL LAW—INSTRUCTIONS—WEIGHT AND CREDIBILITY OF TESTIMONY.**

While the judge of a federal court may express his opinion in a charge as to the weight or effect of evidence or the credibility of witnesses, he is not warranted in directing a jury that they should ignore evidence offered by a defendant as to the possession by her of certain powers of mental healing because it was contrary to well-established laws of nature. If the evidence is admissible, its credibility and weight are matters for the jury to determine.

In Error to the District Court of the United States for the Southern District of Florida.

For opinion below, see 128 Fed. 950.

H. Bisbee, Geo. C. Bedell, and O. T. Green, for plaintiff in error.  
J. N. Stripling, U. S. Atty., and W. W. Howe, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. Four indictments were found against the plaintiff in error, who will hereafter be called the defendant, charging her with a violation of section 5480 of the Revised Statutes of the United States, as amended by the act of March 2, 1889, c. 393, § 1, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3697]. The material parts of the statute are as follows:

"If any person, having devised or intended to devise any scheme or artifice to defraud \* \* \* to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the postoffice establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting to do so, place or caused to be placed any letter \* \* \* in any postoffice \* \* \* of the United States, to be sent or delivered by the said postoffice establishment, \* \* \* such person so misusing the postoffice establishment shall, upon conviction, be punishable by a fine of not more than \$500 and by imprisonment for not more than 18 months, or by both," etc.

The indictments were consolidated under Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720], and tried on the plea of not guilty, as one case. The defendant was convicted, and sentenced to imprisonment in the penitentiary for one year and a day. The charge of the trial judge is reported in full in *United States v. Post* (D. C.) 128 Fed. 950.

It is not desirable to make a full statement of the evidence (the record contains more than 500 pages), but it is necessary to make a sufficient statement of it to make clear the questions to be decided.

When about 22 years of age the defendant was graduated by a college in Illinois. From that time for about 20 years she was occupied in teaching and literary pursuits, and became well-known as a writer. When about 30 years old she became a student of Christian and mental science. She studied the subject for many years. After investigation she rejected the principles of Christian science, so far as it relies upon divine power to heal, but became a believer in the substantiality and usefulness of mental science. About the year 1885 she moved from Illinois to Georgia, and en-

gaged there in the business of healing by the mental science method. While in Georgia, at first, she treated her patients at home, and later she used the United States mails in order to treat patients at a distance. In 1892 she located in Florida, and began the practice of mental healing there. She treated patients at a distance, corresponding with them through the mails, and advertising in journals and pamphlets, and continued to do so until the beginning of these prosecutions. Her business so increased that she employed several clerks and assistants, some of whom had previously been taught by her in lectures on the subject of mental science. She published several books and many pamphlets on the subject. She had between seven and ten thousand patients whom she treated, and from many she received testimonials that they had been benefited or cured. Many of her patients testified on the trial that they had been benefited by her treatment, and knew of others receiving benefit or being cured. Her business was conducted openly. She taught mental science by delivering lectures to classes. She employed and paid a mental scientist to treat a member of her family. She is now 73 years of age, and is an intellectual and educated woman. The advertisements by letters and publications that she continuously made of her business were very optimistic. She claimed to possess the power to cure all, or nearly all, diseases; to remove the conditions that produce poverty, and to inspire or cause those conditions that bring success; to restore hair to its natural color, and to grow it on bald heads; to alleviate or remove many unfavorable conditions; to remove the evidences of old age, and to restore youth, if the patient had faith that it could be done; and she further claimed that by "absent treatment" through a second person she could cure a third person without the latter having knowledge of the treatment. And there was evidence tending to show that she gave the business of the treatment of patients but little, if any, personal attention, and was acutely interested only in the money that she was receiving from the patients; but, on the other hand, there was evidence tending to show that she gave the patients every attention as advertised, and that she often treated the poor without compensation, and that no patient ever complained of her. There was evidence tending to show that it was impossible by absent treatment through a second person to cure or benefit a third person without such third person having knowledge of the treatment, and evidence was offered intended to show that cures could be and were made, and benefit conferred, by such treatment. Other facts applicable to special phases of the case will be stated as such phases are discussed.

As to Indictments No. 141, No. 160, and No. 161.

The scheme or artifice to defraud as charged in these indictments is substantially the same, and is, in substance, that the defendant had devised a scheme and artifice to—

"Defraud divers persons whose names are to the grand jurors unknown, by publishing and causing and procuring to be published in certain newspapers,

pamphlets and circulars, entitled," etc., "divers advertisements in which it was represented in substance, that she, the said Helen Post, was a healer of all forms of disease and weakness; that she, by a method and process, which she variously termed 'Mental Science,' 'Mental Healing,' 'Mind Cure Treatment,' 'Mind Cure,' and 'Absent Treatment,' could cure every form of disease and weakness, and that she would treat and cure persons affected with disease by the aforesaid method and process, in their absence from her, for three dollars per week or ten dollars per month; and did then and there intend thereby to induce divers persons, whose names are to the grand jurors unknown, to send money to her for the purpose of receiving such alleged treatment, and to fraudulently convert such money as should be sent to her to her own use, *without administering any treatment*, but to fraudulently convert to her own use such money as should be so sent to her for said alleged treatment. And she, the said Helen Post, at the time of so devising said scheme and artifice, and at the time of so causing and procuring to be published the said advertisements and representations, and at and before the time of committing the offense hereinafter mentioned, *did not intend to administer any treatment for any disease or weakness by said method and process, and did not intend to cure any person or persons who might apply to her.* \* \* \*

These indictments differ as to the letters, etc., alleged to have been deposited in the post office, and in other immaterial matters, but the alleged scheme and artifice to defraud is in substance the same; and the lines which we have here italicized, to the effect that the defendant did not intend to administer any treatment, appear in almost the same words in each indictment. The gist of the scheme or artifice charged in each indictment is that the defendant advertised to practice mental healing, and received pay to treat patients "when she did not intend to administer any treatment." The learned judge who tried the case, in overruling demurrers to the indictments, said:

"It is not the question whether Mrs. Post could or could not do what she promised she would do, but, if at the time of making the representations she intended not to carry them out, she is, in that respect, guilty of the violation of the law."

It is not charged that she falsely pretended that she could cure. No charge is made that she could not treat and cure as advertised, and no charge is made that she knew she could not treat and cure the diseases and conditions as claimed. The point in the indictments which differentiates them from a mere charge of optimism—of professional boasting—is the allegation that she advertised and received money to treat patients, when she did not at the time intend to treat them. The record shows that the advertisement was to treat them by the mental cure method, and it shows that by that treatment was meant that she would direct the patients' thought toward health and against disease, and use her own thought, also, to alleviate or cure. That she did not at the time she so advertised and received pay, or at any time, intend to so treat the patient, is the only charge of bad faith. When an indictment was presented against the same defendant on similar facts, without this charge of bad faith, a demurrer was sustained to it. *United States v. Post* (D. C.) 113 Fed. 852. This ruling of the learned trial judge is sustained by the opinion of Judge Clark, speaking for the Circuit Court of Appeals of the Sixth Circuit, holding that an indictment under the section in question was not good, which charged a



scheme to defraud only the buyer by offering to sell to him counterfeit money at the rate of \$5 for \$1, unless it also charged that the defendant did not intend to or would not send the counterfeit money on receipt of the price, for, if the defendant had the counterfeit money, and intended to do as he offered to do—send the \$5 on receipt of the \$1—there was no deceit or scheme to defraud his correspondent, within the meaning of the statute, although the offer may have been a violation of another law. *Milby v. United States*, 109 Fed. 638, 48 C. C. A. 574. See, also, *Horman v. United States*, 116 Fed. 350, 53 C. C. A. 570; *Milby v. United States*, 120 Fed. 2, 57 C. C. A. 21. If the defendant intended to administer and did administer the treatment she advertised, she is not guilty of the fraud charged, although the treatment may be in fact as valueless as the counterfeit money in the *Milby Case*. There was no conflict in the evidence as to the advertisements. The sole disputed question of fact was: Did she, or did she not, intend to administer the mental treatment?

On the trial of the issue joined on the plea of not guilty, the burden was on the United States to prove, as the essential part of the scheme or artifice, that the defendant, at the time of the committing of the offense charged, "did not intend to administer any treatment for any disease or illness by said method or process, or any other method or process." It is certainly difficult to make such proof. It is true that motive and malice, which are mere emotions or invisible conditions of mind, may be proved by actions—as, for an instance, a killing with a weapon may prove malice. But the killing is an outward, visible action. Here the requirement is to prove an intention of the defendant at a certain time not to use her thought in a certain way at a subsequent time, no visible or tangible action being involved. It would not serve the purpose to say that she could not so use her thought—that her promise was impossible of performance—for that is not charged, and to seek to condemn her for not doing a thing is to assert that she could do it if she chose. The government undertook to make this proof by showing that she did not administer any treatment, intending that the jury should infer by her failure to administer the treatment that she did not intend to do so from the first. The record shows that the government entirely failed in this effort. It was shown that the mode of treatment advertised required the defendant to advise and direct the patient, and to use her own thought in behalf of the patient. The patient was directed by the defendant's circulars and letters (with other advice not material to mention) to "sit for treatment"—to go alone for 15 minutes each day and hold himself receptive to the thought of the defendant. The government offered evidence tending to show that the defendant did not "sit" to treat the patients, or devote any special time to treatment in that mode. But it does not appear that this sitting on her part was a necessary part of the treatment. There is nothing in the record to indicate that the patients were deprived of any part of the advertised treatment by her failure to "sit" for them. There is nothing to show that the patients failed to get substantially the treatment bargained for. On the contrary, it was affirmatively shown that she sent, or paid clerks to send, printed directions and advice to all patients, and wrote, or employed and directed clerks to write, to them

letters to encourage, advise, and direct them. That was all the patients had a right to expect, except that the defendant would use her thought in their behalf. She testified that she did this. It was a thing that she could do as well in one posture or place as in another, if she could do it at all. But if the government were to prove beyond a reasonable doubt that she did not so use her thought, this would not meet the requirement of the indictments. It must prove not only that she did not administer this invisible and intangible treatment, but that she did not intend to administer it. If it be conceded that the defendant believed she had esoteric power or knowledge (and these indictments are silent on the subject), there is no evidence in the record to sustain the charge that she did not intend to use it in behalf of her patients; that is, that she did not intend to treat them by the advertised mental cure method.

In *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, the Supreme Court had occasion to construe Rev. St. U. S. § 3929 [U. S. Comp. St. 1901, p. 2886], which authorizes the Postmaster General, upon evidence satisfactory to him, to instruct postmasters to stamp "Fraudulent" and return all registered letters which are directed to a person conducting any "scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises." The healing business under consideration in that case was founded almost exclusively on the proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in treating and curing them. Mr. Justice Peckham, delivering the opinion of the court, said:

"There can be no doubt that the influence of the mind upon the physical condition of the body is very powerful, and that a hopeful mental state goes far in many cases not only to alleviate, but even to aid very largely in the cure of, an illness from which the body may suffer." The court reached the conclusion that "these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis." "The opinions entertained," said the court, "cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved, as matter of fact, that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and as, in our opinion, it is used in these statutes."

The statute so construed is somewhat like the one involved here, and we think the construction sustains our conclusion that the mere allegation that the defendant was engaged in the business of mental healing is not an allegation of a "scheme or artifice to defraud." The only fraud charged, therefore, is that she did not intend to administer the advertised treatment for which she was paid. The evidence not tending to sustain this charge, the Circuit Court should have directed a verdict of not guilty on these indictments.

#### As to Indictment No. 176.

This indictment presents other issues. This will be made clear by excerpts from that part of it charging the scheme or artifice to defraud:

"That one Helen Wilmans Post, unlawfully, wilfully, fraudulently and knowingly devised a scheme and artifice to defraud divers and sundry persons, whose names and postoffice address is at present to the grand jurors unknown, and the public generally, which said scheme and artifice to de-

fraud was to be effected by opening and intending to open correspondence, and communication with such divers and sundry persons, as aforesaid, by means of the postoffice establishment of the United States, and by inducing and inciting such divers and sundry persons to open correspondence and communication with her, the said Helen Wilmans Post, by means of the said postoffice establishment of the United States, which said scheme and artifice to defraud was, in substance and effect, as follows, to-wit: That is to say, the said Helen Wilmans Post then and theretofore representing and advertising herself to be a Mental Science Healer, and practitioner of Mental Healing and Mind Cure, did before, and at the time of the committing of the offenses hereinafter mentioned, fraudulently assume to, and did pretend to practice what she termed 'Absent Treatment,' by which means and practice she published, advertised and procured to be advertised of and concerning herself, that she could and would cure various and all kinds of diseases known to man and woman, and did hold out to the public generally and to divers and sundry persons, that she was able to, and could and would by means aforesaid, treat and cure all patients and persons desiring and applying for said treatment of, and for, any and all diseases, old age, poverty, liquor habit, drunkenness, and all undesirable conditions; said so-called 'Absent Treatment' for cure aforesaid being conducted by her, pretending and advertising herself, and procuring herself to be so advertised in the name of Helen Wilmans, to be able to cure third persons through the instrumentality of some second person, of all such said diseases, old age, poverty, liquor habit, drunkenness, and undesirable conditions, although the fact of such alleged treatment through such second person was unknown to such other, or third person, no matter at what distance from each other and from her, the said Helen Wilmans Post, representing as aforesaid, that she could and would send such other or third persons, through such second person, her thoughts, vitalizing, healing power, and healing thoughts for the cure of all diseases, old age, poverty, liquor habit, drunkenness and undesirable conditions, by such second person, holding such third person, receptive to, and in close relation with, the thoughts of her, the said Helen Wilmans Post, and further represent, by letters written and caused to be written by her, and various publications and circulars, published and caused to be published and circulated, through the United States mails, at Seabreeze, by her, as a part of said scheme; that she could and would cure all persons of disease, old age, poverty, liquor habit, drunkenness and all undesirable conditions, by such said mode of absent treatment; that it was designed and intended that such said divers and sundry persons should be induced and procured to apply for and take, such absent treatment, by means of certain letters, at present to the grand jurors unknown, written and caused to be written by her, the said Helen Wilmans Post, together with various advertisements and publications, addressed to such divers and sundry persons, and deposited and caused to be deposited by her, the said Helen Wilmans Post, in the United States mails, and postoffice at said Seabreeze, for transmission and delivery to such said divers and sundry persons, to the grand jurors unknown, for the furtherance of and a part of said scheme; said letters, publications and advertisements, so addressed and mailed, for the furtherance and part of such fraudulent scheme, containing, and giving advice, and instruction to such divers and sundry persons induced to apply for, and take such said treatment for third persons and rules for such second person to follow.

"The method employed by her, the said Helen Wilmans Post, to bring about such pretended results and so-called cures aforesaid, being to require the said second person to sit for treatment for such third person, at stated periods, instructing them as follows: 'If you are sitting for treatment for another person who is being treated, without his or her knowledge, you must hold the thought, that you are the medium for the transmission of my thoughts to that person; you must hold both the person and myself in your thought, and feel that you are the link in the chain between us,' and other instructions at present to the grand jurors unknown, directing such said second person as aforesaid, to sit at given times for certain periods instructing the applicant or second person, for the treatment of

other or third person, that the healing thought of her, the said Helen Wilmans Post, could and would be transmitted through them to such third person, and cure him or her, as aforesaid, which such representations were false, and well known to her, the said Helen Wilmans Post, so to be, at the time of making them, and devising said scheme, and mailing and causing to be mailed, as aforesaid, such letters and publications, hereinbefore and hereinafter mentioned, and at the time of the committing of the offenses hereinafter mentioned, and not capable of performance by her, the said Helen Wilmans Post; that the price charged for such absent treatment of a third person through a second person generally, was three dollars per week, or ten dollars per month, payable in advance, but varying according to circumstances, and by which said fraudulent scheme she acquired and appropriated to her own use, large sums of money, the amount thereof being to the grand jurors unknown; and that she sent various advertisements through the mails to induce such said divers and sundry persons to take such absent treatment, as aforesaid, of and by her, the said Helen Wilmans Post for the cure of disease, old age, poverty, liquor habit, drunkenness and undesirable conditions, and to fraudulently obtain money therefor; that such said scheme was fraudulent, fictitious and ineffective for the cure of any disease, old age, poverty, liquor habit, drunkenness and undesirable conditions; that such scheme was a deceit and a fraud at the time of devising the same, as aforesaid, and continued so on up to and at the time of the committing of the offense, hereinafter mentioned, and was so known to and understood by the said Helen Wilmans Post to be a deceit and fraud; that the letters to applicants for such pretended treatment, and during the time thereof after engagement for such said treatment, sent through said mails and postoffice establishment in the furtherance of said scheme, were not written by her, the said Helen Wilmans Post, but were written by typewriter and hand in a stereotyped form and manner by her employes, stenographers and clerks, by her direction."

Here it will be observed is a distinct charge that the representations made by the defendant as to her ability to cure, etc., were false, and were well known to her to be false; that the scheme was fraudulent and fictitious, and that her promised treatment was ineffectual for the cure of any disease, and was a deceit and a fraud at the time of devising the same, and was known to the defendant to be a deceit and a fraud; and that her promises were incapable of performance. The gravamen of the charge here is the falsity of the pretenses, and that such falsity was known to the defendant. The allegation of mala fides pervades the whole scheme. It does not present a question of the lawfulness of the calling of a mental healer, or whether or not mental science is a fraud and humbug, but it presents the question of the good faith of the defendant. It does not assume, as the other three indictments, that she could administer the treatment promised; but it is expressly alleged that she could not, that her representations were false and known to her to be false, and that her promises were impossible of performance. It is also alleged in this indictment that the defendant was not "intending to give such treatment and to cure patients," but it is not assumed that she could, and, on the contrary, it is averred that she could not, and that she knew she could not. If she could not, and knew she could not, it follows, perhaps, without allegation, that she was not intending to give such treatment.

A great many exceptions were taken and errors assigned upon the charges given and refused. While it is impracticable to comment upon all of them, it seems proper that we should express an opinion on such questions raised by the record as may arise on the new trial.

The case should be tried with the distinct understanding that the practice of mental healing is, in federal law, as lawful as healing with drugs. As to the right to use the postal establishment of the United States, no discrimination is made between those whose vocation is healing, whether they be allopathists, homeopaths, osteopaths, or mental scientists. But the use of the mails in furtherance of an artifice or scheme to defraud, under the guise of practicing the vocation of healing, is equally condemned by law, whether the accused be mental healers or the votaries of other schools. The statute is directed against any scheme or artifice to defraud, and it includes everything designed to defraud by representations as to the past or present, or by suggestions or promises as to the future. *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709. This indictment involves questions as to the belief and intention of the defendant. Every man and woman has the right to believe what he or she chooses to believe. And one who holds any belief may engage in practice founded upon it, unless he thereby injures others in person, reputation, or property, or disturbs the peace and welfare of the public. A belief, of course, cannot with impunity be carried into conduct contrary to law. The ultimate question of fact before the jury was as to the good faith of the defendant, and that question involved her belief in her representations and promises. While her belief is not the subject of direct proof, it may be ascertained from circumstances and by proof of her actions and declarations. If she was practicing her profession in good faith, the fact that she received compensation for her advice and services is of no consequence; the regular physician, the lawyer, and the preacher do the same. The cardinal inquiry was: Was she engaged in the business of treating and curing, or endeavoring to cure, applicants, or was she practicing a scheme or artifice to defraud? It is not a question as to whether or not the method of treatment is one that should be approved or disapproved by the court and jury. If it was as baseless as mundane astrology, it makes no difference, if the defendant believed in it and practiced it in good faith and without positive intention to defraud. If, without belief in her professions or proposed treatment, and with knowledge that her representations were false, she made them to defraud, the fact that mental healing is a lawful vocation does not protect her.

After evidence had been offered tending to prove the charges of the indictment, the defendant offered evidence by way of defense, and, among other things, sought to prove that she possessed the power to treat and cure people as she had advertised. The court instructed the jury that:

"When one contends that he has made new discoveries in science or art, opposed to the general experience of man for ages, and directly in conflict with the generally accepted rules, seeks to gain money or secure profit thereby, the burden of proof of the truth of such discovery is upon the party making the claim, and such contention must be satisfactorily proved before it can be accepted."

This charge indicates that the court, considering the evidence offered by the defendant, concluded that it set up as a special defense that the defendant possessed the extraordinary power which she claimed, and instructed the jury that the burden of proof was on her to satisfactorily

prove such contention. There are other and similar expressions in the charge, which, in effect, direct the jury to return a verdict of guilty "if the defendant has failed to satisfy you of the truth of the powers she claimed." This view of the court is made plainer by a further instruction. Referring to the power which the defendant claimed to have, the jury were instructed that:

"This power is not recognized as a natural law by the experience of mankind, and that she is attempting to establish a new and unrecognized law of nature; and therefore the burden rests upon her to satisfy you that she possessed such power, and could do what she promised and advertised to do."

Here we have the distinct assertion that the burden rests upon her to satisfy the jury that she possessed such power.

In a criminal trial, where the defendant's only plea is, "Not guilty," the general rule is unquestioned that the burden of proof, and the obligation to convince the jury of the prisoner's guilt beyond a reasonable doubt, as to all essential matters, including the criminal intent, is upon the prosecution throughout the trial, and that there is no shifting of the burden of proof during the trial. Underhill on Criminal Evidence, § 23; *Potter v. United States*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214. Where the defendant offers, under the plea of not guilty, some affirmative defense—as, for example, the defense of insanity—the cases in the state courts are in conflict as to the question on whom rests the burden of proof. Underhill on Criminal Evidence, § 157; 2 Bishop, New Crim. Proc. § 669. But on principle, now sustained by a large majority of the state courts, the burden in such cases is on the prosecution. 2 Bishop, New Crim. Proc. § 673. In federal jurisprudence there is no question as to the proper rule. In *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499, it was held that the "burden of proof," as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime. This rule was applied to a case where the defense was insanity. If, in this case, we look on the defense made by the defendant—that she had the power to effect the cures that she claimed she could make—as an affirmative and separate defense, still it would be the unquestioned rule of law in the federal court that, if the evidence she offered was sufficient to create a reasonable doubt as to her guilt, or as to any fact necessary to be proved to secure her conviction, she would be entitled to an acquittal. She is not required to prove any fact to the satisfaction of the jury. In other words, if, on the whole evidence, including that offered by both sides, the jury have a reasonable doubt as to her guilt, she is entitled to an acquittal of the specific offense charged. This being the law, it was error, we think, to instruct the jury, in any aspect of the case, that the burden of proof rested upon the defendant to satisfy the jury that she possessed the power to cure diseases, as claimed, and that her contention must be satisfactorily proved. It is one of the affirmative averments of the indictment that the representations made by the defendant were false and not capable of performance by her, and

the burden was on the United States to prove it. It is true that the learned trial judge correctly charged the doctrine of reasonable doubt in general terms, but that would not, in our opinion, remove the impression which must have been made on the minds of the jury—that the burden was on the defendant to prove a part of her defense to the satisfaction of the jury.

Referring to the evidence offered by the defendant tending to show that she could effect the cures by the method she was practicing, and especially to the claim that she could "send by emanations from her own mind such power as will, after passing through the mind of a second person, influence the physical condition of a third person," the learned judge asserted that this power was not recognized as a natural law by the experience of mankind, and that the defendant is attempting to establish a new and unrecognized law of nature. He then said to the jury that where "testimony of itself is directly contrary and in opposition to the well-established laws of nature, accepted by all men from the experience and study of ages, such testimony may be properly ignored without contradiction." A jury may unquestionably be properly instructed to disregard evidence that they find to be false. *Allen v. United States*, 164 U. S. 492, 499, 17 Sup. Ct. 154, 41 L. Ed. 528. And under the practice of the federal courts, the judge may express his opinion as to the weight or effect of evidence or the credibility of witnesses; but, if evidence is admitted as, and is, legal and relevant, the jury, we think, should not be peremptorily directed to ignore it. If it be of a kind that greatly taxes the credulity of the judge, he can say so, or, if he totally disbelieves it, he may announce that fact, leaving the jury free to believe it or not. If the jury concur in the view expressed by the judge, they may entirely disregard such evidence in their verdict; but to direct the jury to ignore it is to tell them not to consider it at all, even to determine whether it deserves credence or not. We are aware of the fact that this instruction related to evidence, part of which, perhaps, would seem to many, if not all, intelligent minds, incredible; but, if evidence is admissible at all, we can see no reason why it is not to be passed on by the jury. We are not holding that the defendant has a right to embark in a business, and to insist that its legality shall be tested by principles beyond the understanding of others, and not by such knowledge as the courts and juries possess. The case must, of course, be tried and tested by the rules of law and by common human understanding. But when a question of fact is tested, although it may involve the existence of a power not generally recognized, evidence bearing on the question must be considered as in other cases. Science has not yet drawn, and probably never will draw, a continuous and permanent line between the possible and impossible, the knowable and unknowable. Such line may appear to be drawn in one decade, but it is removed in the next, and encroaches on what was the domain of the impossible and unknowable. Advance in the use of electricity, and experiments in telepathy, hypnotism, and clairvoyance, warn us against dogmatism. The experience of the judiciary, as shown by history, should teach tolerance and humility, when we recall that the bench once accounted for familiar physical and mental conditions by witchcraft, and that, too, at the expense of the lives of innocent men

and women. In that day, it was said from the bench that to deny the existence of witchcraft was to deny the Christian religion. Juries would have done better. Then and now questions of fact were best tried by jury.

We are of the opinion that the court ruled correctly in refusing to grant the request of the defendant to direct an acquittal on indictment No. 176.

In dealing with the issues raised by the record, we have not intended to express any opinion as to the substantiality of mental science, or whether it is founded on some occult natural law or on mere parade and mummery. The court is not a society for psychical research, charged with the duty of forming and announcing opinions on that subject. We have endeavored only to make it plain that there is nothing in this case to require a departure from the ordinary rules of evidence and familiar criminal procedure.

The judgment must be reversed, and the case remanded for a new trial.

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SEWALL et al. v. WOOD et al.

(Circuit Court of Appeals, Third Circuit. February 21, 1905.)

No. 34.

1. SHIPPING—CHARTERS—FREIGHT—WEIGHT OF CARGO.

In an action for breach of a charter party for a shipment of pipe, evidence held to sustain a finding that the weight of the pipe shipped, for the purpose of ascertaining the freight, was 3,258 tons, as claimed by the shippers.

2. SAME—CONSTRUCTION.

Where a charter party provided for shipment of a complete cargo of cast iron pipe, "say about 3,400 gross tons," it should be construed as contemplating a margin beyond 3,400 tons, and was not fulfilled by a shipment of 3,258 tons.

3. SAME—PAROL EVIDENCE.

Where a charter party for a complete cargo provided that the ship should receive on board the merchandise "hereinafter mentioned," which was immediately succeeded by a clause providing that the shipper agreed to furnish the vessel a full and complete cargo both under and on deck of cast-iron pipe, "say about 3,400 gross tons," correspondence between the owners and the brokers who negotiated the contract, in which the owners were advised that the shippers had contracted to deliver 3,400 gross tons of pipe to the Dutch government in the Island of Java, and in which the owners represented that the vessel was capable of carrying from 3,400 to 3,500 tons, was admissible to explain the charter; the master having refused to accept more cargo after 3,258 tons had been delivered aboard.

4. SAME.

Where a charter party described the capacity of the ship as about 3,400 gross tons and fixed the freight rate at \$8.00 per ton of 2,240 pounds, the representation as to the capacity of the ship should be construed as meaning 3,400 long tons.

5. SAME—DAMAGES.

Where a charter party obligated the ship to receive 3,400 gross tons of iron pipe, and the master refused to receive any more cargo after about 3,258 tons had been loaded, the shippers were entitled to recover the extra



expense to which they were put in shipping the balance of the cargo to destination.

**G. SAME—DAMAGE.**

Where the master of a vessel refused to receive more cargo before all of the shipment contracted for had been loaded, whereupon a delay was occasioned to settle the matter, the ship was not entitled to collect demurrage therefor.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 128 Fed. 141.

Henry R. Edmunds, for appellants.

N. Dubois Miller, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the District Court for the Eastern District of Pennsylvania, in a cause of contract civil and maritime. On or about the 16th day of February, 1901, the libelants were under a contract with the Dutch government, in the Island of Java, to supply 3,441<sup>1097</sup>/<sub>2240</sub> tons of iron pipe, to be delivered to said government in Java not later than the 30th day of November, 1901. The ordinary voyage from Philadelphia to Java, by sail, is about five months. Being under said contract, the libelants, through their brokers, Haldt & Cummins, of Philadelphia, sought to obtain a ship in which to send forward the pipe. The respondents accordingly came into correspondence with said brokers, part of which is set out in the record as follows:

"Bath, February 13th, 1901.

"Messrs. Haldt & Cummins, Philadelphia, Pa.—Gentlemen: Your favor of the 12th inst. at hand, and we note shippers of the Sourabaya pipe are particularly anxious for an earlier ship. We have one that will come around about the latter part of April, but she will carry more than the one due the middle of May. The earlier ship will take about 4,600 tons, to load her, which we presume is more than your parties have to forward. We have nothing else that we can put before you at this time. Should you not find such a vessel as you want at the desired time, perhaps we can treat with you later. Our ship coming around in May is just right for the order. She carries 3,400 tons, and is a fine steel ship insuring at a lower rate than wooden tonnage.

"Yours very truly,

Arthur Sewall & Co."

"Philadelphia, February 15th, 1901.

"Messrs. Arthur Sewall & Co., Bath, Maine—Dear Sirs: Your favor of the 13th received. We are unable to interest the Sourabaya pipe shipper in your 3,400 ton ship due in May, for two reasons, first the contract calls for delivery at Sourabaya not later than October, and they fear she may be too late. Second, the pipe will be all ready by April 10th, and as the pipe is valued at \$125,000 they will lose the interest on this amount for one month at least, which would mean a loss of \$625 interest.

"If you will write us fully in a strain that will allow us to present your letter to the shipper, showing the position of the ship, giving her name, making her capacity as large as possible as the cargo may run slightly over 3,400 tons, and showing when she would probably arrive at Sourabaya, we are sure it would have considerable effect and might influence them to decide to close with you, although we do not think that \$9.00 per ton freight can be had, as you know they have been offered a steamer at 36/.

"Yours truly,

Haldt & Cummins."

"February 16th, 1901.

"Messrs. Haldt & Cummins, Philadelphia, Pa.—Gentlemen: Your favor of the 15th inst. at hand.

"The ship we are talking for the Sourabaya order is the 'Kenilworth' now on passage from San Francisco for the U. K. She sailed on November 7th, and allowing ample time she should reach your port by the latter part of May. This certainly ought to put her into Sourabaya during the month of October. She is a fine steel ship. Her cargoes have run from 3,400 to 3,500 tons.

"As regards rate while we feel that our ideas, as previously expressed, are not out of the way, we might endeavor to meet shippers' views and accept \$8.50 provided they are inclined to favor the vessel; other terms as named in your letter under date of the 8th inst.

"As regards the larger vessel, it would hardly be practicable to put in case oil in New York, as this being the lighter cargo must necessarily be loaded last.

"Should you be able to work the business, we hope to hear from you promptly.

"Yours very truly,

Arthur Sewall & Co."

"Philadelphia, March 7th, 1901.

"Messrs. Arthur Sewall & Co., Bath, Maine—Dear Sirs: Your favor of the 6th at hand. We confirm telegram passed between us to-day, resulting in the charter of the ship 'Kenilworth' on the terms of the enclosed charter party, which we trust you will find in order, and if so, please sign same and return to us and we will forward you copies.

"We used every effort to get the terms most favorable in the charter party and succeeded fully to our expectations, and trust you will accept the charter as presented without alterations as it required great effort on our part, to induce Wood's people to close the business on these terms, and fearing that they might insist that the vessel guarantee to carry their exact amount of cargo, a prompter vessel be offered them, or a vessel be offered them at better terms, we prevailed on them to sign the charter party, which closes the deal as far as they are concerned.

"Very truly yours,

Haldt & Cummins."

The charter party referred to in the foregoing letter, was dated March 7, 1901, at the city of Philadelphia, and stated to be between Arthur Sewall & Co., master and agent for owners of the ship "Kenilworth," of New York, of the first part, and R. D. Wood & Co., of Philadelphia, Pennsylvania, of the second part. It witnesseth—

"That the said party of the first part agrees, on the freighting and chartering of the whole of said vessel \* \* \* unto the said party of the second part, for a voyage from Philadelphia, Pa., to Sourabaya, Java, on the terms following: The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, and receive on board during the voyage aforesaid the merchandise hereinafter mentioned. The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo both under and on deck of cast iron water pipe, say about 3,400 gross tons. \* \* \* And to pay the said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, at the rate of Eight (\$8.00) dollars per ton of 2,240 pounds."

The ship arrived in Philadelphia prior to May 10, 1901. Loading of the said ship was at once proceeded with, in due course, until on or about May 9, 1901, when there had been loaded, as claimed by libelants, 3,258 gross or long tons of iron pipe, in accordance with the said charter party. The captain of the said ship then declined to take on any more cargo, alleging that the said ship was then loaded to her full dead weight capacity, and that she could carry no more than was then on

board. He also protested that he had more than 3,258 tons aboard, as the capacity of his ship was greater than that amount, and that his vessel, on a previous voyage, had carried over 3,468 gross tons of grain, with 30,000 feet of lumber extra, for lining, and that there was a mistake in the weight, as she was loaded three inches deeper than she had ever been before. The libelants requested the captain to sign the bills of lading, containing a statement that the ship had only 3,258 tons aboard. This the captain refused to do, although he says he was willing to sign for the number of pipes, but not for their weight. In consequence of this dispute, the ship could not be cleared, and was delayed four days. Finally, the master tendered, and the libelants accepted under protest, a bill of lading, setting out how many pipes had been shipped, "weight unknown. Cargo to be weighed at destination, at master's option, for determination of freight." There was also a clause claiming \$868 for four days' demurrage. Under the contract with the consignees, the shippers were to pay the freight. After part of the cargo had been unloaded, the master refused to deliver the balance until he should be paid, not only the freight but also his claim for demurrage. The Dutch officials took the advice of several lawyers, and finally, pursuant thereto, paid the master his full claim. There were no facilities for weighing the pipe at Sourabaya, and the freight was collected and paid upon the marked weight of 3,258 tons.

The consignees, in settling with the shippers for the price of the pipe, deducted, as they were authorized to do under the contract, the amount paid for freight, and also for the demurrage claimed by the master of the ship but the subject of protest by the shippers, and for the fee paid to the lawyers, upon whose advice they acted. In the libel brought by the appellees, claim is made for the amount thus paid for the demurrage and for the fee to lawyers in Sourabaya; also for the extra expenses to which the libelants were put by reason of the necessity of shipping the balance of 183 tons, necessary to fill out their contract with the Dutch government, in other ships.

As to the disputed question of the number of tons actually received on board the ship, the learned judge of the court below found that 3,258 or 3,259 tons, as stated by the shippers, was the correct weight of the pipe delivered by them. He says:

"The important question of fact in the case, as already stated, concerns the capacity of the ship and the amount of cargo that was actually put on board. Here the testimony is in conflict, but I think the libelants' testimony is better in quality and ought to prevail."

This finding of fact must be accepted here, unless manifestly and clearly unwarranted by the evidence contained in the record. We have carefully examined the testimony on this point, and not only find no such inconsistency, but think that it fully warrants the conclusion arrived at by the learned judge. The weight of each pipe was marked thereon, and the testimony of the servants of the shippers who weighed and so marked the pipe, was tendered, and an agreed statement by them was received as evidence. There was no weighing of the pipe at Sourabaya, as there was no opportunity so to do. This testimony as to weight, therefore, remains uncontradicted, except by the statement of the master as to the capacity of his ship, and his opinion and belief

that she was loaded down to three inches below her dead weight capacity, which he believed to be something over 3,500 tons.

It remains to consider whether the court below were right in the construction given by it to the contract between the libelants and respondents, as exhibited in the charter party, and in admitting in evidence the correspondence preceding the charter party, as explanatory thereof, and as containing representations which should be read into and constitute part of the written contract sued upon.

The material parts of the charter party have already been referred to. By its terms, the appellant agreed to receive on board the merchandise "hereinafter mentioned," which, in the immediately succeeding clause, is thus described:

"The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo, both under and on deck, of cast iron pipe, say about 3,400 gross tons."

Thus, the cargo, both as to character and quantity, which it was agreed that the ship should carry, is designated. We do not think the words "about 3,400 tons" can be construed as giving the carrier so wide a margin, as to the extent of his undertaking, as nearly 200 tons would be. But, in the view we take of the case presented by the record, the word "about" must be construed as to a margin beyond 3,400 tons instead of less than 3,400 tons. We think the court below were right in admitting the correspondence preceding the making of the charter party, set out in the record and hereinbefore recited. This correspondence presents facts and circumstances surrounding and pertinent to the making of the contract contained in the charter party and out of which it grew. They were necessary to the proper understanding of the terms of the contract, which they in no wise contradicted but only explained, and were not in any wise inconsistent therewith. By this correspondence, the appellants were informed of the fact that the appellees were under contract to deliver a quantity of pipe in Java, on or before a date fixed, and that the cargo to be loaded on the ship might run slightly over 3,400 tons. The letter of appellants, of February 13th, states that the ship offered carried 3,400 tons, and that of February 16th, in reply to one from the shipbrokers stating that the cargo would run slightly over 3,400 tons, stated that "her cargoes have run from 3,400 to 3,500 tons." There can be no doubt that this represented carrying capacity of the ship tendered, was the inducement to the appellees to charter her. The representation was in fact that the ship would carry the quantity of pipe which appellees were under contract with the Dutch government to deliver in Java. It was as much a part of the contract of affreightment, as if it had been written into the charter party. We think this correspondence, therefore, represented a situation, with reference to which the contract between the parties was made, and with relation to which it must be construed, and by which it is neither contradicted nor varied.

The principle here applicable is well illustrated in *Mackill v. Wright*, L. R. 14 A. C. 106, where there was a contract of affreightment, by which the appellants guaranteed that their ship would "carry not less than 2,000 tons dead weight of cargo." With reference to this guar-

anty, it was stipulated that "should the vessel not carry the guarantied weight as above, any expense incurred from this cause to be borne by the owners, and a pro rata reduction per ton to be made from the first payment of freight." By the said charter party, it was agreed that the ship should "load all such goods and merchandise as the said charterers or their agents shall tender alongside for shipment, not exceeding what she can reasonably stow and carry over and above her tackle," etc. Before and at the time of the making of the charter party, the parties thereto had conversations, by which it appeared that the cargo would consist generally of locomotives and locomotive machinery, together with 300 or 400 tons of coal. It would, of course, happen in loading such a cargo, that the larger pieces would occupy stowage room on the ship disproportionate to their weight. At the meeting at which the charter party was signed, "a note unauthenticated by their subscription, or otherwise, was by consent of both parties, written upon its margin, specifying the 'largest pieces' of machinery which were to be included in the cargo by number, weight and measurement." There were to be 23 such pieces in all. As a matter of fact, many more than 23 such large pieces were included in the cargo, and, in consequence, when all the cargo space in the ship was occupied, there was only something over 1,600 tons, instead of 2,000, which he was guarantied to carry. Suit was brought for the lump sum agreed to be paid as freight in the charter party. The shippers, however, contended that they were entitled to a reduction under the stipulation that, "should the vessel not carry the guaranteed weight as above, any expense incurred from this cause to be borne by the owners and a pro rata reduction per ton to be made from the first payment of freight." The owners, on the other hand, insisted that the failure to carry the 2,000 tons guarantied as the dead weight capacity of the ship, was due to the fault of the shippers in loading so many large pieces of machinery as to interfere with the stowage capacity, and they relied upon the understanding, of which a memorandum was made on the margin of the charter party, that only a certain number of large pieces should be included in the cargo. In delivering the opinion of the House of Lords, Lord Chancellor Halsbury used this language:

"That if it could be truly asserted that both parties were acquainted with the nature of the cargo that was to be carried, it would be unreasonable, in construing a mercantile contract of this character, not to suppose that both parties used the general language with reference to the particular subject-matter as to which they were contracting. \* \* \* The marginal note upon the charter party, whether part of the contract or not, seems to me to free the question from all doubt. It certainly was information afforded to the shipowners for the purposes of the contract."

Lord Watson, in delivering a concurring opinion in the same case, says:

"Of course no such inference can be admitted when it is inconsistent with the express or implied conditions of the charter party. But in cases like the present, it is competent to investigate the whole facts and circumstances attendant upon the execution of the charter party, with the view of ascertaining what particular kind of goods, if any, it was then in the contemplation of both parties should be shipped and carried, that being the cargo with reference to which it must be presumed, in the absence of express or implied stipulation to the contrary, that the guaranty was given and accepted."

In the case at bar, we think the statements contained in the correspondence between the parties prior to making the charter party, had relation to the contract contained in that instrument, were not inconsistent with it, but made clear its terms, and as such entered into and formed part of the written contract. We think the principles in this regard, stated and approved by this court in the case of *Bacon v. The Poconoket* (D. C.) 67 Fed. 262, require this conclusion. See, also, *Clydesdale Shipowners Co. v. Brauer S. S. Co.* (D. C.) 120 Fed. 854; *Morris v. Levison*, L. R. 1 C. P. Div. 155; and *Wilfred v. Myers* (D. C.) 40 Fed. 170.

It is necessary to notice the contention, that in the references to the carrying capacity of the ship made in the charter party, as well as in the correspondence, a ton of 2,000 pounds, and not one of 2,240, was contemplated, because it was vehemently urged by learned and able counsel. It might suffice to say, with reference to this contention, that the charter party described the capacity of the ship as about 3,400 gross tons, and that in common parlance the word "gross" in this connection describes a long ton, or a ton of 2,240 pounds. This is not admitted by the learned counsel for appellant, but it seems to us that all doubt is removed as to the proper interpretation of these words by the subsequent stipulation of the charter party fixing the freight rate at "Eight (\$8.00) dollars per ton of 2,240 pounds." But the question is not properly before us. It was first raised in argument before this court. It appears not to have been raised in the court below, and no assignment of error relating to it appears in the record. Moreover, there was no denial of the allegation contained in the libel, that the "ship sailed on the 13th day of May, 1901, with only 3,258 tons of pipe aboard." Upon the whole case, we agree with the learned judge of the court below, that libellant was entitled to recover from the respondents the extra expense to which they were put in shipping the balance of the cargo to Sourabaya, and also that, as the captain was proved to be wrong in contending that the ship had on board more than 3,258 tons, and in refusing to sign the bill of lading for that quantity, the four days' demurrage therefor, collected by the master of the ship at Sourabaya, should be returned.

The decree of the court below is therefore affirmed.

## JEWELL V. CITY OF SUPERIOR.\*

(Circuit Court of Appeals, Seventh Circuit. October 6, 1904.)

**1. MUNICIPAL CORPORATIONS—IMPROVEMENT BONDS—ASSESSMENT—COLLECTION—DUTY OF CITY.**

Where a city issued municipal improvement bonds and pledged assessments levied on property benefited therefor, it was not a guarantor of the bonds, but a mere statutory trustee for collection of such assessments, and was required only to exercise due diligence to collect the same according to law and enforce the lien thereof for the benefit of the bondholders, and was liable only for a failure to perform such duty or to pay over the money collected.

**2. SAME—DELINQUENT ASSESSMENTS—RETURN TO COUNTY—STATUTES.**

Rev. St. Wis. 1898, § 1114, providing that delinquent taxes returned by a city to the county shall belong to the county when the county levy is equal to or exceeds the amount of the delinquent taxes in the return, the excess, if any, when collected, to be returned to the city, applies only to the relations between cities and counties with respect to the collection of taxes, and does not affect the obligations existing between the city and holders of street improvement bonds with reference to the collection of special assessments applicable to payment of the bonds.

**3. SAME—ASSESSMENTS RETURNED DELINQUENT.**

Where delinquent special assessments applicable to the payment of street improvement bonds were returned by the city to the county as delinquent taxes, the city was only liable to account to the holders of local improvement bonds entitled to such assessments when collected for such as were received by the city from the county after collection.

**4. SAME—EXTENSION OF TIME—EFFECT.**

Where a holder of local improvement bonds issued by a city had knowledge of the law authorizing the city to extend time of payment of assessments applicable to such bonds at the time the assessments were extended, and when he contemporaneously extended the time of payment of the bonds to a corresponding date, and his lien was not lost by reason of the extension, the city did not thereby become absolutely bound for the payment of the bonds with reference to the collection of the assessments.

**5. SAME—INTEREST.**

Where a city was only a trustee for collection of local improvement assessments for the benefit of bondholders, it was only liable for interest on nonapplied collections at the rate paid to it by depositories holding the fund.

**6. SAME—COLLECTION—APPORTIONMENT.**

Where local improvement bonds were issued by a city, secured by a pledge of special assessments levied in payment of the improvement, a holder of such bonds was entitled to such proportion of the moneys collected by the city as the amount of bonds of each class held by him bore to the total amount of bonds issued against each of such improvements, less the sums previously paid him.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

The city of Superior, in the years 1890 and 1891, caused the improvement of Tower avenue and of Clough avenue in that city, and levied assessments upon the property benefited to pay the cost of the improvements. These assessments, in accordance with the provisions of the charter, were divided into five equal installments, with interest on the unpaid installments, and were inserted in the tax roll of the city for each of the years 1891 to 1895, inclusive. The total amount of assessments thus extended upon the tax roll

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\* Rehearing denied January 8, 1905.

were as follows: Tower avenue improvement, \$49,906.06; Clough avenue improvement, \$16,696.17. In the year 1891, pursuant to the authority of chapter 16 of its charter, the city of Superior issued its bonds, from the sale of which money was derived to pay the cost of the improvements. These were in the usual form of bonds, were payable July 2, 1898, and bore interest at the rate of 6 per cent. per annum, payable semiannually, as evidenced by coupons attached. The bonds recited that they were issued for the purpose of paying the cost of the construction of the improvement and on account of such assessment made upon the property abutting upon such avenues for such improvements as the owners had not elected to pay. Each bond contained a provision that the payment of the principal and interest of the bonds is made chargeable upon the property abutting upon the avenue stated in the bond. The amount of bonds thus issued was: Tower avenue, \$42,439.60; Clough avenue, \$14,129.75. Of these bonds appellant is the owner of Tower avenue bonds, Nos. 943 to 950 and No. 1,003, \$4,439.60; Clough avenue bonds Nos. 1,522 to 1,541 and No. 1,542, \$10,129.75. On July 2, 1898, the appellant, by agreement with the city, extended the time of payment of the bonds until July 1, 1908, and reduced the rate of interest to 5 per cent., payable semiannually, as evidenced by coupons then issued to him by the city, agreed to forbear suit until that date, gave the city the option of paying the bonds with accrued interest at any time prior to that date, and reserving to the holder the right to mature the principal of the bonds in case of failure for six months to pay any installment of interest due. All interest coupons due July 2, 1900, and prior thereto on all of the bonds were paid as they matured, and all coupons maturing January 2, 1901, upon bonds 1,523, 1,529, 1,542, were also paid, but no later coupons were paid. The appellant, prior to June 11, 1902, because of nonpayment of interest, exercising the option, returned matured the principal of the bonds. There were outstanding at the commencement of this suit of these bonds at face, Tower avenue bonds, \$31,939.60; Clough avenue bonds, \$12,129.75. The city had paid for the principal of canceled bonds and interest upon all the bonds as follows: Tower avenue bonds, \$31,706.12; Clough avenue bonds, \$9,175.66. During the years 1891 to 1895, both inclusive, of the assessments levied to pay for the improvement of Tower and Clough avenues, and extended upon the tax roll, there was paid to the city treasurer for principal and interest, prior to turning the delinquent tax roll to the county treasurer, Tower avenue \$30,432.24; Clough avenue, \$7,736.97. There was also paid during those years to the county treasurer of Douglas county on account of principal and interest on such assessments, as follows:

	Tower Avenue.	Clough Avenue.
Paid before tax sale.....	\$ 2,010 62	\$ 904 86
After time of payment.....	193 90	.....
From the tax sales.....	7,698 35	3,422 89
From assignments of tax certificates by county.....	2,465 50	1,888 90
From redemption of assessments.....	3,917 67	439 20
	<hr/> \$16,286 04	<hr/> \$6,155 85

The practice with respect to delinquent taxes under the law was this: The city treasurer returned to the county treasurer all unpaid assessments in connection with the general taxes upon the same property each year in one lump sum, but the tax roll turned over at the time exhibits general taxes and special taxes separately extended thereon. No separate account was kept by the county treasurer of assessments returned delinquent, or of collections made by him. In each case assessments were commingled with the delinquent general tax. The city was charged by the county in the fall of the year with the state and county levies, and was credited in the spring with the amount of the delinquent roll. From time to time the county treasurer paid over moneys to the city treasurer as they were collected, and all such payments were in lump sums, not showing how much were special assessments and how much were general taxes, the payment being made on general account. The total amount of delinquent taxes and assessments returned by the city treasurer to the county treasurer for the years 1891 to 1901, were



**\$3,266,189.85.** The total amount paid by the county treasurer to the city treasurer during the same period on account of delinquent taxes and assessments is \$1,710,292.31, which includes \$70,000 of school moneys received from the state. About \$400,000 of the amount of taxes and assessments returned delinquent to Douglas county by the city of Superior were charged off for losses, and \$175,000 still remains to the credit of the city on the county's books. The evidence does not disclose that any of the assessments here involved which were returned delinquent to the county, and afterwards collected by it, have been paid over to the city.

In the years stated, and during taxpaying time, moneys received by the treasurer of the city, whether for general tax or for special assessments, were deposited in bank from day to day in one lump sum, and during the same time this fund was drawn against by the city for its current expenses, no special care being taken to prevent encroaching on that part of the fund made up of special assessments; but upon the return of the delinquent roll to the county treasurer in each year the moneys collected by the city upon special assessments were by the city treasurer placed in a separate street improvement fund account; but no separate account was maintained of each particular improvement. Until 1902 the appellant was not advised that the funds were so deposited, and until March, 1900, did not know that the special assessments were not kept in separate accounts. The banks which acted as depositories of the city funds were to pay 4 per cent. interest upon deposits, and by a subsequent agreement of October 20, 1898, the rate was reduced to 1 per cent. Some of these banks failed during the panic, involving the loss of city deposits; but it does not appear that any of the assessments here involved were included in such loss.

In 1898, pursuant to chapter 184, p. 304, of the Laws of Wisconsin for the year 1897, \$3,586.37 of the Tower avenue assessments and \$1,343.24 of the Clough avenue assessments were divided into five equal installments, and extended and made payable in the years 1904 to 1908. The appellant was not consulted or notified with respect to this extension; but on or prior to July 2, 1898, the time when payment of the bonds was extended by him, he knew of the provision of law authorizing the extension of the assessments and of the practice of the city in extending assessments thereunder. This suit is brought for an accounting with respect to the fund in question, and for a decree against the city of Superior for the assessments collected by it applicable to the payment of appellant's bonds, and for the amounts which have been extended; and also for a decree against the city for the amount of his bonds and coupons, irrespective of any question of collection of the assessments upon the ground of its liability upon them. The latter ground was, however, subsequently waived; he asking no relief except such as he may be entitled to by reason of the acts or omissions of the city with respect to the assessments levied to pay for the improvements in which the bonds in suit were issued.

On March 5, 1904, the court below having found the facts as stated, and which are stipulated by the parties to be correct, decreed that the complainant below is entitled to recover from the city such proportion of the assessments actually received by it as the amount of bonds held by him on such improvement bears to the total amount of bonds issued on such improvements, to be determined by dividing the amount of assessments received by the city each year on account of such improvements, with interest at the rate received from the banks in which such assessments were deposited, namely, 4 per cent. until July 25, 1895, and 1 per cent. thereafter, by the total amount of bonds issued for each of such improvements with interest theretofore paid and still due thereon; that the amount due the complainant is to be determined by multiplying the amount of bonds held by him on each of the improvements with interest to date, by the ratio or percentage thus obtained, and deducting from the product all interest paid on the bonds held by him on each of the improvements prior to the extension of the time of payment, July 2, 1898; and decreed that he recover from the city the sum of \$3,000, with interest at 6 per cent. per annum until paid. From this decree the complainant below appeals to this court, assigning for error: First. That the court erred in failing to decree against the city for the amount of assessments

returned delinquent to the county for collection. Second. In not permitting a recovery for the amount of assessments paid to the county treasurer of Douglas county, or for those assessments bought in by Douglas county and for which it took a deed upon the property assessed. Third. For failing to decree for the complainant for such unpaid assessments as the city had failed to collect. Fourth. In denying a recovery for assessments extended under chapter 184, p. 304, of the Laws of 1897. Fifth. Limiting the amount of recovery to his pro rata share of the fund to which the holders of all the bonds were entitled, claiming that a decree should have passed for the total amount of his bonds and interest. Sixth. That the court erred in limiting the interest to 4 per cent. prior to July 25, 1895, and to 1 per cent. thereafter; insisting that he should have recovered 6 per cent. from the dates of collection, because of the city's conversion of such sums at such dates. That, if not entitled to 6 per cent. interest, he should have been allowed 4 per cent. interest up to January 2, 1898, because the charter provided that such funds should be deposited in the bank at not less than that rate of interest, and the city failed to obtain that rate; and that upon sums collected by the city interest should be computed at 6 per cent. from January 2, 1898, the date of the maturity of the bonds. Seventh. The complainant also assigned for error that the court erred in its method of determining the amount that the complainant was entitled to recover.

Chester B. Masslich, for appellant.

Thomas E. Lyons, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). We are not put to the necessity of determining the question of the personal liability of the city of Superior upon these bonds. With respect to somewhat similar obligations its liability was considered by us in *King v. City of Superior*, 54 C. C. A. 499, 117 Fed. 113, and by the Supreme Court of Wisconsin in *Fowler v. City of Superior*, 85 Wis. 411, 54 N. W. 800. The authority of the latter case is, however, somewhat shaken by the later case of *Uncas National Bank v. City of Superior*, 115 Wis. 340, 91 N. W. 1004. The appellant, the owner of the bonds in question, has, for the purposes of this suit, waived any claim thereon except for such relief as he may be entitled to growing out of the acts and omissions of the city with respect to the assessments pledged for the payment of the bonds. Therefore, within the theory of the bill and stipulation, the city is not a primary debtor, but merely the legal agent through whom the special assessments are to be collected. The municipality is statutory trustee for collection, bound to the exercise of due diligence to collect according to law, enforcing the lien through municipal machinery as agent of the owners of the bonds, and answerable for failure to perform this duty, or in paying over or in failing to pay the money collected. *New Orleans v. Warner*, 175 U. S. 120, 132, 20 Sup. Ct. 44, 44 L. Ed. 96. It is not a guarantor of collection; and, unless there be such failure in duty, there cannot be liability for noncollection. *Roter v. City of Superior*, 115 Wis. 243, 91 N. W. 651.

It is insisted that the city of Superior should respond for the assessments returned delinquent to the treasurer of the county of Douglas, from the fact of such return, and whether in fact collected or not. By the general law of the state taxes returned delinquent "shall belong to the county." But this is the rule only when the county levy is equal

to or exceeds the amount of delinquent taxes in the return. Any excess must, when collected, be returned to the city. Rev. St. Wis. 1898, § 1114. These provisions of law deal with the relations between cities and counties with respect to the collection of taxes, and do not affect the relations between the holder of street certificates or street improvement bonds and the city as trustee for collection. The latter is responsible for the due execution of its trust. It is not rendered liable because of the methods of accounting provided by statute as between itself and the county. It is liable for moneys collected by it, or, if collected by another branch of government, for such of those moneys coming to its possession under the law. *Jenks v. City of Racine*, 50 Wis. 318, 6 N. W. 818; *Town of Iron River v. Bayfield*, 106 Wis. 587, 82 N. W. 559. The case of *Sheboygan County v. City of Sheboygan*, 54 Wis. 415, 11 N. W. 598, does not, we think, sanction the claim here made. There was involved, as between the county and the city, the amount of a special assessment returned by the city as delinquent and charged back to the city. The opinion states arguendo that the holder of the certificate was entitled to the amount from the city treasurer so soon as the latter received credit from the county treasurer, because the city treasurer had retained the amount out of the taxes collected by him. It must therefore be that the amount of the delinquent return was less than the county levy. In the later case of *The State ex rel. Donnelly v. Hobe*, 106 Wis. 411, 82 N. W. 336, the charter provisions of the city of Superior were considered, and it was expressly ruled that these special liens constituted private property until actually discharged by payment to the owners, or to the respective officers of the law authorized to receive payment; that, if the county treasurer, after receiving the delinquent tax roll, collects the amount of the lien, he becomes trustee of the money for the owner or the holder of the lien, and that mandamus will lie in favor of the holder to compel payment from him. These special assessments are private property, and belong to the owners of the bonds, not to the municipality. The law requires that they should be carried out on the tax roll in separate columns opposite the respective lots affected. Although as a matter of book-keeping, the total delinquent tax, whether composed of general tax or special assessments, or both, is returned to the county treasurer in a lump sum, the tax roll delivered to him with the return exhibits the special assessments in separate columns. There is no need of confusion, for upon collection by the county treasurer the particular assessment paid is checked off upon the tax roll. So that it is a matter of no difficulty to trace each assessment paid, and the law requires the county treasurer to pay to the owner the amount collected. Therefore it was held in the *Hobe Case* that mandamus would lie to compel the county treasurer to pay directly to the owner the assessment by him collected, without regard to his account with the city treasurer. None of these cases, as we read them, sanctions the theory that the city becomes liable simply because of the return of the tax as delinquent. They place liability upon the ground of the receipt of the moneys by the municipality or officer sought to be charged. These suggestions dispose of the first, second, and third assignments of error.

The fourth assignment asserts the right to recover for the assess-

ment extended under the provision of law. The extension of time for the payment of these bonds and the extension of time for the payment of assessments were substantially cotemporaneous, and corresponded as to the date of maturity. The appellant had knowledge of the law which authorized the extension, and knew of the practice of the city to extend assessments. These facts, with knowledge of the general financial condition of the city of Superior following the panic of the year 1893, might well lead to the inference that the appellant gave at least a tacit consent to, and exhibited a passive acquiescence in, the extension. However that may be, he has failed to show—indeed, he has not attempted to show—that any loss or harm has accrued to him by reason of the extension. The lien granted to him by the law is not lost. So far as the record discloses, it remains intact, and as available for his protection as it was prior to the extension.

The fifth assignment questions the action of the trial court in limiting the amount of his recovery to his pro rata share of the fund to which the holders of all the bonds were entitled. This fund, derivable from the assessments, was a trust fund, pledged to the payment of all of the bonds. The right of the appellant therein was only to such portion of the fund realized as the sum of his bonds bore to the entire amount of the issue of bonds. It is true that equity favors the vigilant, not the slothful; but we think it would be a manifest perversion of equity to require a trustee to commit a breach of trust owing to other cestuis que trustent, by taking from other bondholders and awarding to the appellant so much of this fund as would pay his bonds in full. We know of no principal of equity which would warrant such a decree.

The sixth assignment has reference to the question of interest. The rate allowed was that which the city received from the depositories of the fund, and that usually is all that a trustee in like circumstances would be liable to pay. The insistence is based upon the theory that the city had converted the fund, but we are unable to concur in that contention.

Several assignments embodied in the seventh assignment in the statement of the case go to the manner adopted to ascertain the proportion of the fund due to the appellant. The method pursued is somewhat involved, but we need not be careful to determine its correctness, because, whether computed by that method or by any other known to us, the amount decreed is greater than the share of the fund due to the appellant. Compelled, under the stipulation, to view these bonds, not as obligations of the city for the payment of money, but as mere certificates to pay which the assessments are pledged, there is no liability upon the city for the payment of money, except for failure to put in force the machinery of the law to collect them, or to pay over the amount collected. One who is content to invest upon such security must take the hazard of collection under and according to law, and cannot hold the municipality as guarantor. Therefore the appellant here is only entitled to his pro rata share of the fund collected by the city, less the amount which he has already received. We have been unable to arrive at the result of the decree by the method of computation declared. The tables furnished by the appellee (the appellant has furnished none) show that upon the method of computation adopted by

the trial court the appellant had received more than he was entitled to, and that upon the theory that the city was chargeable with the moneys collected by the county (a theory repudiated by the court below) the appellant was entitled to \$3,524.91, instead of the \$3,000 decreed. We have adopted another method of computing the amount due him; one less involved, and possibly more nearly accurate. He is entitled to such proportion of the moneys collected by the city as the amount of bonds of each class held by him bear to the total amount of bonds issued against each such improvement, less the sums previously paid to him.

Thus he is entitled to 71.70 per cent. of the amount chargeable to the city with respect to Clough avenue improvement (\$8,982.78), which would amount to.....	\$ 6,404 81
And to 10.46 per cent. of the amount collected on the Tower avenue improvement (\$35,270.89), which would amount to.....	8,689 34
	<hr/> \$10,094 15
Less previously received by him on both series of bonds.....	8,887 50
	<hr/> \$ 1,756 65
Adding interest at 6 per cent. from July 2, 1902, to date of decree, March 5, 1904.....	177 36
	<hr/> \$ 1,934 01

—being over \$1,000 less than he has been awarded by the decree. We should, of course, decree for any assessment collected by the county if the moneys so collected had been traced into the hands of the city treasurer; but the finding of the decree, stipulated to be correct as to facts, is to the contrary.

The decree must therefore be affirmed.

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## THOMAS CHINA CO. V. C. W. RAYMOND CO.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1905.)

No. 1,342.

### 1. SALE—BREACH OF WARRANTY—REMEDY OF PURCHASER.

Where a purchaser of machinery which does not comply with the contract of sale retains and uses the same, he loses the right to rescind, and his only remedy is the recovery of damages for the breach of warranty, either by direct action, or by way of counterclaim in an action by the seller to recover the purchase price.

### 2. SAME—CONSTRUCTION OF CONTRACT.

In a contract for a sale of machinery, containing a general warranty of its fitness for the purpose intended, a further agreement by the seller to replace any part breaking from defective material or improper workmanship provides a cumulative remedy only, and, in case parts of the machinery prove defective or break, the purchaser has the right to remedy the defects, or procure new parts from other manufacturers, and recover the reasonable cost and expense thereof from the seller under his general warranty.

### 3. SAME—ACTION TO RECOVER PRICE—DEFENSES.

In an action for the price of machinery which has been accepted, retained, and used by the purchaser, it is not necessary to allege or prove compliance with a provision of the contract requiring the seller to submit

the drawings and plans to an agent of the purchaser for approval before the machinery was built.

**4. SAME—CONSTRUCTION OF CONTRACT.**

Where a contract to furnish for the equipment of a pottery "machinery as follows" enumerated among other articles kiln doors, such doors are "machinery," for the purposes of the contract, and of a requirement therein that the plans and drawings of the machines should be submitted to and approved by an agent of the purchaser before they were built; and the purchaser cannot complain that the doors made were too light or of improper design, where they were made in accordance with plans and drawings so approved.

**5. SAME—ACTION FOR PURCHASE PRICE—COUNTERCLAIM.**

Defendant, having contracted for certain machinery to be built by plaintiff, wrote for the blue prints showing the size and dimensions of the machines, from which to build the foundations, and they were furnished. *Held*, in an action to recover the purchase price, that defendant was entitled to plead and prove as a counterclaim that the machines sent did not correspond in dimensions to such blue prints, and that additional expense was incurred in rebuilding the foundations, providing it was shown that plaintiff knew the purpose for which the blue prints were wanted.

**6. APPEAL—REVERSAL—ERROR PREVENTING RECOVERY OF NOMINAL DAMAGES.**

A judgment is not reversible because of an erroneous construction of a contract by the court in its instructions, by which a party was denied the right to recover damages for a breach, where, under the evidence, only nominal damages would have been recoverable.

**7. SAME—REVIEW—OBJECTIONS TO EVIDENCE.**

To entitle a party to review a ruling overruling objections to the admission of evidence, the grounds of such objections must have been stated.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Billingsley, Clark & De Ford, for plaintiff in error.

Carr, Stearns & Chamberlain, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is a suit brought by the defendant in error, by petition, to recover from the plaintiff in error the unpaid balance, amounting to \$2,107, of the purchase price of certain machinery used in the manufacture of pottery. The answer admitted the contract of sale, but denied the performance of the conditions to be performed by the plaintiff in the court below, and a cross-petition was filed by the defendant in that court to establish a counterclaim against the plaintiff for damages alleged to have been sustained by the defendant in consequence of specified breaches of the contract by the plaintiff. By the verdict of the jury, the defendant appears to have established at the trial a counterclaim in the sum of \$696.92, and the plaintiff to have established its claim to the unpaid balance of the purchase price stated in the contract, and the sum of \$193.56 for extras, less the amount allowed upon the counterclaim. Judgment for the plaintiff was entered accordingly. The defendant, not being satisfied with this result, brings the case here, alleging errors in the rulings of the court upon the trial.

The stipulations of the contract upon which the main questions of the controversy arise are as follows:

"It is understood that your Mr. Harker will examine and O. K. the drawings of any of the machines we may submit to him before we build the same.

"Ship as required within ninety days.

"We guarantee the above machinery to be of modern design; to be constructed throughout of the best materials, and to be machine finished according to the very latest standard, with all parts made from jigs and templates and interchangeable, and all the important adjustment finished to micrometer sizes. We agree to replace f. o. b. cars, Dayton, Ohio, free of charge, any parts breaking from defective material or improper workmanship. We guarantee the above machinery to perform in a proper manner all of the duties that are customarily required of machines and machinery of this class and character and built for this purpose.

"All agreements are contingent upon strikes, accidents, delays of carriers and other causes beyond our control."

1. It is complained that the court instructed the jury that they might find a verdict for the balance appearing to be due upon the contract. It is apparent from an examination of the instructions that what the court meant was that the jury might take that as the starting point, for the court proceeds to state the conditions upon which the jury might allow the defendant reductions under its counterclaim. We see no objection to submitting the case in this way. The defendant had received and kept and used the machinery upon the footing of the contract, and had at no time claimed the right to rescind, or offered to return the machinery. The right to rescind had been lost by the defendant. The remedies of the buyer of machinery on a contract such as this, upon discovering its defects, were stated by Judge Lurton, in delivering the opinion of this court in *Dodsworth v. Hercules Iron Works*, 66 Fed. 483, 488, 13 C. C. A. 552, as follows:

"The first was to reject, and give notice of their determination to the vendor. This course, if adhered to, would have entitled them to sue for a return of purchase money, and such other damages as they had sustained by the failure of the vendor to furnish them the machinery according to the contract. If the machinery had not been removed by the plaintiff upon notice of rejection, then the defendants might have removed and stored it, subject to the risk of the seller, or, if suffered to remain, they might have recovered storage. The second remedy open to defendants was to accept the machinery and bring an action for breach of the warranty in the contract. The third remedy, having paid but part of the price, was to set off by way of counterclaim, when sued by the buyer for the balance due, the damages sustained by the failure of the machinery to comply with the contract. *Benj. Sales (Corbin's Ed.)* § 1348. The right of rejection was lost by the long-continued use of the machinery, which use was utterly inconsistent with a purpose to resort to the first remedy which was open to them, and consistent only with a claim of title and ownership. *Id.* § 1356."

And see *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847; *German Savings Inst. v. De La Vergne Refrig. Mach. Co.*, 70 Fed. 146, 17 C. C. A. 34. The third of these remedies is that pursued by the defendant in this action.

2. The court construed to the jury the above-stated stipulation in the guaranty of the plaintiff, "We agree to replace f. o. b. cars, Dayton, Ohio, free of charge, any parts breaking from defective material or improper workmanship," as intending to provide that

the only remedy the buyer should have in case of such breakage would be to notify the seller, and have it replaced by the latter; and the court put the matter in this way, as if it answered the claim of the defendant that certain articles furnished "were of such imperfect design, material, and construction as to be not only worthless, but dangerous." In this we think the court erred. To begin with, the defects complained of were other and larger than those covered by this limited stipulation relative to breakage. It was claimed that these articles were of faulty design, and that they were within the terms of the general guaranty contained in the following words:

"We guarantee the above machinery to perform in a proper manner all of the duties that are customarily required of machines and machinery of this class and character and built for this purpose."

The facts that the parts were broken and might be replaced would not, as the court seems to have supposed, have displaced the more fundamental grounds of objection. For broken parts might have been replaced without fulfilling the guaranty. Moreover, the court was in error in holding that the promise to replace broken parts bound the purchaser to resort to that means of remedy. The view generally taken of such a stipulation is that it is a cumulative promise, and gives the purchaser a special privilege in addition to such rights as he may have under the general warranty, which he may exercise, or not, as he may see fit. *Douglass Axle Mfg. Co. v. Gardner*, 10 Cush. 88; *Seigworth v. Leffel et al.*, 76 Pa. 476; *Park v. Richardson*, 81 Wis. 399, 51 N. W. 572; *McCormick v. Dunville*, 36 Iowa, 645; *Hefner v. Haynes (Iowa)* 57 N. W. 421; 24 *Ency. of Law (2d Ed.)* 1158, 1159; *Kemp v. Freeman*, 42 Ill. App. 500; *Moore v. Emerson*, 63 Mo. App. 137.

It follows that the defendant, in case the parts of the machinery were broken or proved defective, might resort to other manufacturers to remedy the defects by supplying new parts. It might better fulfill its requirements in that way than by going back to the party who had originally furnished the defective machinery. Beyond doubt, it is ordinarily the right of a purchaser of warranted machinery which has been put into his works for continuous operation, but proves inadequate for use by reason of defects warranted against, to take any reasonably prudent and sufficient means to supply the defects; and, if he acts in good faith, he is entitled to charge the warrantor with the cost thereof. This rule applies to the case at bar. The defendant was therefore entitled to prove under the counterclaim that such defects appeared; that it took proper measures to remedy them, and at what fair cost. *Benjamin v. Hillard*, 23 How. 149, 16 L. Ed. 518; *Marsh v. McPherson*, 105 U. S. 709, 26 L. Ed. 1129; *Bixby v. Normal School Association (Iowa, 1899)* 98 N. W. 234; *Wood's Mayne on Damages*, 160; *Cutler v. Close*, 5 Car. & Payne, 337, per Tindal, C. J.

Such cases are illustrations of the general rule stated by the Lord Justices in the Court of Appeal. *Le Blanche v. London & Northwestern Ry. Co.*, 1 Com. Pl. Div. 286. "I agree," said James, L. J., "that the general rule is that a person with whom a con-



tract has been broken has a right to fulfill that contract for himself as nearly as may be; but he cannot do this unreasonably or oppressively, as regards the other party, or extravagantly." To the same effect is the statement of Mellish, L. J. Bagallay, L. J., preferred the following statement:

"If the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing."

Probably there should be a proviso that the expenses be not greater than the loss which the party incurring them would otherwise incur, unless this proviso is implied in the language quoted.

3. It is contended that, as the petition states that the drawings and plans for the machinery were submitted to and approved by the defendant's agent Harker, and that this was not proved, the plaintiff could not recover. But this was an objection to receiving the machinery, and was not available in defense of a suit brought to recover the price of the property which had been received and used by the defendant. It was not material to be alleged, or, if alleged, to be proved.

4. It is further objected that the court erred in saying to the jury that if they found that the plans of the kiln doors, which were claimed to be defective, were approved by him (Harker), the defendant could not now complain that the doors were too light or were of improper design. This objection is supported by the contention that Harker was not the agent of the defendant, and, further, that the kiln doors were not a part of the machinery. But the proposition of the plaintiff which was accepted by the defendant states that "it is understood that your Mr. Harker will examine and O. K. the drawings of any of the machines we may submit him before we build the same"; and while it might be that, in the common meaning of the words, "kiln doors" would not be classed as "machinery," yet the contract in this case treats them as such. The proposition of the plaintiff was, "For and in consideration of the hereinafter-named amount, we propose to furnish you in good shipping order, machinery as follows: f. o. b., Lisbon, Ohio," and the kiln doors were enumerated thereunder. The court did not err in treating these facts as settled by the contract. So, in regard to the form and dimensions of the kiln doors, if the drawings thereof were submitted to and approved by Harker, and were constructed according to the drawings, the defendant cannot now be heard to complain.

5. The defendant offered to prove that while the plaintiff was getting the machinery ready the defendant was engaged in preparing the foundations for it, and sent to the plaintiff a request for blue prints describing the form and dimensions of the machinery; that the plaintiff sent them, and the defendant built the foundations of masonry corresponding therewith; that, with respect to some of the machines, they did not correspond with the blue prints, and it became necessary for the defendant to change the foundations to conform with the machines. This proof was rejected; the court being of opinion that the contract did not require

the plaintiff to furnish blue prints to the defendant, that they were for the use of its own workmen, and that, it being a matter independent of the contract, it was not a proper matter for a counterclaim in a suit upon the contract. But it was a matter arising during the execution of the contract, and intimately related to it. If the circumstances were such as to impose a legal liability upon the plaintiff for misleading the defendant to its prejudice, we think that, upon the broad principles on which the privilege of asserting a counterclaim rests, the defendant should have been permitted to prove this claim. The plaintiff raised no objection on legal grounds to this item of counterclaim, but in its reply denied the existence of it. It would seem the plaintiff must have known that the defendant would prepare the foundations for the machinery, and we think there was enough in the evidence from which the jury might reasonably have found that the plaintiff knew that the blue prints were wanted for that purpose. If the plaintiff had such knowledge, and furnished the blue prints to show the dimensions of the machinery it would put in, and the defendant relied upon being supplied with machinery of the dimensions specified, and was prejudiced by its not being of such dimensions, the plaintiff would be liable therefor. It amounted to a supplementary agreement on the part of the plaintiff by which the particular dimensions of the machinery which had not been expressly defined in the contract were made certain. If the plaintiff did not know, and is not chargeable with knowledge because he ought to have known, that the blue prints were requested for the purpose of enabling the defendant to properly construct the masonry, the result would be different. It would not be chargeable with consequences which it could not foresee. We are therefore of opinion that the evidence should have been received, and its bearing and limitations explained to the jury.

6. Damages were also claimed by the defendant upon the ground that the machinery was not shipped within the time agreed, which was within 90 days, "as required." The defendant called for the machinery July 23, 1901, which was 90 days after the date of the contract. But it was not all shipped until some time in October following. The court instructed the jury that this provision meant "as required" by the needs of the purchaser, and not as called for by it. We more than doubt whether this is the proper construction of that term of the contract. But as no competent evidence was given of the damages resulting from its nondelivery, the defendant was not entitled to recover any, and the error of the court proves harmless. Evidence was given that the plant cost \$80,000, and that certain of the machines had a capacity for production stated. But these data were not sufficient to prove the rental value of the plant or of a machine, or the earning value of either. Counsel for defendant insists that it was entitled at least to nominal damages. But such a recovery would establish no right surviving the purposes of the suit—as, for instance, a right pertaining to the title to property—or determine a question of costs, and the claim to damages falls under the maxim, "*De minimis non curat lex.*"

Haven v. Beilder Mfg. Co., 40 Mich. 286; Lewis v. Flint & P. M. R. Co., 56 Mich. 638, 23 N. W. 469, 13 Cyc. 20.

7. The plaintiff called as a witness one Jester, who testified that he was "erecting engineer" for the plaintiff; that he was a participant in the preparation of the contract, and knew what articles were delivered under it, and their qualities, dimensions, and the circumstances of their delivery and erection; that the machinery was built in conformity with the specifications of the contract; and that there was no "departure from the contract at all." Then, on cross-examination, he was asked whether, on an occasion identified as a visit to a machine shop, he did not say "to the man in charge that the machinery furnished to the Thomas China Company was too light." The question was objected to, but no ground for the objection was stated. The court sustained the objection, but did not assign its reasons. Counsel for defendant excepted to the ruling, stating that he expected the witness to answer in the affirmative. This ruling is now supported upon the grounds that the witness could not bind the plaintiff by such a declaration, and that it was not an impeaching question, because his testimony in chief related only to the conformity of the machinery with the specifications of the contract. It should be admitted that the supposed declaration would not bind the plaintiff, but the defendant contends the question was competent for the purpose of impeaching the witness. It is not clear whether the second question of counsel was intended to inquire whether the plaintiff had fully conformed to the contract, or only as regarded the specifications. If the latter, the court did not err. Error should clearly appear, in order to warrant a reversal of the judgment by reason of it, and upon this point there is no certain ground.

8. Counsel for the plaintiff proposed to the witness Schroll this question:

"State whether or not the machine which you finally delivered to the Thomas China Company was manufactured and turned out as quickly as it could be done in view of the strike?"

This was objected to, but no ground was stated for the objection. The objection was overruled, and the defendant excepted. The witness answered that it was. The matter was relevant to the issue, and, if counsel intended to save their objection, they were bound to assign their reasons for it, so that the court might pass upon them. This is the well-settled rule.

There are one or two minor questions raised, but not very clearly presented. As they may not arise upon another trial, we will pass them.

The judgment must be reversed, with costs, and with a direction to award a new trial.

## THE EDWARD SMITH.

(Circuit Court of Appeals, Sixth Circuit. January 14, 1905.)

Nos. 1,350, 1,351.

## 1. ADMIRALTY—REVIEW ON APPEAL—FINDINGS OF FACT.

Where the district judge in an admiralty cause saw and heard the witnesses, a judgment based on findings of fact made on conflicting evidence will not be reversed by an appellate court, unless there is a decided preponderance of evidence against it.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, § 770.]

## 2. COLLISION—STEAM VESSELS MEETING TOW—CROWDING BY OVERTAKING VESSEL IN CHANNEL.

The steamers Masaba and Smith were passing up through Lake St. Clair, and, about the time they entered the dredged channel leading to the canal, passing signals were exchanged with the Aurora, coming down with the barge Aurania in tow, then coming out from the canal some two miles away. The Masaba, which was the larger and faster vessel, and having a tow, about this time overtook the Smith, and, without any agreement by signal, undertook to pass her on the starboard side, entering the channel nearly abreast, in violation of the rules governing the navigation of the canal and approaches. The vessels were nearly abreast, and not over 100 feet apart, when they passed the Aurora, and the Smith, which had checked speed somewhat, was affected by the suction of the Masaba, and sheered toward the Aurora, but increased her speed and overcame the suction, passing in safety. She then checked again, and was again caused to sheer by the effect of the suction, crossing the Aurora's tow-line, and coming into collision with the Aurania; both vessels being seriously injured. *Held*, that the Masaba was primarily in fault, and liable to both the Aurania and Smith; that the latter was also in fault, and responsible for half the damages to the Aurania and herself, on the ground that she permitted the Masaba to attempt to pass, in violation of the rules, without protest, or that she did not drop behind before meeting the tow, and in checking unreasonably a second time under conditions which subjected her more strongly to the influence of suction after passing the Aurora.

[Ed. Note.—Collision, overtaking vessel, see note to *The Rebecca*, 60 C. C. A. 254.]

Appeal and Cross-Appeal from the District Court of the United States for the Northern District of Ohio.

For opinion below, see 105 Fed. 987.

In No. 1,350:

Shaw, Warren, Cady & Oakes and H. Putnam, for appellant.

Goulder, Holding & Masten, Hoyt, Dustin & Kelley, and C. E. Kremer, for appellees.

No. 1,351:

Hoyt, Dustin & Kelley and C. E. Kremer, for appellant.

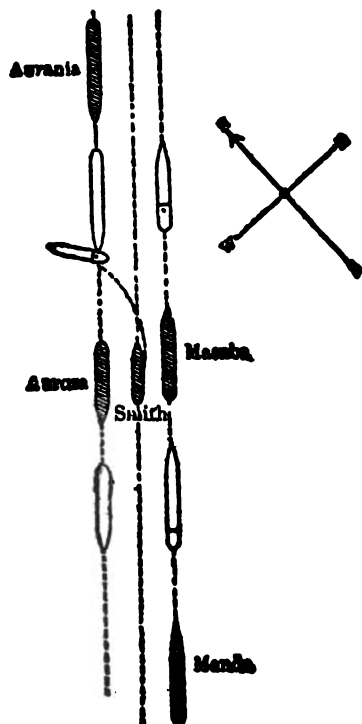
Shaw, Warren, Cady & Oakes and Goulder, Holding & Masten, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from a decree of the District Court, sitting in admiralty, pronounced by Ricks, District Judge, condemning both the steamer Edward Smith No. 2 and the steamer Masaba for a negligent collision between the steamers Edward

Smith No. 2 and the barge Aurania, by which both the steamer and the barge sustained heavy damages. The collision occurred in or near to the dredged channel by which the canal proper is approached from the head of Lake St. Clair. It occurred in broad daylight on July 24, 1898, and the vessels implicated were long in view of each other, having exchanged passing signals when nearly two miles apart. The original libel was filed by the owners of the Aurania against the steamer Edward Smith No. 2 and the Masaba. The Edward Smith filed a cross-libel against the Masaba to recover her own damages. The other facts essential to be now stated are these:

The barge Aurania, in tow of the steamer Aurora, was bound down. The steamer Edward Smith No. 2 and the steamer Masaba, having in tow the barge Manda, were bound up; the Smith being on the port side. The position at the time of the collision is fairly indicated by a diagram from brief of the proctors for the owners of the Smith:



About the time that the Aurora came out of the canal proper she exchanged passing signals of one blast with both the Smith and the Masaba, which were then about the head of the lake, and coming up abreast, or nearly so. The course of the Aurora and her tow, the barge Aurania, was, in accordance with this agreement, directed well over to the western side of the dredged channel, and the Smith was safely passed about 100 feet on the port side of the Aurora. But, after the

Smith had so safely passed the Aurora, she took a sudden and rapid sheer across the bow of the Aurôra's tow—the Aurania—resulting in a collision in which both the Smith and the Aurania sustained severe injuries; the Smith sinking rapidly on the western side of the dredged channel, while the Aurania went aground on the opposite side.

It is conceded on all sides that the navigation of the Aurora and of the Aurania was without fault, and that she is entitled to recover her damages against either the Smith or the Masaba, or against both, unless it is shown that the sheer of the Smith was due to some cause for which neither of the libelees is to be condemned.

The district judge heard and saw the witnesses, who testified orally in the court below, and his finding of fact upon a question of conflicting evidence is entitled to much weight. In the case of *The City of Cleveland v. Chisholm*, 90 Fed. 431, 434, 33 C. C. A. 157, we said:

"Notwithstanding this right of retrial here, the rule prevails that the judgment of the District Court will not be reversed, when the result depends alone upon questions of fact depending upon conflicting evidence, unless there is a decided preponderance against the judgment, where the trial judge saw and heard the witnesses and had an opportunity of weighing their intelligence and candor."

The same rule applies in other Circuit Courts of Appeal. *Pioneer Fuel Co. v. McBrier*, 84 Fed. 495, 497, 28 C. C. A. 466; *The Brandywine*, 87 Fed. 652, 31 C. C. A. 187; *The Captain Weber*, 89 Fed. 957, 32 C. C. A. 452. When, however, the evidence is taken before an examiner, this rule does not apply. *The Glendale*, 81 Fed. 633, 26 C. C. A. 500; *The Sappho*, 94 Fed. 545, 36 C. C. A. 395.

There were three questions of fact, upon which the evidence was very conflicting, which have an important bearing upon the results. One of these was the relative position of the Smith and Masaba at the time of the former's sheer. The libel filed by the owners of the Aurania, as well as the cross-libel filed by the Smith, against the Masaba, aver that at the time of this sheer the Smith and the Masaba were about abreast and very close together. The Masaba had a length of 310 feet; the Smith 218 feet. The Masaba had a greater beam by 3 feet. The Smith was loaded, having a 1,500-ton cargo. The Masaba was empty, but had a tow and some 800 or 900 tons of water ballast. The Smith drew about 13 feet 6 inches forward and about a foot more at her stern. The Masaba, moving, was drawing about 4 feet forward, but at her stern, when moving with her tow, about 15 feet, and in the shallow water of the canal entrance possibly a foot or so more. The Masaba was not only the larger, but also the faster, boat, and before and about the time of the sheer her speed was slightly the greater. That the Smith had passed the Masaba at Detroit is admitted. The Masaba followed the Smith out of the Detroit river and into Lake St. Clair. The claim that the Masaba passed the Smith while crossing Lake St. Clair, so that, when the head of the lake was reached, the Smith was the overtaking vessel, is not established. The evidence upon the point is conflicting. But the trial judge who heard and saw the witnesses reached the conclusion that the Masaba was endeavoring to pass the Smith, and had been the overtaking vessel all the way across Lake St. Clair, and that at the time of the sheer, and for some short time

before, had been traveling almost abreast of the Smith; the sterns of the two boats being about together, while the bow of the longer vessel was from 50 to 75 feet in advance of the stern of the shorter steamer.

Another of the disputed questions of fact was as to the locality of the collision. The weight of evidence is that it occurred from one-half to one mile below the canal proper, the canal with visible banks, and in the dredged channel by which the canal proper is approached from the head of Lake St. Clair. There is some doubt about the width of this approach at the time of the collision. Its official width, as shown by charts, is now about 400 feet, narrowing until canal banks proper are entered, when the width is about 300 feet. The probabilities are that this collision took place where there was a navigable channel, including the dredged or improved approach, of close onto 800 feet. Under the canal regulations this improved channel of approach, both above and below the dikes of the canal, is comprehended in the canal, and within the rules for canal navigation.

The faults charged against the Masaba in the libel of the *Aurania*, which are relied upon, are: First, that she persisted in an effort to overhaul and pass the Smith in the shallow waters of the canal approach at the head of Lake St. Clair; second, in going so close to the Smith as to interfere with her steering and in causing her to sheer.

In the cross-libel of the Smith against the Masaba, the faults charged are: First, that she attempted to overhaul and pass the Smith without any agreement by signals; second, that upon getting abreast of the Smith she persisted in her effort to pass after entering upon the narrow waters of the dredged channel, in violation of the rules and regulations for the navigation of the canal, which forbid two vessels entering abreast, or to pass another vessel in the canal while going in the same direction; third, in not dropping astern on the approach of the down-bound *Aurora* and her tow until they should get through the canal; fourth, that she crowded so close upon the course of the Smith that the latter could not safely drop astern, nor be steered safely, and caused her by suction to sheer over into the course of the *Aurania*.

That the Masaba was violating the rules regulating the navigation of the St. Clair Flats Canal, in that she had entered the dredged channel practically abreast of the Smith, and that she persisted in her effort to pass the Smith after getting into the approach, we have no doubt. Still, if her violation of these canal rules did not contribute to the sheer of the Smith, she is not to be condemned. But the burden is upon her to show that her violation of the rules did not contribute to the collision, which occurred while she was proceeding in defiance of the canal regulations. *Belden v. Chase*, 150 U. S. 675, 14 Sup. Ct. 264, 37 L. Ed. 1218.

We will not now stop to consider whether the Masaba has shown that her violation of these canal rules had nothing to do with the sheering of the Smith. There is a much larger question, or two of them, and if the Masaba can escape condemnation upon these greater matters she will have little trouble with the breaches of the minor rules of navigation. The Masaba, as we have already seen, was the overtaking vessel. She had not ceased to be in that category when the Smith took her sheer. The evidence satisfactorily establishes that for perhaps half a mile

and more the two boats had been almost abreast, the stem of the Masaba being from 50 to 100 feet in advance of the stem of the Smith. The difference in speed was little, about one mile per hour in favor of the Masaba. She was probably two miles behind the Smith on coming out of Detroit river, and had almost come abreast before reaching the head of the lake. But without passing she seems to have then pulled out to the starboard, "to get away from the Smith's smoke." But she was very soon again headed for the canal, which put her on a course converging upon that of the Smith. It is not plain just when this course brought her again into close proximity with the Smith, but the weight of evidence seems to indicate that she came abreast, or nearly so, about the time passing signals were exchanged between the down-bound tow and the Smith and Masaba. This was probably  $1\frac{1}{2}$  miles below the canal proper.

Upon this matter of the proximity of the Masaba to the Smith at the time and just prior to the sheer there is much conflict. The witnesses estimate this distance all the way between 700 and 50 feet. The extreme estimates come from the decks of the Smith and the Masaba. The average distance, as testified to by the witnesses from the deck of the Masaba and her tow, the Manda, is from 300 to 400 feet, a distance which, if credited, will quite overthrow the theory that the Masaba's suction caused the sheer of the Smith. Upon the other hand, the average estimate by the witnesses from the decks of the Smith, the Aurora, and the Aurania is 100 feet or less.

We have considered all of the evidence, including Miss Green's photograph, and the expert opinion as to the distance of the Masaba from the Smith when this was taken, according to the laws of optics and photography. Without going into details, we are of opinion, from all the circumstances and all the conditions, that the Masaba, at the time of the Smith's sheer, was not more than 100 feet off the Smith's starboard hand, and that the sterns of the two boats were about abreast, the stem of the Masaba being some 50 or 75 feet in advance of the stem of the Smith; the latter being the shorter boat by some 90 feet. We are also quite of the opinion that at this distance, between two boats so unequal in length and displacement, traveling in the same direction, and in shallow water, where suction is more likely to be felt, the navigation of the Smith was influenced and her steering made uncertain, and that the proximate cause of the sheer of the Smith was the suction of the Masaba. As the overtaking vessel, it was the duty of the Masaba to keep out of the way of the Smith, and this means that it was her duty, whether the Smith had tacitly consented to being passed or not, to keep far enough off the course of the latter to avoid the influence of suction. The Ohio, 91 Fed. 547, 550, 33 C. C. A. 667.

But we do not think that the Smith has so fully met the burden which, as between her and the Aurania, devolves upon a vessel which endeavors to excuse her sheer. In the case of The Ohio, 91 Fed. 547, 549, 33 C. C. A. 667, where the Siberia endeavored to excuse a sheer across the course of the Ohio by showing that it was caused by the suction of the Mather, a passing vessel, we said:

"If this swing from her course was caused wholly by the wrongful approach of the Mather, and could not have been prevented or broken before



the collision by the use of all the means which were reasonably within the control of those charged with her navigation, she must be acquitted; for the cause of the collision would be a cause not produced by her. But the burden is upon her to show, not only that her sheer was caused by the wrongful conduct of the Mather, but that her own management was such, both before and after the sheer, as not to have contributed to the final collision."

We cannot assent to the argument that the Smith was misled and had no sufficient reason to suppose that the Masaba would persist in her effort to pass after reaching the dredged approach to the canal, a thing prohibited by the canal rules, or would persist in going abreast, a course likewise forbidden by the canal rules. But it is difficult to see how she could fail to misapprehend her purpose to persist in her effort to pass, or at least to continue abreast. The libel of the Smith, referring to this matter, says:

"As the Masaba came up abreast of the Smith, she came in closer to the latter on a course somewhat converging with the Smith's course. When her bow was thus abreast of the Smith, it was apparent that, as the vessels were then going, the Smith must enter the canal abreast of the tow. Thereupon, it being apparent that the Smith could not get ahead of the Masaba, which continued going at apparently full speed, the Smith's engine was checked in an endeavor to drop behind the tow."

This refers to a checking which occurred at the head of the lake, and just before entering the canal approach, and just before the exchange of passing signals with the Aurora. This first checking does not seem to have been made with any view of dropping back. Mr. Moore, her first officer, and in charge of her navigation then, says of this:

"I saw the Aurora coming out, with her consort, the Aurania, and was getting up pretty close to them, and I looked around and saw the Masaba nearly abreast of us. We ran along a little while, and it wasn't a great while before he pulled up abreast of us. I was getting pretty well to the dredged cut then, and I checked down, which was a thing we always do there, generally check down and go slow speed, and ran along a little while, and I checked the second time. I didn't care to be too fast and get up when the Aurora was in the narrow channel. I thought probably his barge would be steering a little bad then, and I wouldn't care to meet him."

The Smith's libel says of this second checking:

"Thereafter the Masaba crowded over toward the Smith, and the latter was kept off to port and checked a second time to as slow an engine as she could take and maintain steerage way; but the Masaba seemed to draw her along and pass very slowly, and, as the Aurora and Smith were about to meet and pass, the suction of the Masaba caused the Smith to sheer to port and toward the Aurora, and she was rung up full speed under a hard aport wheel to break sheer and avoid a collision."

She recovered from this sheer, and the Aurora passed safely. Not warned by the effect of this checking when so close to a larger and faster boat going in the same direction, the libel says, she "was again checked as soon as she was started," when she went off again on another sheer, which was not broken by the tactics before employed, with the result that she was carried across the Aurora's towline and into collision with the Aurania.

The faults of the Smith are that she did not seasonably signify her unwillingness that the Masaba should pass her, or that she did not drop behind before entering the canal approach and before meeting the down

tow, and in checking unseasonably and irrationally, under conditions which were likely to subject her more strongly to the influence of suction at the stern of the Masaba. To check again after recovering from the first sheer, a sheer manifestly due to the more effective exertion of suction by reason of having dropped back under a reduced speed, was to invite a repetition of the same consequences before experienced. This checking under the conditions existing, aside from the failure to protest against the persistent effort of the Masaba to pass under the complications due to the passing of the down-bound tow, was a positive fault in navigation, after the force of suction had begun to manifest itself. Her deviation from her course under such circumstances was, therefore, not solely due to the fault of the Masaba. We may repeat and apply here what we said in the case of *The Ohio*, supra, in reference to the sheer of the *Siberia*:

"But the *Siberia* does not exonerate herself from liability to the *Ohio* by simply showing that she thus came within the influence of the suction of a passing steamer. The *Ohio* has a right to call upon her to show that she was brought within this dangerous influence without fault, and that there was no fault in her management after this force began to exert itself upon her." *The Ohio*, 91 Fed. 547, 33 C. C. A. 667.

The Smith has not met this burden in either particular.

A somewhat less stringent rule of responsibility is applicable when we come to determine the liability of the Masaba to the Smith. Thus, if the Masaba by her own wrongful conduct placed the Smith in a position of immediate and extreme danger, she would not be held to blame if she did something wrong in her endeavor to extricate herself, and should not be held to have contributed to her own damage. *The Ohio*, 91 Fed. 547, 558, 33 C. C. A. 667; *The Maggie J. Smith*, 123 U. S. 349, 355, 8 Sup. Ct. 159, 31 L. Ed. 175. But that is not the case here. The faults of the Smith for which we have held her liable are not faults in extremis. True, she was wrongly crowded so close by a larger and faster steamer, going through shallow waters, that the influence of suction was to be apprehended. But she suffered herself to be placed in this position without her consent, but also without protest. When she realized that the Masaba intended to persist in an effort to pass her in the waters of the canal, or to traverse them abreast, both being in violation of the rules regulating the navigation of the canal, she still did not protest. To avoid a continuance of a situation which involved a violation of the canal rules, she checked, not once, but twice—a course which plainly involved increased danger of sheering.

But it is said that the burden upon a large steamer overtaking a smaller and slower one, in confined and shallow water, is so great, and the faults of the former so much greater, that the overtaken and smaller steamer should not be held to a division of damages. For this rule counsel cite the cases of *The Great Republic*, 23 Wall. 20, 35, 23 L. Ed. 55, and *The Oregon*, 158 U. S. 187, 15 Sup. Ct. 804, 39 L. Ed. 943. It may be conceded that the Masaba was the chief offender, but it cannot be averred that the faults of the Smith were trivial, or that the faults of the Smith did not effectively contribute, or that they have not been plainly established. Under such circumstances there is no other rule than a division of damages, although it would seem more equitable

if the greater damages could be charged against the vessel primarily and chiefly responsible.

Without an undue extension of this opinion, we cannot in detail consider a number of arguments which have been presented in behalf of the appellees. It is enough to say that the case has been examined in all its phases, and we have deemed it sufficient to present only the leading grounds upon which we rest a judgment of affirmance.

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LEHMAN v. GRAHAM.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1905.)

No. 1,356.

**1. FEDERAL COURTS—JURISDICTION—INJUNCTION TO STAY ENFORCEMENT OF JUDGMENT OF STATE COURT.**

Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], providing that a writ of injunction shall not be granted by a court of the United States to stay proceedings in any state court, except under a bankruptcy law, does not prevent a federal court in a suit within its jurisdiction by reason of diversity of citizenship and the amount involved from granting relief against a judgment of a state court obtained by fraud or on other equitable grounds, where such relief could be granted if the judgment were that of a federal court; and in such case a preliminary injunction may be granted to prevent the collection of the judgment by execution or otherwise.

[Ed. Note.—Federal courts enjoining proceedings of state courts, see notes to *Gardner v. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

**2. APPEAL—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.**

The granting of a preliminary injunction rests in the sound judicial discretion of a Circuit Court, and, while its order granting such injunction is reviewable, it will not be disturbed on appeal unless it is violative of the rules of equity that have been established for the guidance of its discretion.

**3. SAME.**

Where a preliminary injunction has been granted on a sworn bill, which presents grave questions of law, to prevent immediate and certain injury to the moving party, and it appears that no injury will result therefrom to the defendant which cannot be provided against by a bond, the appellate court on an appeal from the order will not consider questions going to the merits of the bill, which should be raised by proper pleadings and first presented to the trial court.

**Appeal from the Circuit Court of the United States for the Southern District of Florida.**

This is an appeal from an interlocutory decree granting a temporary injunction. John A. Graham filed the bill against Francis Irsch and D. Lehman. The material averments of the bill are as follows:

(1) On May 5, 1891, Graham was indebted to Irsch in the sum of \$4,000. To secure this debt, he made his note and mortgage, payable to Irsch on demand. By the mortgage he conveyed to him an undivided interest in lands situated in the Southern District of Florida.

(2) On the same day, as collateral and additional security for the payment of the debt, Graham assigned to Irsch his right and interest in a mortgage made by one James W. Lyman to Graham, which mortgage covered real estate therein described. This mortgage was made to secure a note for \$5,-

230.86, and Graham agreed with Irsch to transfer and deliver the note, also, as collateral security to further secure the \$4,000 debt to Irsch.

(3) On September 15, 1891, Irsch brought suit in the United States Circuit Court for the Northern District of Florida to foreclose the mortgage executed by Graham to Irsch. On May 18, 1893, a decree of foreclosure was entered.

(4) On August 15, 1893, by agreement in open court made between the solicitors of Irsch and Graham, the decree of foreclosure was amended so as to make it embrace as a decree of foreclosure the right, title, and interest of Graham in the note and mortgage of James W. Lyman to Graham, which had been assigned as collateral security for the payment of the \$4,000 note made by Graham and payable to Irsch.

(5) The purpose of this agreement and amendment to the decree, and the only purpose, was to foreclose and sell the right and interest of Graham in the note and mortgage so pledged by him as collateral.

(6) At the time of this agreement Graham still held possession of the note made by James W. Lyman, not having transferred the same to Irsch, but, pursuant to such agreement, he now transferred it, writing thereon: "Pay to Francis Irsch, subject to the terms of assignment heretofore made. John A. Graham." It was fully understood and agreed between the parties at this time that the transfer of Graham's interest in the note was only as collateral security for the payment of the debt of \$4,000, which Graham owed to Irsch, and that the transfer was made in accordance with the consent decree entered August 15, 1893.

(8) On April 3, 1894, a deficiency decree was entered in said cause in favor of Irsch and against Graham for \$4,163.52.

(9) By act of Congress the foreclosure suit and proceedings therein were transferred to the Circuit Court of the United States for the Southern District of Florida and became part of the records thereof. On March 5, 1902, Graham fully paid the deficiency decree.

(10) That Irsch and Lehman conspired to defraud Graham, and fraudulently to charge him as an indorser and guarantor of the note of James W. Lyman, and to violate the stipulation and agreement of counsel and the decree of the court thereon.

(11) That, pursuant to this conspiracy, Lehman took the note of James W. Lyman as security for a previously existing indebtedness of Irsch to him, and did not pay or give any consideration therefor, and that he took the note with actual knowledge that Graham was not liable as an indorser thereon, and with notice of the terms of indorsement thereon, and of the agreement between Graham and Irsch.

(12) That Lehman never acquired ownership or title to the note, and that the transaction of Irsch and Lehman was a fraud and device to charge Graham as an indorser, and to violate the terms of the agreement and the decree made pursuant thereto.

(13) That, for the purpose of defrauding Graham, D. Lehman, on August 12, 1896, brought suit in the circuit court of Duval county, Fla., against Graham, as an indorser on the note of James W. Lyman, and obtained judgment thereon on May 14, 1897, for the sum of \$3,433.66. This judgment was against Graham on the allegation that he was an indorser and guarantor of the Lyman note. \* \* \*

(16) That since the entry of the judgment in favor of D. Lehman and against Graham in the Circuit Court of Duval county, Fla., Graham has paid and satisfied in full the deficiency decree taken and entered against him by Irsch, and all costs and charges thereunder, and that thereby he has satisfied and paid in full the original note and mortgage given by him to Irsch, and that the judgment in the circuit court of Duval county, Fla., is a second and double charge, claim, or lien against him.

(18) That Graham has requested Lehman to cancel the judgment, and that he refuses to do so, and has sued out writs of garnishment thereon.

(19) It is also alleged that D. Lehman has caused a copy of the judgment which he recovered against Graham to be recorded in the public records of Manatee county, Fla., in which county Graham owns real estate, and that such judgment constitutes an apparent lien and cloud upon Graham's title to lands situated in that county, although he avers that the judgment is not valid or

effective, and has, in fact, been paid. It is also alleged that the original judgment has been destroyed by fire, and that Lehman is prosecuting a suit to re-establish it.

There is a prayer that D. Lehman, his agents and attorneys, be enjoined and restrained from enforcing, or attempting to enforce, or re-establish, the judgment recovered by said D. Lehman against Graham in the circuit court of Duval county, Fla., on May 14, 1897, and that they be enjoined and restrained from suing upon or taking any proceeding under the judgment, or attempting to re-establish the same.

The court made the following order: "It is ordered that the said defendant, D. Lehman, his agents and attorneys, be enjoined and restrained from enforcing or attempting to enforce said judgment recovered by the said D. Lehman against complainant in the circuit court of Duval county, Florida, on May 14, 1897, described in the bill, and from suing upon or taking any proceedings under the said judgment, except the re-establishment of the same, until the further order of this court. It is further ordered that so much of the said motion for such restraining order as seeks to prevent the said defendant, D. Lehman, from re-establishing the record of said judgment in said circuit court of Duval county, Florida, be, and the same is hereby, denied."

The defendant, Lehman, appealed to this court, and assigns the following errors:

"(1) That said order is in violation of section 720 of the Revised Statutes of the United States, in that it enjoins proceedings now pending in the courts of the state of Florida.

"(2) Because the allegations of the bill of complaint do not entitle the complainant to any relief whatever against this defendant.

"(3) Because the allegations of the bill of complaint show that the complainant has been guilty of such laches as to bar him from the relief prayed for in his bill of complaint against this defendant.

"(4) Because the facts set up in the bill of complaint do not constitute any cause of action cognizable in a court of equity and within the jurisdiction of the equity side of the United States Circuit Court, the facts stated in said bill constituting an attempt to review a decision of a common-law court of the state of Florida, contrary to the established practice of courts of equity.

"(5) Because the allegations of the bill of complaint show that all the material facts therein alleged can be pleaded in defense to the suit brought by this defendant against the complainant, John A. Graham, in the state court of the state of Florida, upon the judgment sought to be enjoined, which suit the said complainant by his said bill seeks to enjoin."

C. D. Rinehart and E. P. Axtell, for appellant.

J. C. Cooper (C. M. Cooper and E. J. L'Engle, on the brief), for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

This suit is brought by John A. Graham, a citizen of the state of Florida and a resident of the Southern District of Florida, against Francis Irsch, a citizen and resident of the state of New York, and D. Lehman, an alien, a citizen and resident of the Empire of Germany. One of the purposes of the bill is to remove "an apparent lien and cloud" upon lands owned by the complainant, and situated in the district where the suit is brought. The complainant and one of the defendants being citizens of different states, and the other defendant being an alien, and the amount involved being sufficient, the case was within the jurisdiction of the court. *Dick v. Foraker*, 155 U. S. 404, 411, 15 Sup. Ct. 124, 39 L. Ed. 201, and statutes there cited.

Section 720 of the Revised Statutes of the United States [U. S.

Comp. St. 1901, p. 581], provides that the writ of injunction shall not be granted in any court of the United States to stay proceedings in any state court, except in cases where such injunction is authorized by a proceeding in bankruptcy. The literal application of this statute would have forbidden the issuance of the injunction in this case. But the statute does not, and could not, have literal application. It must be construed so as to harmonize with other statutes and with the Constitution. Sections 716, 718, and 719 of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 580, 581] authorize the United States courts and judges to issue the writ of injunction. The Constitution confers on the federal courts jurisdiction in all cases in law and in equity arising under the Constitution, the laws of the United States, or between citizens of different states, and "between a state, or the citizens thereof, and foreign states, citizens or subjects." An injunction to restrain proceedings in a state court is frequently an incident to a case of which the statutory and constitutional jurisdiction of the United States courts is unquestioned. If the federal court has jurisdiction of the case by reason of the citizenship or alienage of the parties, or otherwise, it can grant relief against a judgment of a state court obtained by fraud (or on other equitable grounds) in any case in which relief could be granted if the judgment were rendered by a United States court; and in such case a preliminary injunction may be issued against the defendants to prevent the collection of the judgment by execution or otherwise. *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497; *Terre Haute & I. R. Co. v. Peoria & P. U. R. Co.* (C. C.) 82 Fed. 943; *National Surety Co. v. Bank*, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394.

What has been said is sufficient to show that on the averments of the bill section 720 of the Revised Statutes, as construed by the Supreme Court, does not deprive the Circuit Court of the power to issue an injunction in a case like this.

It is also urged on our attention with great earnestness and the citation of many authorities that the jurisdiction invoked in this suit is ancillary and supplemental to the foreclosure suit of Francis Irsch against John A. Graham, and that, this being true, the Circuit Court had jurisdiction, without regard to the citizenship of the parties; and that, having obtained jurisdiction of the parties and the subject-matter before the proceedings in the state court, section 720 of the Revised Statutes of the United States has no application. We do not deem it necessary or advisable to enter on the discussion of that question.

Many questions going to the merits of the case are raised by the assignment of errors and the briefs. We are not disposed to consider and decide them at this stage of the litigation. This is an appeal from an order granting a temporary injunction. Formerly such an order was not reviewable, but was in the absolute discretion of the Circuit Court. The act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], allows an appeal from such a decree, but the act has been uniformly construed that the granting of an injunction pending the suit is in the sound judicial discretion of the circuit court, and that its order will not be disturbed on appeal, unless it is violative of the

rules of equity that have been established for the guidance of its discretion. *Kerr v. New Orleans*, 126 Fed. 920, 61 C. C. A. 450, and cases there cited. In actual practice the court is often required to pass upon an application for a temporary injunction without an opportunity to make a careful investigation of the case. When the sworn bill presents grave questions of law that should be decided on argument and after careful consideration, and when it appears that injury to the moving party may be immediate and certain, and that no injury will be done the defendant by the order, or such injury that may be fully provided against by bond, it seems a reasonable and proper practice to grant the temporary injunction. *City of Newton v. Levis*, 79 Fed. 718, 25 C. C. A. 161. When the case comes up later on answer, plea, or demurrer the questions involved can be more carefully examined. The Circuit Court should at least, when the case is not plain, have the power to preserve the present conditions until it can be examined. When this can be done without injury to the defendant, the discretion of the court should not be lightly interfered with. No harm can come from permitting the free exercise of this discretion, especially where no loss can come to the defendant from a short delay. If the defendant chooses, he can always move the court to require a bond to protect him. As the case now stands, there is no pleading except the bill. Many questions have been argued before us that could be more properly raised by plea, answer, or demurrer. If raised in that way in the lower court, and decided according to appellant's contention, the complainant would have a right to amend the bill; but if we should examine these questions, or at least some of them, on this appeal, and sustain the appellant's contention, there would be no opportunity to amend; and, besides, if we adopt the practice of considering every alleged defect of a bill on an appeal like this, this court would be deciding various questions before they were presented to and passed upon by the Circuit Court. We must adhere to our previous decisions on this subject. *Kerr v. New Orleans*, 126 Fed. 920, 61 C. C. A. 450; *Massie v. Buck*, 128 Fed. 27, 62 C. C. A. 535; *Railroad Commission v. Rosenbaum Grain Co.* (C. C. A.) 130 Fed. 110.

The decree of the Circuit Court is affirmed.

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LIDDON & BRO. v. SMITH et al.

(Circuit Court of Appeals, Fifth Circuit. January 31, 1905.)

**1. BANKRUPTCY—APPEALS—CONTOVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.**

Proceedings on a petition filed in a bankruptcy court by a mortgagee of a bankrupt asserting a right to the proceeds of the mortgaged property which has been sold by the trustee are not bankruptcy proceedings, but constitute a controversy arising in bankruptcy proceedings, reviewable by the Circuit Court of Appeals in the exercise of its general appellate jurisdiction under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431].

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

**2. SAME—RIGHTS OF MORTGAGEE.**

Where a purchaser of property subject to a mortgage pending a suit in the state court to foreclose instituted voluntary proceedings in bankruptcy, manifestly intended to be adverse to the interests of the mortgagee, his attorney should not be made an allowance "for valuable services rendered in preserving" the mortgaged property, and given a lien therefor prior to the mortgage on the proceeds of the property when sold by the trustee.

Appeal from the District Court of the United States for the Northern District of Florida.

Benj. S. Liddon, for appellants.

John M. Calhoun and Robt. J. Boone, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. A. B. Heath, one of the appellees, owned and was operating a sawmill near the town of Sneads, Fla., in October, 1901. On the 31st day of that month he made a mortgage in favor of the appellants, Liddon & Bro., covering the sawmill complete, describing its constituents, and providing in the mortgage that it should embrace also all other features or attachments then upon the mill or that might thereafter be added thereto, and all lumber, deal and square timber then upon the millyard, or that might be cut by the mill during the existence of the mortgage. It also embraced 40 acres of land on which the other property described in the mortgage was situated. This mortgage was given to secure certain promissory notes aggregating \$800, a part of which was for money then due by the mortgagor to the mortgagees, but the greater part was to cover advances to be made by the mortgagees to the mortgagor in the prosecution of his business. In April, 1902, Heath transferred his sawmill property and its operation to the appellee W. B. Smith by an oral agreement, the terms of which are not clearly shown. It appears, however, that Smith undertook to discharge the notes and mortgage, and he made a payment thereon at the time of the transfer. After that Smith appears to have had the active management of the operation of the mill, but Heath remained in some way connected with the business, and each obtained supplies from the appellants on an account that was kept in the name of Smith. In June, 1903, Smith abandoned the business, and went to Georgia, where he had formerly resided, and since that time has not been in Florida. A few days after Smith's departure the appellants commenced proceedings in the state court to foreclose their mortgage, and by proper process from that court the mortgaged property was seized at the appellants' suit. After this seizure Heath had a consultation with Mr. J. M. Calhoun in reference to these matters, which resulted in Heath's going to Georgia to see Smith. Thereafter Calhoun, as attorney for Smith, prepared a petition in the usual form for voluntary bankruptcy, with the required schedules attached, and these papers, being sent by mail to Smith in Georgia, were sworn to and subscribed by him July 9, 1903, and, being returned to Calhoun, were filed in court July 15th. There being no judge in the district, the petition was, on the same day that it was filed, referred to C. L. Shine, one of the referees in bankruptcy of that court. On the same day W. B.



Smith, by petition signed "John M. Calhoun, Attorney for Petitioner," and sworn to by Calhoun as such attorney, applied to the referee for the appointment of a receiver, and suggested that A. B. Heath be appointed. On July 24th the referee made the adjudication in bankruptcy, and on that day made his order appointing A. B. Heath receiver to take possession and custody of the bankrupt's estate. On July 28th the referee approved the bond of the receiver, but this bond appears to have been filed in court July 1, 1904, and the proof shows that the receiver did not take possession of the estate. The "Schedule A-2" attached to the original petition showed that the appellants held a mortgage upon the sawmill machinery and four mules for the amount of \$400, and "Schedule A-3" showed that they held an unsecured open account, contracted in 1902-03, for \$400. The appellants made due proof of their claim of an unsecured open account. A trustee was duly appointed, who, on October 2, 1903, applied to the referee for authority to sell all of the property embraced in the inventory and schedules free from liens, and that the money be held to abide the further order of the court. Attached to this application was the consent of certain creditors, including Liddon & Bro. Thereupon, on the same day, the referee made an order which authorized the trustee to sell the property at private sale free from all liens thereon. On October 10th the trustee submitted his report of the sale, and on October 23d the appellants filed with the referee their petition setting up the notes and mortgage held by them, with the prayer that the trustee should be ordered to pay to them the sum of \$446.18, less the necessary expenses of the sale and charges in caring for the property. This petition the appellees severely contested. After a protracted hearing the referee filed his report, to which the appellees excepted, and, their exceptions being overruled by the referee, the matter was brought before the judge, who, on July 1, 1904, passed the decree from which this appeal is taken.

The appellees have moved to dismiss the appeal, stating numerous grounds, only one of which we deem it necessary to discuss. It is stated as follows: "Because the judgment herein is not one \* \* \* allowing or rejecting a debt or a claim of five hundred dollars or over." This assignment assumes that the appeal in this case could only be taken under section 25a of Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], and it appears that the appellants considered that they were entitled to appeal under that section. It will have been observed that the appellants did not claim that there was as much as \$500 due them on their unsecured open account, which was the only claim of which they made proof under section 57 of Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]. Their mortgage debt they did not present for allowance against the bankrupt's estate, but made it the basis of their petition praying that they might have turned over to them such portion of the proceeds of the sale of the mortgaged property as they showed themselves to be entitled to receive under the mortgage lien. The words "bankruptcy proceedings" are used in sections 23, 24, and 25, 30 Stat. 552, 553 [U. S. Comp. St. 1901, pp. 3431, 3432], in contradistinction to controversies arising out of the settlement of the estates of bankrupts. *Denver First National Bank v. Klug*, 186 U. S. 205, 22 Sup. Ct. 899, 46 L. Ed. 1127. The appellants asserted title to

the proceeds of the mortgaged property in the possession of the trustee by the petition they filed, and this raised a distinct and separable suit, and the controversy thereon may be treated as one of those controversies arising in bankruptcy proceedings over which the Circuit Court of Appeals can, under section 24a, exercise appellate jurisdiction as in other cases. *Hewit v. Berlin Machine Works*, 194 U. S. 300, 24 Sup Ct. 690, 48 L. Ed. 986. The motion to dismiss the appeal must therefore be denied, but in considering the appeal we are limited to the controversy over the right of the appellants to the proceeds of the sale of the mortgaged property, which controversy embraces, of course, the correct ascertainment of the balance due the appellants on their notes and mortgage, and the amount of the cost and charges, which have a superior rank to their claim against the proceeds of the mortgaged property.

Appellants contend, first, that the court erred in adjudging that there was only \$291.41 due them upon the mortgage; second, that the court erred in adjudging that the attorneys for the bankrupt had rendered valuable services in connection with the preservation of the estate, and that his claim of \$122.50 is a prior claim, and must be paid as other costs; third, that the court erred in adjudging that A. B. Heath was entitled to be paid the sum of \$65 as costs in connection with preserving the estate.

The printed record occupies 164 pages, and the statement of the proceedings which it shows is very much involved, and exhibits such a want of orderly conduct and such a manifest bitterness of tone indulged in the whole controversy that we do not deem it necessary or advisable to undertake to formulate in detail what the record, in our view of it, shows. After a laborious examination of the whole record, we are satisfied that the appellants' first suggestion of error is not well taken, and that the judge's finding of the amount due on the notes and mortgage, as stated by him in his decree, is fully supported by the evidence in the case. From the same laborious and careful examination of the whole record, we conclude that the second and third suggestions of error are well taken. This bankruptcy proceeding was nominally voluntary, but it is manifest that it was procured by Heath, and conducted by him and his lawyer, Calhoun, in a most inveterate opposition to the valid secured claim of the appellants. While we may not, in such a case as this, review the action of the court of bankruptcy in the allowance of these claims as claims against the estate of the bankrupt, we are authorized and required to adjudge whether they should take rank superior to the mortgage against the proceeds of the mortgaged property. That property, at the time the petition in bankruptcy was filed, was in the custody of the state court on an application of the mortgagees to foreclose a lien on it that had been given long before the bankrupt had any interest whatever in the property. This lien the schedules prepared by Calhoun—manifestly with the assistance of Heath, and verified by Smith—recognized as existing for the sum of \$400; and in the statement thereof made by the judge in the decree appealed from it appears that at the date of that decree there remained due on the claim, after allowing all the payments that had been made thereon, the sum of \$491.40, from which sum the judge—very properly, we

think—deducted \$200 on account of the 40 acres of land which were embraced in the mortgage, thus reducing to the sum of \$291.40 this charge against the proceeds now in the hands of the trustee. It seems manifest to us that the services rendered by the attorney, J. M. Calhoun, nominally for the bankrupt, had no legitimate connection with the preservation of the estate, and that under the conditions existing it would be most inequitable to allow his account for fees therefor to take rank of the mortgagees' claim as a charge against the proceeds of the sale of the mortgaged property. It also appears to us that A. B. Heath rendered no service in the preservation of the property which will not be amply compensated by the amount allowed him by the referee. We therefore are constrained to reverse the decree of the District Court in adjudging to J. M. Calhoun \$122.50 as a claim prior in right to that of the mortgagees against the proceeds of the sale of the mortgaged property, and also to reverse so much of the decree as adjudges \$65 to A. B. Heath to take rank as costs in connection with the preservation of the estate superior to the claim of appellants, and we allow to him only the amount allowed him by the referee to which action of the referee the appellants have not excepted.

With these amendments, the decree, so far as it is before us on this appeal, we affirm.

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FOSTER V. MURPHY & CO.

(Circuit Court of Appeals, Second Circuit. February 3, 1905.)

**1. BROKERS—MARGINS—CONTRACTS—MODIFICATION.**

In an action for breach of a broker's contract by the sale of cotton for nondeposit of margins, evidence *held* to sustain a finding that the previous contract between the parties had been modified so as to authorize the immediate sale of plaintiff's cotton, without notice, on his failure to keep his margins good.

**2. SAME—AUTHORITY OF AGENT—PROOF.**

Where a witness, who was a member of defendant firm, testified that he called on plaintiff, and told him defendant was dissatisfied with the business, and wanted a distinct understanding, and thereupon the contract between the parties was modified, such proof was sufficient to show that the witness had authority to act for defendants.

**3. SAME—CONSTRUCTION.**

Where a contract between broker and customer with reference to margin transactions authorized the broker to close the transactions when the margin was exhausted, he was not required to wait until a loss had occurred, but was entitled to sell when the margin was depleted or impaired.

**4. SAME—CALLS FOR MARGIN—REASONABLENESS.**

Defendants, during market excitement, called plaintiff for margins by telegram at 10:10 a. m., and at 10:43 sent another telegram that, if margins were not deposited, plaintiff's account would be closed at once. Plaintiff admitted receiving a telegram worded "somewhat similar," and at 11:03, prior to which a tremendous crash in the market increased the shortage in plaintiff's margins from \$1,800 to over \$8,000, defendants telegraphed that unless plaintiff made a deposit within five minutes they would close the account, which they subsequently did. *Held*, that such facts warranted a finding that plaintiff was given a reasonable time with in which to deposit margins.

**5. SAME—EVIDENCE.**

Where plaintiff had been permitted to state everything that was said by him or defendants' agent at the time a contract between plaintiff and defendants was alleged to have been modified, and to restate the same in rebuttal, it was not error for the court to refuse to permit plaintiff to answer whether any new contract was made between plaintiff and such agent.

**6. SAME.**

In an action by plaintiff, who had been doing a private wire commission business through defendants, against defendants to recover for the alleged wrongful sale of cotton for plaintiff's failure to put up margins, evidence as to what quotations a witness saw registered on plaintiff's blackboard on the day of the sale, as distinguished from the quotations actually sent or received from defendants over plaintiff's wire, was inadmissible.

**7. SAME—VERDICT—MOTION TO VACATE—APPEAL.**

Exceptions to a refusal to set aside the verdict present no question reviewable in the Circuit Court of Appeals.

In Error to the Circuit Court of the United States for the Southern District of New York.

T. Henry Dewey and John T. Abney, for plaintiff in error.

William H. Stayton, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The plaintiff, at the time in controversy, was a citizen of South Carolina and was a stock, grain and cotton broker, doing business at Greenville in that state. The defendant was a New York corporation engaged in the same business at the city of New York. The defendant owned a private telegraph wire connecting its office with the office of the plaintiff which it rented for \$41.67 per month to the plaintiff. By means of this wire the market prices in New York, of the commodities dealt in, were communicated to the plaintiff and the figures were immediately posted on a board kept in his office for the use of his customers. The plaintiff agreed to send all buying and selling orders to the defendant and secure them by the stipulated margins; the margin for cotton being agreed on at \$1 per bale. The relation of broker and customer was thus established. Prior to the 9th of February, 1900, the defendant had purchased for the plaintiff 9,600 bales of cotton which were being held and carried for his account. On that day the fluctuations in the cotton market were violent and rapid and, after calling for additional margins which were not sent, the defendant sold all of this cotton at private sale and without notice to the plaintiff. The sale was promptly repudiated by the plaintiff and this suit was thereafter commenced to recover damages for the conversion.

The questions in controversy were principally questions of fact, the plaintiff contending that the sale was made in direct violation of the agreement between the parties; the defendant that it was in exact accord with its stipulations. The cause was tried with great care and attention to detail by the trial judge and, in order to avoid any confusion or injustice which might result from a general verdict, he took the precaution to frame and send to the jury specific questions covering every aspect of the controversy upon the facts. These questions and

the answers returned were as follows: "First: Did the contract between the parties provide that, in the event of a selling out, defendant should be relieved from giving notice of time and place of sale?" The jury answered this question "Yes." "Second: Did the contract between the parties provide that, in the event of a selling out, defendant might sell at public or private sale?" The answer was "Yes." "Third: Did the defendant give plaintiff reasonable notice of demand for additional margin, and of their intention to sell him out if he failed to respond to or make his margin good?" The answer was "Yes." "Fourth: Did J. F. Gatins send the telegram to R. C. Foster, saying: 'All right. Deposit \$3,100 and figure account, and if find that we are in the wrong will not call for any more. You have 9,500 bales long. J. F. G.'?" The answer was "No." We thus have a contract relating to marginal transactions established between the broker and its customer by which, in consideration of lower commissions and other special advantages growing out of the exclusive use of a private wire, the common-law rule governing that relation was modified by permitting the broker to sell the property at public or private sale without notice of the time and place of the sale in case the customer, after reasonable notice, failed to keep his margin good. The jury also found that the plaintiff had reasonable notice of the demand for additional margin and of the defendant's intention to sell his property if he failed to respond. They found, further, that the alleged telegram, which in effect proposed to accept \$3,100 as a conditional compliance with the demand for margin, was never sent by the defendant. Unless there was error in submitting these questions to the jury there can be no doubt that the cause was properly disposed of. The answers settled the entire controversy between the parties and the subsequent action of the court in directing a verdict was simply giving force and effect to the findings of the jury.

It is argued that there was no evidence of a special agreement modifying the original agreement between the parties. We are unable to accede to this view. It appears that the parties had been doing business for some time prior to August or September, 1899, and that the manner in which it had been conducted was not satisfactory to the defendant. In these circumstances an agent of the defendant, clothed with full power to negotiate, visited the plaintiff at his office in Greenville and made definite arrangements with him as to the conduct of the business in the future. The following is his testimony on the subject of margins:

"Q. Was anything said with reference to maintaining this margin? A. Yes, to be kept good at all times. Q. Was anything said with respect to the rights of Murphy & Co., or Foster, upon failure to keep the margin good? A. Yes, sir. Q. What was said? A. It was said that we could sell him out instantly if his margin became exhausted. Q. With or without notice? A. Without notice."

The plaintiff does not deny this conversation so far as it relates to margins; he says only that he does not recollect it, he does say, however, that the subject of selling at public or private sale was not mentioned. The most favorable view of the conversation which the plaintiff could expect was that it presented a question of fact to be passed

on by the jury. Manifestly the trial court could not say as a matter of law that there was no evidence of a special agreement when the testimony that such an agreement was made was not even contradicted.

But it is urged that the defendant's agent was unauthorized to act in the premises and that the plaintiff had no reason to suppose that he had authority so to act. The testimony of Phelan, the agent, sufficiently answers this contention. He says:

"I told him in the first place why I had come to see him, that we were dissatisfied with the business and that I wanted to have a distinct understanding and agreement with him about it. Q. Did you say who 'we' were? A. Murphy & Co., yes. I was one of them."

Again it is insisted that the agreement testified to by Phelan gave the right to sell the property only in the event that the margin was completely exhausted. This construction of the agreement cannot be maintained. A margin is intended for the protection of the broker, but if he be compelled to postpone the sale of the property which he is carrying for the customer until he has no margin left it is difficult to perceive upon what theory any adequate protection is afforded. In other words he must wait until he has actually incurred a loss before he can act. The plaintiff's construction of the agreement, is based, we think, upon a forced, narrow and unwarranted interpretation of the word "exhausted." The parties were both brokers entirely familiar with the technical terms and usages of the business. Phelan had sought the plaintiff to secure a more favorable agreement than the law gave him and it is inconceivable that after requiring that the margins should be "kept good at all times" he should agree that the plaintiff might violate the agreement with impunity, leaving the defendant remediless. That he intended to use the word "exhausted" in the sense of "depleted" or "impaired" is too plain to admit of doubt.

The amount necessary to margin the deals in question was about \$10,000. Any sum less than this was insufficient security and if the plaintiff failed to keep the margin at this amount after due notice the defendant had the right to sell him out. This was the agreement which the parties made and which the law implied. In effect the jury so found, they could not have answered the third question quoted above upon any other hypothesis.

It is argued by the plaintiff that the court assumed "that there was some special agreement subsequently made modifying the original agreement and that this assumption was error." We do not pause to inquire whether the point is presented by the assignments of error for the reason that we think the plaintiff misapprehends the position of the trial judge, he assumed nothing that was not admitted or proved by uncontradicted testimony. That plaintiff and Phelan had a conversation was conceded: whether the conversation modified the original agreement in the particulars in controversy was not conceded, and, therefore, the jury was asked to pass upon the question in all its details.

The proposition that the plaintiff was not given a reasonable time in which to furnish the margin called for and that the court should have so declared as matter of law, is based upon the erroneous assumption that he was allowed but five minutes. As we have seen the jury found

that he was given reasonable time and their verdict is amply supported by the testimony. The telegram to which the plaintiff undoubtedly refers was sent at 3 minutes past 11 and is as follows: "Unless you give us deposit in five minutes, will close your account." This was the last of a series of telegrams, the first being sent at 10:10 a. m., all making urgent demands for margin. As early as 10:43 a. m. the defendant sent a dispatch saying: "If you do not deposit your account will be closed at once." The plaintiff admits that he received a dispatch worded "somewhat similar." How it can be seriously contended that the plaintiff received a notice of five minutes only in the face of this telegraphic correspondence occupying nearly an hour, it is difficult to perceive.

Again it is contended that in no event was the defendant warranted in selling out the entire property. It is argued that, as the margin became impaired, only sufficient cotton should have been sold to make good the existing deficiency. The contract between the parties did not require such action by the defendant and in any event it is not apparent that it was practicable to adopt such a course on the morning in question. It was a period of intense excitement. The course of the market shows that no serious difficulty was to be apprehended until 10:47, when there came a tremendous crash which in 15 minutes increased the shortage in the plaintiff's margin from \$1,800 to over \$8,000. After this unexpected and abnormal drop in the market there was no time or opportunity for nice calculations as to whether all or a part of the cotton should be sold. The margin was rapidly diminishing—it seemed but a question of a few moments when the last dollar would disappear and it was clearly within the defendant's rights to sell the entire property and save what was possible from the wreck. It is evident from the correspondence that the defendant hoped and expected that the plaintiff would make the necessary deposit and that extreme measures would not be necessary. The unexpected drop in the market so changed the situation that the defendant was justified in taking prompt action for its protection. The account between the parties shows that the margin had become so small at the time the sale was ordered that common prudence compelled the defendant to act.

The calculations of the court based upon the time of the sale and the ruling prices at that hour were most carefully made and the direction of a verdict in favor of the plaintiff for \$315 was all the plaintiff had a right to expect. This amount was reached by holding the defendant to the strictest accountability in making a private instead of a public sale, and, after the jury had answered the questions in favor of the defendant a verdict for a larger sum could not have been logically directed.

There was no error in sustaining the objection to the question propounded to the plaintiff "whether any new contract was made between you and Phelan after Phelan came." The court allowed the plaintiff great latitude in stating everything that was said by him or Phelan. The above question was asked after the court had permitted the plaintiff in rebuttal to restate the conversation with Phelan. After having exhausted himself as to what was said it was clearly incompetent for him to characterize the testimony. Whether a new contract was made was a question for the jury and not for the plaintiff to answer.

There was no error in sustaining the objections to the questions asked of the witness King as to what quotations he saw registered on the blackboard in the plaintiff's office on February 9th. In the absence of proof to show that the posting was correct and that all quotations received were posted, the testimony was inadmissible, and, in any event, it was immaterial. The important fact to be ascertained was not what was posted, but what was actually sent and actually received. Upon this question the evidence was very full and complete.

Other propositions are argued which do not seem to be embraced in the pleadings or presented by the assignments of error. Exceptions to a refusal to set aside the verdict present no question reviewable in this court. *Morning Journal v. Rutherford*, 51 Fed. 513, 2 C. C. A. 354, 16 L. R. A. 803. It suffices to say that we have examined the record with care and find therein no error which warrants a reversal of the judgment.

The judgment is affirmed.

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DOLLE v. CASSELL et al.

YORK MFG. CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. January 26, 1905.)

Nos. 1,852, 1,853.

**BANKRUPTCY—CONDITIONAL SALES—VALIDITY OF LIEN UNDER OHIO STATUTE.**

Under Rev. St. Ohio, § 4155-2, which provides that conditional sales of chattels, under which delivery has been made, shall be void, unless recorded, as against "all subsequent purchasers and mortgagees in good faith and creditors," as such provision is to be construed under the rules of decision laid down in analogous cases by the Supreme Court of the state, a reservation of title in such a contract which had not been filed at the time of the bankruptcy of the purchaser is void, as against his creditors, whether their claims arose before or after the contract was made.

Appeals from the District Court of the United States for the Southern District of Ohio.

Louis J. Dolle and Constant Southworth, for appellants Louis J. Dolle and the York Mfg. Co.

Waight & Moore, for Waight and Ames.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. These appeals were taken—the first by the assignee of a creditor, the second by a mortgagee of the bankrupt, the Mt. Vernon Ice, Coal & Milling Company—from an order made by the District Court on June 8, 1904, declaring the rights of the creditors and of the mortgagee, and directing the distribution of the assets. The subject-matter of these several appeals are so interrelated that it is expedient to consider them together.

The Mt. Vernon Ice, Coal & Milling Company is a corporation organized under the laws of Ohio and had engaged in business at Mt. Vernon, in that state. Desiring to secure some icemaking machinery, it entered into a written contract with the appellant the York Manufacturing Company for a supply. This contract was concluded Octo-



ber 27, 1902, and provided that the vendor should supply the machinery and set it up in readiness for operation in the plant of the Mt. Vernon Ice, Coal & Milling Company for the sum of \$7,375, to be paid in installments. There was in the contract this stipulation:

"It is further expressly agreed that the title to and ownership of the machinery, apparatus or plant herein contracted for shall remain in the York Manufacturing Company until the entire purchase price agreed to be paid, \* \* \* shall be actually paid in cash."

And there was given the right to the vendor to enter the premises of the vendee and remove the property in case of default. Twenty-five per cent. only of the price of the machinery was ever paid. It was part of the stipulation of the contract that the vendee was to erect the building and make it ready for the reception of the machinery. This contract was never filed as required by the statute of Ohio relating to conditional sales, hereinafter referred to. Four persons named, William Mild, William E. Mild, Charles L. Mild, and Elizabeth Klinkel, were the principal stockholders of the Mt. Vernon Ice, Coal & Milling Company. The company was short of funds wherewith to progress in its operations. It had bought a lot on which it was erecting its building or buildings, and given back to its grantor a mortgage thereon for \$1,000 of the purchase money. The title to this lot then stood in the name of William Mild. In order to secure means to carry on the business of the company, the Milds applied to Waight and Ames—the former being a stockholder—to assist in raising money by lending their credit as sureties on notes to be given for loans. Thereupon the following agreement was made:

"This agreement, made and concluded this 1st day of November, A. D. 1902, by and between J. B. Waight and Ben Ames, parties of the first part, and The Mount Vernon Ice, Coal & Milling Company, William Mild, William E. Mild, Charles L. Mild and Elizabeth Klinkel, parties of the second part, witnesseth that,

"Whereas, the said The Mount Vernon Ice, Coal & Milling Company, William Mild, William E. Mild, Charles L. Mild, as stockholders thereof, are engaged in the business of conducting a flouring mill and are erecting an artificial ice and cold storage plant in Mount Vernon, Ohio, and expect to conduct the business of a flouring mill, the manufacture and sale of artificial ice, and a cold storage plant, and,

"Whereas, said parties have already invested therein about \$12,000.00, and it will be required and become necessary to complete said artificial ice and cold storage plant, to obtain a line of credit for about the sum of \$10,000.00, and they are desirous of borrowing said sum, or as much thereof as may be necessary to complete said plant.

"Now, therefore, said first parties, J. B. Waight and Ben Ames, agree to sign as security for said The Mount Vernon Ice, Coal & Milling Company to such persons or banks as loans may or can be made from, for said company for sums not to exceed \$10,000.00 in the aggregate, and continue as such security and carry said loan for a period of not to exceed two (2) years, upon the following terms:

"First. Said William Mild, William E. Mild and Charles L. Mild are to satisfy said first parties that they have already invested the sum of \$12,000.00 in said business, and that said business is free from indebtedness.

"Second. Said second parties are to elect said first parties directors of said The Mount Vernon Ice, Coal & Milling Company, they two with two of said Milds to constitute the board of directors of said company, and place their stock in said company in the hands of a trustee to be voted by said trustee for the re-election of said first parties as directors of said company for and

until all the loans upon which first parties are security, are paid and satisfied in full.

"Third. First parties are to be given a first lien upon all the property, both real and personal, of said The Mount Vernon Ice, Coal & Milling Company as security to indemnify them from any and all liability incurred by them on account of their becoming security for said company, or stockholders therein.

"Fourth. In the event of the property of the said The Mount Vernon Ice, Coal & Milling Company, not being sufficient to pay any and all of the indebtedness, upon which said first parties have become liable as security therefor under this agreement, then Elizabeth Klinkel, one of second parties to this agreement, agrees that she will pay any of said liabilities that said property of said The Ice, Coal & Milling Company is not sufficient to pay, and save and protect said first parties from any liability by reason of becoming security as aforesaid for said The Mount Vernon Ice, Coal & Milling Company.

"Fifth. William Mild, William E. Mild and Charles L. Mild agree that they will give their services to the work of said The Mount Vernon Ice, Coal & Milling Company until any and all liabilities upon which said first parties have, or may hereafter become security for said The Mount Vernon Ice, Coal & Milling Company shall be paid and charged in full, or said first parties released therefrom, and that they will not make a charge against said The Mount Vernon Ice, Coal & Milling Company for said work, or draw therefrom to exceed \$15.00 per week, each, for said services until they and all loans upon which first parties are liable, are paid in full.

"Sixth. Said second parties agree to pay said first parties as a consideration for becoming security for them as aforesaid, in addition to paying the interest upon said loans, the sum of \$1,500.00.

"Seventh. It is understood and agreed that for and during the time said first parties are liable as security for The Mount Vernon Ice, Coal & Milling Company, upon any of said obligations, they are to have control of said company and the services of William Mild, William E. Mild and Charles L. Mild therein, and upon the payment of said loans, and a release and discharge of first parties from any and all of said liabilities, then said first parties agree to turn over to said The Mount Vernon Ice, Coal & Milling Company and said Milds, all control of said property and all rights or interest that they may have therein.

"In witness whereof, the parties have hereunto set their hands and seals the day and year above set forth.

William Mild.

"William E. Mild.

"Charles L. Mild.

"Elizabeth Klinkel."

A mortgage without date was made on the same day, November 1, 1902, by William Mild, on the lot above mentioned, to Waight and Ames, conditioned for their indemnification for becoming sureties as contemplated by their agreement. This mortgage was not recorded until July 16, 1903, on which day the Mt. Vernon Ice, Coal & Milling Company made a general assignment for the benefit of its creditors. After giving the mortgage just mentioned, but on the same day, William Mild executed a deed of the lot, intending to convey it to the company, but, as is said, by mistake, the names of Waight and Ames were inserted as grantees. In their petition they offer to surrender to the bankrupt all claims under this deed. The deed was never recorded.

At the date of the agreement, November 1, 1902, no part of the machinery had come to the possession of the ice, coal, and milling company; but it began to arrive in January, and was finally installed in the plant two or three months later.

After the agreement above set forth, of Waight and Ames, five notes were made and used, amounting in all to \$10,000. Some were signed

by the bankrupt and Waight and Ames; others were signed by the Milds and by Waight and Ames, and not by the bankrupt. Waight and Ames paid one of the notes not signed by the bankrupt, given for \$1,000, about February 1, 1903. The rest remain unpaid. On July 22, 1903, a petition by creditors for an adjudication of bankruptcy was filed against the Mt. Vernon Ice, Coal & Milling Company, and on December 11, 1903, the adjudication was made. The claims proved amount to \$37,000. The property of the bankrupt has been sold, and realized \$5,100. Soon after the adjudication of bankruptcy, the York Manufacturing Company filed an intervening petition, setting forth the terms on which they sold the machinery to the bankrupt, alleging the default in payment, and praying that they might be allowed to enter the premises and remove the machinery therefrom. This petition was resisted by the creditors. A little later Waight and Ames filed their intervening petition, setting up their mortgage, alleging that they had no knowledge of the contract with the York Manufacturing Company at the time of taking their mortgage, and praying that they be given precedence over the York Manufacturing Company.

Section 4155-2, Rev. St. Ohio, provides as follows:

"In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring, or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain in the vendor, lessor, renter, hirer or deliverer of the same, until such sum or the value of such property or any part thereof shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors, unless such condition shall be evidenced by writing, signed by the purchaser, lessee, renter, hirer or receiver of the same and also a statement thereon, under oath, made by the person so selling, leasing or delivering any property as herein provided, his agent or attorney, of the amount of the claim, or a true copy thereof, with an affidavit that the same is a copy, deposited with the clerk of the township where the person signing the instrument resides at the time of the execution thereof, if a resident of the state, and if not such resident, then with the clerk of the township in which such property is sold, leased, rented, hired or delivered is situated at the time of the execution of the instrument; but when the person executing the instrument is a resident of a township in which the office of county recorder is kept, or when he is a non-resident of the state, and the property is within such township, the instrument shall be filed with the county recorder; and the officer receiving any such instrument shall proceed with the same in all respects as he is required to do by section four thousand one hundred and fifty-two of the Revised Statutes of Ohio, and shall receive the same fees as are allowed by law for similar services in other cases."

The referee held that the mortgage of Waight and Ames was a valid lien on all the bankrupt's property, including the machinery furnished by the York Manufacturing Company, subject to the mortgage on the lot for \$1,000 purchase money, and that the York Manufacturing Company had no lien on the machinery, but was a general creditor only. On petition for review, the District Court reversed this ruling, and held that the mortgage of Waight and Ames did not cover the machinery supplied by the York Manufacturing Company, but that the latter company had no lien thereon as against general creditors; that the mortgage of Waight and Ames was a valid lien on the rest of the property,

subject to the purchase-money mortgage on the lot; that Waight and Ames were not creditors, except as to the \$1,500 for becoming sureties, but that they might prove the debts of the creditors who held the notes on which they were sureties, if those creditors failed to do so, and be subrogated to the rights of said creditors to the extent that they have paid or may pay any balance due on said notes after applying the surplus of the proceeds of the real estate after the purchase-money mortgage had been paid; and that "the entire \$10,000 of the notes secured by said Waight and Ames is included in this right."

The District Court held that the mortgage of Waight and Ames was subordinate to the lien of the York Manufacturing Company on the machinery, upon the ground that no part of it had been placed upon the grounds of the bankrupt until two months after the making of the mortgage to Waight and Ames. And Waight and Ames have not appealed. But as above stated, the court granted them leave to prove the claims of the holders of the obligations on which they were sureties, provided the holders did not themselves prove them, and this right of subrogation was extended in respect to the whole \$10,000. But this gave the right to prove such claims only as belonged to those creditors and were provable by them, and not any claim of Waight and Ames. One note, representing \$1,000, had been paid five months or more before the bankruptcy proceedings, and could not, therefore, be proved as a claim of the holders of the notes, though it might be established as a general claim by Waight and Ames.

Under the provisions of section 4155-2, Rev. St. Ohio, above set forth, the agreement for the retention of the title of the machinery sold by the York Manufacturing Company until payment of the purchase price was void as to creditors, unless filed as there required. The contract was never filed, and that property, together with the other property of the bankrupt, has been seized by the court in bankruptcy. The question arising on the intervening petition of the York Manufacturing Company is whether the petitioner is entitled to recover the machinery sold to the bankrupt, or its proceeds, by virtue of the reservation contained in the contract of sale. In the case entitled *In re F. B. Shuster Co.*, 134 Fed. 43, which came here from the Western District of Kentucky we held that, under the settled law of Kentucky, such an unfiled contract for a conditional sale was valid between the parties, and as against subsequent mortgagees or purchasers with notice, and as against creditors, except those who became creditors subsequent to the unfiled contract, and without notice thereof. And we further held that, subject to the satisfaction of the claims of such subsequent creditors, the vendor in the contract of sale was entitled to enforce in the bankruptcy court the lien reserved. Contrary to the construction given to the Kentucky Statute in respect to the filing of such instruments, the Supreme Court of Ohio apparently holds that, under the statute of that state relating to the filing of chattel mortgages, an unfiled mortgage is void as to all creditors, whether prior or subsequent, without regard to notice, who secure a lien upon the property before the mortgage is filed. *Bloom v. Noggle*, 4 Ohio St. 45; *Building Association v. Clark*, 43 Ohio St. 427, 2 N. E. 846; *Hanes v. Tiffany*, 25 Ohio St. 549; *Kilbourne v. Fay*, 29 Ohio St. 264,

23 Am. Rep. 741; *Bercaw v. Cockerill*, 20 Ohio St. 163. While we do not find that the statute of Ohio requiring the filing of contracts of conditional sales of chattels has been construed by the Supreme Court of the state, we have no reason for supposing that "creditors" under the latter statute are not the same as the persons described by that term as the persons against whom such instruments are void in the statute relating to unfiled chattel mortgages.

In the case entitled *In re Shirley*, 112 Fed. 301, 50 C. C. A. 252, which came here from Ohio, we had occasion to consider its chattel-mortgage statute, and the decisions of the Supreme Court of the state concerning its construction; and, with reference to the word "creditors," we were led to the conclusion stated by Judge Day in the opinion of the court as follows:

"While this term is used without limitation in the statute as construed by the Ohio Supreme Court, it means such creditors as have fastened upon the property before the filing of the mortgage. All other creditors must assail the security for fraud, in order to defeat the preference. The cases cited holding a contrary doctrine are from states with different statutes, or where the Supreme Court has given a different construction to a similar statute."

But in the case we now have before us, the conditional contract of sale had not been filed when the vendor was adjudicated a bankrupt, and the question now is whether the reservation in the unfiled conditional sale is valid as against the trustee who now represents the creditors. The Supreme Court of Ohio construes the statutory provision regarding unfiled mortgages, so far as relates to creditors, to extend its protection to the antecedent creditors of the mortgagor, and not to those only who became such while the mortgage remained unfiled. And that court further holds that creditors do not lose the right to have recourse to the property covered by an unfiled mortgage by the conveyance of such property by the mortgagor to a trustee for the benefit of creditors, but that such right may be asserted and worked out while the property is in the hands of the trustee; likening the assignment upon a trust to appropriate the property to the claims of creditors to a judicial seizure for that purpose. *Hanes v. Tiffany*, 25 Ohio St. 549. And in a later case it was held that where the mortgagor of an unfiled mortgage dies, and his estate comes under the jurisdiction of the probate court, the creditors may in that court claim the privilege given them by the statute, and that the executor was bound to protect their rights against the mortgagee. *Kilbourne v. Fay*, 29 Ohio St. 264, 23 Am. Rep. 741. This holding is in accord with our own decision in the case of *F. B. Shuster*, *supra*, for the status of the property of a deceased person is in this respect quite similar to that of the estate of a bankrupt in the possession of the court for administration. Inasmuch as the seizure of the court of bankruptcy operates as an attachment, and an injunction for the benefit of all persons having interests in the bankrupt's estate, as said in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, and by this court in the *F. B. Shuster Co. Case*, we see no reason why the creditors of this bankrupt's estate should not be allowed the privilege which they had against the right claimed under the reservation in the conditional sale of the *York Manufacturing Company*.

The machinery and real estate have been separately sold. The real estate, sold, as we suppose, subject to the purchase-money mortgage, brought only \$50, and the machinery \$5,060; but the proceeds stand in the same plight as did the property prior to the sale, so far as the rights of parties are concerned. The court and the parties have treated the machinery as severable, and not as fixtures of the realty. We shall act upon the presumption that this was its character.

There are several minor questions discussed in the brief of counsel, which we do not think it necessary to consider. Waight and Ames not having appealed, the conclusions we have expressed lead to the same result as that effected by the order of the lower court, which must therefore be affirmed. The costs of this court will be paid by the appellants.

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KEWANEE MFG. CO. et al. v. LEIGH.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,085.

**INJUNCTION—RESTRAINING PROSECUTION OF ACTION AT LAW—GROUNDS.**

The defendant in an action at law by a corporation for money had and received, who is severally liable with another person, not sued, for the debt, is not entitled to enjoin the action, and remove the litigation into a court of equity, on allegations that his co-debtor is the principal stockholder in plaintiff corporation, that it is indebted to him, and he in turn is indebted to defendant, in order that the several accounts may be adjusted, and defendant enabled to establish an equitable set-off, where it is not alleged that such other person is insolvent, since the other stockholders are entitled to have the debt due the corporation collected, and cannot be compelled to await the adjustment of equities between the debtors.

**Appeal from the Circuit Court of the United States for the Northern District of Illinois.**

The bill was by the appellee, a citizen of the State of Illinois, against the appellant, the Kewanee Manufacturing Company, a citizen of the State of New Jersey, and appellant Laughlin, said in the bill to sometimes claim his citizenship in Missouri, and sometimes in Illinois, to restrain appellants from prosecuting a certain action at law, brought by the Kewanee Manufacturing Company against appellee, in the Circuit Court of the United States, for the Northern District of Illinois, to recover the sum of seven thousand dollars, with interest; and resulted in an interlocutory decree ordering an injunction, as prayed for in the bill. From this interlocutory decree the appeal is prosecuted.

The motion for interlocutory decree was heard upon the bill, answer and replication. The bill avers that in the month of November, 1898, the defendant, Laughlin, was president, general manager and chief officer in control of said Kewanee Manufacturing Company, and said Laughlin was interested in what was known as the Noonday Mining Properties in the State of Oregon; that for the purpose of developing said properties, Laughlin, in said month of November, 1898, agreed to advance George J. Atkins and George E. Milligan, for the development of said mining properties in the State of Oregon, the sum of ten thousand five hundred dollars; that Laughlin requested appellee to receive said moneys from him, the said Laughlin, and forward the same to George J. Atkins and George E. Milligan, doing business under the firm name of Atkins and Milligan, who were representing Laughlin in the

development of said mining property in said State of Oregon; that, in pursuance to said request, Laughlin did deliver to appellee, on or about the fourteenth day of December, 1898, the sum of fifteen hundred dollars, and on or about the ninth day of May, 1899, the further sum of about fifteen hundred dollars, and on or about June seventh, 1899, the further sum of fifteen hundred dollars, and on or about July eighteenth, 1899, the further sum of twenty-five hundred dollars; all of which said sums were received by appellee, at the request of Laughlin, and in pursuance of his agreement with said Atkins and Milligan for the development of said mining properties in the State of Oregon, and were by appellee turned over to Atkins and Milligan for the use and benefit of Laughlin, in said mining properties in the State of Oregon.

That the said moneys so delivered to appellee, to be transmitted to the said Atkins and Milligan, for the use and benefit of Laughlin, were in the form of checks drawn by the Kewanee Manufacturing Company; that Laughlin was then and now the president, general manager, and chief executive officer of the said Kewanee Manufacturing Company; and that said Kewanee Manufacturing Company was organized in or about the year 1898, with a capital stock of seventeen thousand one hundred dollars, divided into seventeen thousand one hundred shares, of the par value of one dollar each; which said checks were signed by the treasurer of said Kewanee Manufacturing Company, and countersigned by Laughlin as the general manager thereof.

That on the first day of November, 1898, and thence hitherto, the said Kewanee Manufacturing Company was indebted to, and has remained indebted to Laughlin, in the sum of more than fifteen thousand dollars, and that said Kewanee Manufacturing Company has sustained no loss or damage whatsoever by reason of the execution and delivery of said checks by Laughlin to appellee for the purposes aforesaid, and that Laughlin alone caused the commencement of, and is prosecuting the suits at law hereinafter stated against appellee, in the name of said Kewanee Manufacturing Company for the sole purpose of preventing appellee from setting out and making the defense in an action at law that said moneys were in fact obtained by Laughlin from said Kewanee Manufacturing Company to be used and were used, for his own purposes and that appellee is not in equity and good conscience liable to said Kewanee Manufacturing Company therefor.

That Laughlin, on the first day of November, 1898, and thence hitherto, has owned, in his own right and name, more than twelve-seventeenths of the entire capital stock of the said Kewanee Manufacturing Company.

That the said Laughlin caused said company to be incorporated on or about the tenth day of June, 1898, and ever since its incorporation has absolutely controlled its policy and the conduct of its corporate affairs, selected its board of directors, has been the principal owner of its stock, and in absolute control of the disbursement of its money.

That in the year 1899, Laughlin, acting for the Kewanee Manufacturing Company, sold and conveyed all of the assets, property, business and good will of the said Kewanee Manufacturing Company, prior to June tenth, 1899; that the proposition for said sale was in the name of Laughlin, and that Laughlin caused formal execution of papers ratifying said sale to be made and delivered to the vendee; and that from and after said tenth day of June, 1899, said Kewanee Manufacturing Company has not been engaged in any business for which it was incorporated, so far as appellee shows or can ascertain.

That in the year 1899, Laughlin informed appellee that, in pursuance to said sale of the good will and assets of said Kewanee Manufacturing Company, said Kewanee Manufacturing Company had gone out of business, and that its entire capital stock was to be turned over to the purchaser of the good will and assets of said Kewanee Manufacturing Company; and

That Laughlin claims to own twenty-seventeenths of the capital stock of the said Kewanee Manufacturing Company; and that the books and records of the said Kewanee Manufacturing Company show that seven-seventeenths of its said capital stock other than that held by Laughlin has been marked "surrendered."

The bill further avers, on information and belief, that at the time Laughlin drew the checks, the Kewanee Company was indebted to Laughlin in excess

of such checks; that Laughlin is indebted to appellee in the sum of upwards of ten thousand dollars; that Laughlin is the sole executive officer of the Kewanee Company; that since the organization of the company, Laughlin has conducted his private business, and deposited his private moneys in the bank account of the company, and paid his private debts with the moneys and checks of the company, with the knowledge and consent of the stockholders and directors of the company.

The bill then avers that suits have been brought upon such checks in the Circuit Court of Cook County, for the entire seven thousand dollars; others in the Circuit Court of Cook County for the different sums making up, in the aggregate, the sum of seven thousand dollars; and others in the United States Circuit Court for such sums—more than thirty suits in all, having been brought.

The answer denies that appellee received the checks of the Kewanee Company for the use and benefit of Laughlin, or to be transmitted to Atkins and Milligan for Laughlin's use and benefit; but avers that in the summer or fall of the year 1898, the Noonday Mining Company was a corporation, organized under the laws of the State of Illinois, having its chief office in the city of Chicago, and the appellee was and for several years had been its president and the chief officer in the control of the policy and affairs as well as a large shareholder and bondholder of said company; that Laughlin was interested in said company as a bondholder only, having previously lost faith in the value of some of its mining properties, as well as in the management of its mining operations, which he regarded as inefficient and incompetent, and having renounced his stockholding and practically severed his connection with the company; that George J. Atkins and George E. Milligan were also interested in said company as bondholders and stockholders; that at the request of the appellee, Laughlin accompanied him to the office of the Noonday Mining Company to hear a report which the said Atkins desired to make as the result of a recent visit to said mines; that there were present at such meeting the four persons named, to-wit: Appellee, Laughlin, Atkins and Milligan; that among other things done at said meeting, Atkins reported that he had made a careful investigation of the situation at the mill and mines of said company, and had found a large amount of ore of sufficient value to justify the starting up of the mill and tramway, but that the mill and tramway needed to be overhauled and repaired, and that this could not be accomplished unless about the sum of three thousand dollars was furnished to the company; that as a result of the discussion which followed this report, appellee expressed a strong desire to have the mill and tramway put in condition and to have the mill started at the earliest practicable date, and have the ore to which Atkins referred, reduced and the bullion extracted from it; but declared that his funds were exhausted, and that he was unable to further respond to the company's necessities; that at the request of said appellee, Laughlin agreed to take the responsibility of loaning to the appellee out of the moneys of the Kewanee Manufacturing Company and the American Brake Beam Company, the moneys needed for such purposes, provided the appellee would execute and deliver to the companies respectively, his note for each sum of money so loaned, such notes to bear interest at the rate of six per cent. per annum, and to be payable on demand, and to this appellee then and there agreed; that between appellee and Laughlin it was then and there further agreed that in the event of loss, Laughlin would make good to the appellee one-fourth of the amount of such loans, and that as between them they would, until said Atkins and Milligan were able to repay, divide equally their interest in the proposed venture, or their share of the loss, which was one-half of the whole; that it was agreed between appellee and Laughlin that in any event as between appellee and the company whose money he might borrow for that purpose, the appellee should be liable and responsible for the whole, and as evidence thereof should make and deliver his promissory note for each and every sum borrowed; that in this way, and in this way only, were any of the moneys represented by the checks of the Kewanee Manufacturing Company referred to in appellee's bill of complaint, paid over to appellee for the use or benefit, or on account of Laughlin.

The further facts are stated in the opinion.



William Brace, for appellant.  
David S. Geer, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion:

The bill and answer taken together, show that the moneys received from the Kewanee Company went into a personal joint venture of Laughlin and appellee. Independently of the other facts shown, this would entitle the Kewanee Company to recover in an action at law from Laughlin or appellee, severally, as it might choose. Such was the purpose of the action enjoined by the interlocutory decree.

It is contended, however, by appellee, that such action was rightfully enjoined because (a) All the stock of the Kewanee Company, except that held by Laughlin, has been surrendered, thus making Laughlin the sole owner of the company; wherefore appellee ought to be permitted to set up his equitable set off against Laughlin. (b) That the money taken from the Kewanee Company, was to pay for the Kewanee Company's indebtedness to Laughlin, wherefore it was Laughlin's money, and the appellee does not owe the Kewanee Company. And (c) at the time of the transaction, the Kewanee Company owed Laughlin fifteen thousand dollars; wherefore, Laughlin equitably owing appellee his proportion of the money advanced for the mining venture, appellee ought to be permitted, equitably, to set off such proportion against the Kewanee Company's claim.

The difficulty with the first contention—that Laughlin is now the owner of all stock of the Kewanee Company, wherefore appellee should be permitted to equitably set off his claim against Laughlin—is, that while the bill simply charges that the books and records of the company show that the stock, other than that held by Laughlin, has been marked "surrendered," the answer avers that such surrender was simply a turning in of the stock for the purpose of endorsing, upon the certificates thereof, the distributive dividends which had been made from time to time to the shareholders out of the assets of the company. These averments, taken together, show no transfer of title either legal or equitable, or of the beneficial interest, from the other shareholders to Laughlin.

The second contention—that the money involved in the suit was taken by Laughlin to pay the Kewanee Company's indebtedness to him—reduces itself to this: That the Kewanee Company has, in fact, no title to the money on which the action at law was based. But this is a defense clearly available to appellee in the action at law.

The third defense—that the Kewanee Company is in fact indebted to Laughlin, wherefore appellee should be permitted to set off Laughlin's equitable liability on the moneys advanced against this indebtedness—necessarily rests on this proposition: That a defendant in an action at law, severally liable with another not made a defendant for the moneys had and received from the plaintiff, may show that the other defendant has a complete set-off against the claim, thereby defeating the action, and leaving it to defendants to settle between them-

selves, and according to their own equities, the accounts. But this implies, first, that before the Kewanee Company can enforce its plain demand against one of its several debtors, it must litigate the state of the accounts between it and another debtor—one not insolvent. Also that the creditor must wait until the state of account between the several debtors be adjusted; otherwise the extent of the set off could not be determined. This, of course, cannot be. Whatever may be the equities between appellee and Laughlin, and whatever may be the right of appellee to brush aside the corporate entity behind which Laughlin is an individual owner, the rights of the other stockholders holding five-seventeenths of the stock cannot be thus hindered, delayed and jeopardized. Their right is, that the corporation shall recover what is due to it; and from either of the persons who severally owe the debt; and that such recovery shall be without entanglement, on account of the personal affairs of some other stockholder with the debtor sued. That appellee might, upon a proper showing, acquire through a court of equity, a hold upon the proportion of the judgment going to Laughlin, is not denied; but the case under consideration does not involve that situation, or that character of equitable remedy.

The interlocutory decree was, in our judgment, improvidently entered, and is reversed.

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**In re FIRST NAT. BANK OF CANTON, OHIO.**

(Circuit Court of Appeals, Sixth Circuit. January 21, 1905.)

No. 1,341.

**1. BANKRUPTCY—APPEALS.**

An order disallowing a mortgage lien upon the stock of merchandise and store fixtures of a bankrupt is the subject of an appeal to the Circuit Court of Appeals, under section 24a of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431].

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

**2. SAME—VALIDITY OF MORTGAGES—CONSTRUCTION BY STATE LAW.**

In determining the validity of a chattel mortgage in bankruptcy proceedings, the federal court will follow the settled law of the state in which the transaction occurred.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 944, 968.]

**3. CHATTEL MORTGAGES—STOCK OF MERCHANDISE—POSSESSION OF MORTGAGOR.**

Under the law of Ohio, a mortgage on a stock of merchandise, which expressly or impliedly provides that the mortgagor shall remain in business as before until condition broken, or the mortgagee, in his own interest, chooses to dispossess him, is, if made in good faith, an effectual security from the time that the mortgagee takes actual possession; but before such possession is taken it is void, as a matter of law, as to purchasers and creditors of the mortgagor.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 367-425.]

**4. BANKRUPTCY—LIENS VOID BY STATE LAW.**

Under section 67a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing that claims, which for want of record, or for other reasons, would not have been valid liens as against

creditors of the bankrupt, shall not be liens against his estate, and subdivision "e" of the same section, declaring all conveyances or incumbrances made within four months prior to the filing of a petition in bankruptcy, with the intent to hinder, delay, or defraud creditors, void, except as to purchasers in good faith, and providing that all property so conveyed or incumbered shall pass to the trustee, proceedings in bankruptcy operate as an effectual sequestration of the bankrupt's property for the benefit of his creditors, and a chattel mortgage executed by the bankrupt on a stock of merchandise, void, at the time of the bankruptcy proceedings, as against creditors of the mortgagor, because the mortgagee had not then taken possession and the mortgagor was permitted to conduct the business, was void as against the trustee in bankruptcy of the mortgagor.

Appeal from the District Court of the United States for the Northern District of Ohio.

Weed & Miller and P. J. Collins, for appellant.  
W. S. Hanna, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from an order of the District Court, sitting in bankruptcy, disallowing a mortgage lien claimed by the First National Bank of Canton, Ohio, upon a stock of merchandise and certain store fixtures of the bankrupt, Martin K. Purdy. The mortgage in question was made on December 5, 1903, and registered December 8, 1903. The mortgagor was adjudicated a bankrupt on February 4, 1904. The mortgage purports to have been made to secure a present loan of \$739.93, for which the bankrupt gave four notes, maturing, respectively, in 30, 60, 90, and 120 days from date. The mortgaged property is described as consisting of certain store fixtures, such as counters, show cases, etc., "and all my stock of dry goods, notions, novelties and groceries," located in a storeroom occupied by the bankrupt in the village of Killbuck, Ohio. It is provided in said instrument that the mortgagee shall have the right to enter and take possession in case default is made in payment of either of said notes, or in case the mortgagor shall commit "any waste or nuisance, or attempt to secrete or remove the above-described goods or chattels or any part thereof; or if the said grantee \* \* \* shall before said money becomes due deem it necessary for his or their more complete and perfect security," etc., "and expose the mortgaged property to public sale." The mortgage concludes as follows:

"And until default shall be made in the payment of said indebtedness or breach shall have been made in the performance of any of said covenants on the part of said grantor, the said grantor to remain and continue in the quiet peaceable possession of said goods or chattels and in the full and free enjoyment of the same."

This stock was suffered to remain in the possession of the mortgagor until dispossessed by the receiver and trustee in bankruptcy.

The referee, upon the law and facts of the case, held that the mortgage was invalid and unenforceable against the trustee, because void under the law of Ohio, as against creditors, and also under the bankruptcy law, as having been given, when insolvent, for the purpose of preferring one W. A. McCrea, a creditor—the bank being aware of the bankrupt's insolvency, and of his purpose to prefer said McCrea—and

that the mortgage was therefore not a lien given or accepted in good faith, but in fraud of the bankrupt act.

1. This may be properly regarded as a controversy arising out of the settlement of the bankrupt's estate, and the appeal to this court as one admissible under section 24a of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]).

In *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 300, 24 Sup. Ct. 690, 691, 48 L. Ed. 986, the Berlin Machine Works asserted title to certain chattels, which had been conditionally sold to the bankrupt, by an intervention. Of the issue thus raised, the court said:

"The controversy may be treated as one of those controversies arising in bankruptcy proceedings over which the Circuit Court of Appeals could, under section 24a, exercise appellate jurisdiction, as in other cases. Section 25a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432] relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (*Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116), while section 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by section 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420] to settle the estates of bankrupts, and to determine controversies in relation thereto. *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179; *Burleigh v. Foreman*, 125 Fed. 217, 60 C. C. A. 109."

In *re Soudan Mfg. Co.*, 113 Fed. 804, 806, 51 C. C. A. 476.

In *Cunningham v. German Ins. Co.*, 103 Fed. 932, 43 C. C. A. 377, and 101 Fed. 977, 41 C. C. A. 609, the appeal was not only from an allowance of the lien claimed, but from the allowance of the claim itself. Under those circumstances, we treated the lien claimed as a mere incident of the claim or debt, and therefore properly appealed under section 25a, as from "a judgment allowing or rejecting a debt or claim of five hundred dollars." In *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, the claim and a lien on a fund in the trustee's hands were allowed, and from this an appeal was allowed as from a judgment allowing a claim. The Circuit Court of Appeals of the First Circuit held that that part of the decree of the District Court allowing the lien was not subject to an appeal, and in the Supreme Court it was insisted that the petition of the creditor was one to reach a fund in court, and was not a proceeding in bankruptcy. But the court said:

"Under the circumstances of this case, it seems to us that the petition was incident to the claim (*Cunningham v. German Ins. Bank*, 101 Fed. 977, 41 C. C. A. 609, and 103 Fed. 932, 43 C. C. A. 377), and was a bankruptcy proceeding, under section 2, cl. 7, within the meaning of section 25, regulating appeals in bankruptcy."

2. The mortgage lien asserted was one given by an insolvent merchant upon his entire stock of goods. The provision that the mortgagor, until breach of condition, or until it should seem best to the mortgagee, should "remain and continue in the quiet peaceable possession of said goods and chattels and in the full and free enjoyment of the same," manifestly implies that he was to continue business as before. The fact is that he did remain in possession until dispossessed by the bankrupt's trustee. Whether he in fact continued to make sales is a mere matter of presumption, for the record is silent. In view of the fact that the mortgagor was confessedly insolvent, and was a small mer-

chant, with the usual mixed stock of a country merchant, and that the mortgagee agreed that he might continue in the "full and free enjoyment of the same," we can but presume that the only conceivable mode of "enjoying" the continued possession, by a continuance of business, was "enjoyed" by the bankrupt. The mortgagee is silent. Not one word of explanation is offered upon this or any other point touching the good faith of this transaction, other than the agreed fact that the mortgage was given for money advanced at the time, and not for any pre-existing debt. It is also noticeable that the mortgage contains no clause requiring the mortgagor to account for sales, nor that the lien should extend to goods afterwards purchased and added to the stock. In determining the validity of a chattel mortgage, this court will endeavor to follow the settled law of the state in which the transaction occurs. *Brown v. Grand Rapids Parlor Furniture Co.*, 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817; *Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171; *In re Shirley*, 112 Fed. 301, 304, 50 C. C. A. 252. Under the settled law of Ohio, the question of good faith is not vital, if, under a mortgage of a stock of merchandise, it is expressly or impliedly provided that the mortgagor shall remain in business as before until condition broken, or the mortgagee, in his own interest, chooses to dispossess him. If the instrument has in fact been made in good faith, it becomes an effectual security, notwithstanding such a provision, from the time the mortgagee takes actual possession. But before possession taken, such an instrument is void, as matter of law, as to purchasers and creditors of the mortgagor. *Collins v. Myers*, 16 Ohio, 547, 552; *Freeman v. Rawson*, 5 Ohio St. 1-9, 12; *Francisco v. Ryan*, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711; *Enck v. Gerding*, 67 Ohio St. 245, 247, 65 N. E. 880.

The syllabus (which, under the rule of the Ohio court, is the effectual decision and ruling of the court) of the case of *Francisco v. Ryan*, cited above, is as follows:

"(1) A mortgage on a stock of merchandise, though made in good faith to secure a bona fide debt of the mortgagor, when it allows him to retain possession with a power of sale in the course of his business, is ineffectual to create a lien as against creditors of the mortgagor who assert their rights against the property while it remains under his control; but it is valid as between parties, and when the mortgagee takes possession."

But it is said that such a mortgage is good between the parties and good against creditors who do not obtain some lien upon it before the mortgagee takes possession, actual fraud out of the way, and that no creditor had seized upon this property prior to the adjudication in bankruptcy, and that the trustee's title is no better than that of the mortgagor. For this *Hewit v. Berlin Machine Co.*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, is cited. But in that case the unrecorded conditional sale, with agreement that title should remain in the vendor of the machinery until the purchase price was paid, was good, under the law of New York, as against everybody except subsequent purchasers or pledgees or mortgagees in good faith. Being good against the bankrupt and his creditors under the law of the state where the property was situated, it was held good against the bankrupt and his trustee. But such is not the law of Ohio. In the cases already cited it is de-

cided that the retention of possession by the mortgagor, with a power of disposition by sale, makes the mortgage ineffectual as against creditors who assert a claim before the mortgagee takes actual possession. Section 67a of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) provides that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." By subdivision "e" of same section all conveyances or incumbrances made within four months prior to the filing of a bankrupt petition, "with the intent and purpose to hinder, delay or defraud his creditors," are declared "null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration," and that all property so conveyed, transferred, or incumbered "shall pass to his said trustee." The proceedings in bankruptcy amounted to an effectual sequestration of the mortgaged property before the mortgagee had taken possession. It was a seizure for the benefit of all of his creditors. "The filing of the petition is a caveat to all the world, and, in effect, an attachment and injunction." *Mueller v. Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405. Being a seizure of the property of the bankrupt for the benefit of his creditors, any lien which was ineffectual as against creditors under the law of the state of the transaction is ineffectual against the bankrupt's trustee. *In re Pekin Plow Co.*, 112 Fed. 308, 50 C. C. A. 257; *Chesapeake Shoe Co. v. Seldner*, 122 Fed. 593, 58 C. C. A. 261. In two other cases at this time the same question has come before this court, where the matter has been considered more at length. *In re Shuster Co.*, 134 Fed. 43; *Dolle v. Cassell et al.*, 135 Fed. 52. In the case entitled *In re Shirley*, 112 Fed. 301, 50 C. C. A. 252, we held that, under the decisions of the Ohio court construing section 4150, Rev. St. Ohio, registration operated as a new security from the date of registration, and made the instrument effective as to all creditors who had not before registration fastened some lien upon the property. *Wilson v. Leslie*, 20 Ohio, 161. But with reference to the effect of a mortgage upon a stock of goods, with the right of the mortgagor to remain in possession and continue business, the instrument is fraudulent in law, regardless of registration, and void as to creditors who acquire rights before the mortgagee takes actual possession. Here the mortgagee never took possession, and the seizure under the bankruptcy proceedings therefore occurred before the mortgage was validated. The principle is familiar in the law of Ohio. A mortgage void as against creditors is void as against an assignment in trust for the benefit of creditors. *Hanes v. Tiffany*, 25 Ohio St. 549. The reasoning of the Ohio court is applicable here. In the case cited above, Judge White, speaking for the court, said:

"The mortgagee not having possession of the mortgaged property, the statute declares the mortgage void as against the creditors of the mortgagor. The assignee took the property under the assignment, and held it for the exclusive benefit of creditors. The mode of providing for creditors by way of assignment, in trust for their benefit, is recognized and regulated by statute, and we see no good reason why their rights may not be as effectually asserted through the assignee as they could be by judgment and execution in case there had been no assignment."

In this view of the case, it becomes unnecessary to consider the other ground upon which the judgment appealed from was rested.  
Judgment affirmed.

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MOORE V. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1905.)

No. 1,406.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—STATUTES.

Const. Miss. 1890, § 193, and Code 1892, § 3559, declare that every railroad employé shall have the same rights and remedies for injuries suffered by him from the act or omission of the corporation or its employés as are allowed by law to other persons where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, etc. *Held*, that where a brakeman in an action for injuries alleged that the train on which he was injured was under the direction and control of the conductor and engineer, who were his superior officers, and that while plaintiff was between the rails to turn the angle cock and apply the air brakes to a heavy train on a down grade, as was his duty, the engineer suddenly, and without signal or warning to plaintiff, violently backed the engine against the train, so as to cause a cowcatcher on the rear of the tender to strike plaintiff, by reason of which his arm was caught between the cowcatcher and drawhead and crushed, the declaration stated a cause of action under the statute.

2. SAME—DANGEROUS APPLIANCES—QUESTION FOR JURY.

Where, in an action for injuries to a brakeman by being caught between the rear pilot of the engine and the next car as he was applying the air brakes to a heavy train, plaintiff alleged that the engine with such rear pilot was a dangerous appliance when attached to a freight train, in that when the tender was backed to a car the pilot extended under the car rendering the space between the tender and the car unsafe and dangerous to work in, and that when plaintiff was performing his duty in standing between the rails to turn on the air he was struck by such pilot, thrown down, and injured before the drawheads came together, such allegations, if proved, presented an issue of fact as to defendant's negligence in furnishing defective appliances for submission to the jury.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

Marcellus Green, for plaintiff in error.

Edward Mayes, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This was an action for damages for personal injuries. Besides the necessary allegations as to the character of the parties, the jurisdiction of the court, character and extent of injuries received, and damages claimed therefor, the declaration showed substantially that on the 4th of December, 1902, the defendant had a certain through freight train, numbered 85, consisting of more than 10 cars besides the engine and tender, the engine being numbered 482, and the train under the direction and control of one Smith, conductor, and one Stewart, engineman, both servants of the defendant,

under the direction and control of whom, as his superior officers, the plaintiff was in the discharge of his duties as head brakeman; that the engine numbered 482 was an unsafe and unsuitable appliance in that freight train, in that it was negligently equipped on the rear end of the tender with a pilot or cowcatcher, which extended when the tender was backed up to a car and under the couple of the car, and thereby the place between the tender and the car was rendered an unsafe and dangerous place to work in going between the rails to apply the air cock when necessary, and the pilot so extended under the car left no place for the brakeman to stand, as the said pilot would strike the brakeman between the rails and knock him down before the drawheads would come together; that in an emergency, which is fully described, and alleged to have been occasioned by the negligence of the engineman, it became the duty of the plaintiff to go on the track at a time when the engine was disconnected from the train and at a standstill, eight or ten or more feet from the train, in order to turn the angle cock and apply the air brakes to the heavy train, which was on a down grade, and beginning to move, so as to threaten great injury to the property of the defendant, and hazard to the lives of passengers and employes, and that while thus on the track, in the exercise of due care in the discharge of his duty, and under the direction and control of the engineman, the engineman suddenly, and without warning to the plaintiff, and without any signal from the plaintiff to back his engine, backed violently against the train so as to cause the cowcatcher to strike the plaintiff, knock his feet from under him and under the car, and catch his right arm between the cowcatcher and the drawhead, and crush it off; that in the emergency described at the time and place set out the engineman was the superior officer or agent of the defendant over plaintiff, and having the right to control and direct the services of plaintiff in the duties he was then discharging.

To this declaration the defendant did not demur, but pleaded the general issue and "plea of contributory negligence in short by consent." On behalf of the plaintiff three witnesses testified—the plaintiff himself, and one W. L. Bass and one G. C. Sutton, who were both present at the time and place that the injury was received. Having introduced this testimony the plaintiff rested, and thereupon the defendant moved the court to exclude the evidence offered by the plaintiff, and to direct the jury to return a verdict for the defendant on the ground that the case as made out by the plaintiff shows that, if he was injured at all by anybody's negligence, according to his own theory he was injured by the negligence of the engineer working on the same train on which he was working, and in the very job that he was engaged upon, and it is one of the very few cases that fall under the old common-law doctrine of the fellow servant rule, as fixed by section 193 of the Mississippi Constitution of 1890, and section 3559 of the Code of 1892; which motion the court sustained, and instructed the jury to find for the defendant, and, the verdict being returned in accordance with the instructions and judgment rendered thereon, the plaintiff assigns this action of the court as error. The rule which obtains in the United States courts in reference to directing a verdict in civil cases has, of late years, been so often in-



voked and applied, especially in cases like the present, that its terms have become matter of such familiar knowledge, and the reported cases in which it has been applied are so numerous, that it is not necessary to discuss them, or even to cite them. Under the terms of the section of the Constitution of Mississippi referred to in the defendant's motion and above cited, it is the opinion of the majority of the court that the declaration in this case states a cause of action, independent of any consideration that is due to the allegations of the defective and dangerous appliance indicated in connection with the engine. It is, however, the opinion of the majority of the court that the allegations on that subject present an issue of fact for submission to the jury, if the evidence offered tends to support it. As we have concluded that the case must be reversed and remanded for a new trial it is not proper that we should discuss the testimony offered, any further than to announce that, if the jury believe the witnesses, the evidence the plaintiff introduced was sufficient, standing alone and in the absence of contradictory proof, to support a verdict. It is therefore clear, in the judgment of the majority of the court, that the trial court erred in withdrawing the case from the jury; that it should have been submitted to the jury under proper instructions; and that it is carrying the rule much too far to insist that at every stage in the trial of such a case the trial judge must or may consider himself as acting upon a motion for a new trial, and whenever it is his impression that he would grant a new trial if the jury should, on the testimony then before them and under such appropriate instructions as he might give them, return a verdict against one of the parties which he on a motion for a new trial would set aside, he should at once direct a verdict without further hearing and consideration of the case.

The judgment of the Circuit Court is reversed, and the case remanded to that court, with instructions to award the plaintiff a new trial.

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BUTLER et al. v. CARTER & RUSSELL PUB. CO.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1905.)

No. 1,428.

**1. LIBEL—SUFFICIENCY OF DECLARATION—IDENTIFICATION OF PLAINTIFF WITH PERSON LIBELED.**

A declaration in an action for libel by the publication of an article set out, and which related to a woman described therein as widely known as "Annie Oakley," and as having been a famous rifle shot who had given public exhibitions, etc., which, in addition to an allegation that the libel was published of and concerning plaintiff, further alleges that plaintiff had acquired great skill in shooting with a rifle, and had given public exhibitions, and was widely known by the name of "Annie Oakley," sufficiently shows on its face that the article related to plaintiff.

**2. SAME.**

It is not necessary that a declaration in libel should identify the plaintiff with every description in the libel, since such rule would enable one to publish libels with impunity by inserting misdescriptions in some respects not essential to a general understanding of the person meant.

In Error to the Circuit Court of the United States for the Southern District of Florida.

The declaration, after showing that the plaintiff, Mrs. Frank E. Butler, is a citizen and resident of the state of New Jersey, and that the defendant, the Carter & Russell Publishing Company, is a Florida corporation, is as follows:

"(1) That, before and at the time of the committing of the grievances hereinafter alleged, the plaintiff, Mrs. Frank E. Butler, was a professional rifle shot, and had acquired great skill in the art of shooting a rifle, at both stationary and moving objects, and was widely known under the name of 'Annie Oakley,' and under that name had acquired the reputation among many people of being the best and most accurate woman rifle shot in the world, and under the said name had given many exhibitions of her skill in the use of the rifle, for which she charged compensation, and from which exhibitions she derived a large income, and at the time of committing the grievances hereinafter mentioned her occupation consisted in giving exhibitions of her skill as such, and from which she derived a large income.

"(2) That on the 18th day of August, A. D. 1908, the defendant was the proprietor, printer, and publisher of a certain newspaper published in the city of Jacksonville, Duval county, Florida, called 'The Metropolis,' and that on the said day the following libel was falsely and maliciously published therein of and concerning the plaintiff, Mrs. Frank E. Butler, that is to say:

"'Dope Caused Her Downfall. Annie Oakley [meaning the plaintiff, Mrs. Frank E. Butler] is now in jail. Famous daughter-in-law of Buffalo Bill. Her Appetite for Drugs Drove Her to Steal the Trousers of a Negro [meaning thereby that the plaintiff, Mrs. Frank E. Butler, had been guilty of the crime of larceny].'

"'The Greatest Female Rifle Shot in the World [meaning the plaintiff, Mrs. Frank E. Butler] Comes to Grief in Chicago, the City where She [meaning the plaintiff, Mrs. Frank E. Butler] Excited the Admiration of Thousands a Few Years Ago.

"'Chicago, Aug. 13.—A woman who declares she is a daughter-in-law of "Buffalo Bill," and the most famous rifle shot in the world, lies in a cell of the Harrison Street Station under a Bridewell sentence for stealing the trousers of a negro, in order to get money with which to buy cocaine. She cried while saying that for her spectacular marksmanship, King Edward himself once led the applause in the courtyard of Buckingham Palace.

"'When arrested on the complaint of Charles Curtis, a negro, she was living at 140 Sherman Street. She gave the name of Elizabeth Cody, but it occurred to no one to connect her with Col. Cody's famous daughter-in-law. However, when brought before Justice Caverly, she declared that she was the famous show woman.

"'“I plead guilty, your honor, but I hope you will have pity on me,” she begged. “An uncontrollable appetite for drugs has brought me here. I began the use of it years ago to steady me under the strain of the show life I was leading, and now it has lost me everything. Please give a chance to pull myself together.”

"'The striking appearance of the woman, whom the crowd at the World's Fair admired, is now entirely gone. Hers is one of the extreme cases which have come up in the Harrison Street Police Court. She is to be taken to the Bridewell to serve out a sentence of \$45.00 and costs.

"'“A good, long stay in the Bridewell will do you good,” said the Court.

"'Annie Oakley's husband, Sam Cody, died in England. Their son Vivien is now with Col. Cody at the latter's ranch, on the North Platte. Annie left "Buffalo Bill" two years ago, and has since been drifting around the country with stray shows.'

"And the plaintiff says she is damaged thereby to the amount of ten thousand (\$10,000) dollars, for which she asks judgment."

The defendant appeared and demurred to the declaration, alleging that "it is bad in substance." The Circuit Court sustained the demurrer, and entered judgment for the defendant. The plaintiff brought the case here, and assigns as error the judgment of the Circuit Court sustaining the demurrer to the declaration.

J. N. Stripling (A. H. Larkin, on the brief), for plaintiff in error.  
Alex. St. Clair-Abrams, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The Circuit Court having sustained the demurrer to the declaration, the sole question presented for our consideration is as to the correctness of that ruling. No question is raised as to the proper allegation of the act of publication, nor as to the statement of the matter alleged to be defamatory. And no question is raised as to the actionable quality of the language published, for it is clearly such as would subject the party charged to an indictment for a crime involving moral turpitude, or subject her to infamous punishment.

The chief objection made to the declaration is that it does not "show on its face that the defamatory words were published of and concerning the plaintiff, Mrs. Frank E. Butler." The libel complained of does not contain the name of the plaintiff, and it is therefore clear that, to show a right of action on account of the defamatory words, she must make such allegations as will show that she was meant—that the publication relates to her. By statute, in many jurisdictions, it is made sufficient to allege generally that the defamatory words were spoken or published of the plaintiff. Townshend on Slander & Libel, § 310; 13 Ency. Pldg. & Prac. 40. But in Florida there is no statute to this effect, and the declaration must be examined as at common law; and we assume that, in the absence of a statute, the averment found in the declaration that the libel was published "of and concerning the plaintiff" would not be sufficient. Townshend on Slander & Libel, § 316. Where the language published does not naturally and per se refer to the plaintiff, and requires extrinsic matter to show its relation to the plaintiff, the declaration must allege by way of inducement such extrinsic matter. Townshend on Slander & Libel, § 308. Has the plaintiff conformed to this rule?

She does not rest alone on the averment that the libel was "published of and concerning the plaintiff," but she seeks to remove all ambiguity as to its application by the following averment:

"That, before and at the committing of the grievances hereinafter alleged, the plaintiff was a professional rifle shot, and had acquired great skill in the art of shooting a rifle at both stationary and moving objects, and was widely known under the name of 'Annie Oakley,' and under that name had acquired the reputation among many people of being the best and most accurate woman rifle shot in the world, and under the said name had given exhibitions of her skill in the use of the rifle, for which she charged compensation, and from which exhibitions she derived a large income."

This averment is to be read in connection with the alleged libel copied in the declaration. Looking at that, we find that it relates to one widely known as "Annie Oakley," one who is a professional shot, one who had acquired great skill in shooting, and one who had given public exhibitions as an expert shot. The declaration shows, therefore, that the publication not only refers to the plaintiff by a name by which she was known, but that it refers to her vocation and skill, both of a

kind unusual with women. In substance, therefore, on this point, the declaration says that the plaintiff is known to the public as "Annie Oakley," and that she, the plaintiff, is the person who is defamed by that name; and, to make her identity clearer, she points out several events in her life that appear to be referred to in the publication, which would probably identify her as the party defamed, even if no name had been used. We are of the opinion that the declaration sufficiently alleges that the libel charged was published of the plaintiff.

But it is claimed that, as the publication asserted that the woman referred to was the daughter-in-law of Buffalo Bill, it is essential that the plaintiff allege that she occupied that relation. This contention is made, also, as to other matters of description in the libel. It is not necessary for a plaintiff to make averments to satisfy every description in a libel. To establish such a rule would enable one to libel with impunity, by adding to a description which everybody would understand one that did not appertain to the person slandered. *Mix v. Woodward*, 12 Conn. 262, 282.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer.

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**SUPREME COUNCIL A. L. H. v. McALARNEY.**

(Circuit Court of Appeals, Third Circuit. February 13, 1905.)

No. 45.

**MUTUAL BENEFIT INSURANCE—RESCISSION OF CONTRACT—LACHES.**

Where an assessment insurance association passed a by-law which amounted to a renunciation of its contracts and entitled a member to rescind his contract and recover the premiums paid thereon, but no action was brought therefor until three years and seven months after the passage of the by-law, an affidavit of defense which sets up that no claim for rescission had previously been made, and that during the delay a large number of members who might have been assessed for the payment of plaintiff's claim died or ceased to be members, and that new members were taken in without any notice of the claim, is sufficient on its face to show such laches as would prevent a summary judgment against the association.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 131 Fed. 538.

Frank P. Prichard, for plaintiff in error.

J. H. Brinton, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The judgment brought before us by this writ of error for review was rendered against the defendant (the plaintiff in error) for want of a sufficient affidavit of defense.

Of course, for present purposes, we must accept as true all the distinct averments and specific statements of fact contained in that affidavit. The plaintiff (McAlarney) was the holder of an insurance certificate for \$5,000, issued to him by the defendant association, similar

to the certificates which were involved in the cases of Supreme Council, etc., v. Black, 123 Fed. 650, 59 C. C. A. 414, and Supreme Council, etc., v. Daix, 130 Fed. 101, heretofore decided by this court, and Supreme Council, etc., v. Lippincott (which we have just decided) 134 Fed. 824. The plaintiff's cause of action is the alleged anticipatory breach of his insurance contract growing out of the defendant's action in adopting in August, 1900, and putting into effect on October 1, 1900, a by-law reducing its insurance certificates from \$5,000 to \$2,000. This suit was not brought until May 10, 1904. The suit is for the recovery back of the assessments the plaintiff paid upon his certificate, and proceeds as upon a rescission of the contract.

Under the averments of the affidavit of defense it must be taken (for the present) that the plaintiff did not protest against the by-law, and never notified the defendant that he rescinded the contract, and that he did no act indicating an intention to rescind the contract, until he brought this suit on May 10, 1904, three years and seven months after the right to elect to rescind the contract had accrued to him. The affidavit of defense further sets out that the revenues of the defendant association are derived from assessments levied against its members whenever its obligations require; that its officers did not know of the plaintiff's claim, and therefore did not provide for the same in calling assessments during the period between the time the right of rescission accrued to the plaintiff, in October, 1900, and the bringing of this suit, in May, 1904; that during that time about 3,000 members have either died or dropped out of the association, against whom assessments would have been laid proportionately, and collected, with which to pay the plaintiff's claim; that during said time 125 persons joined the association in ignorance of the plaintiff's claim; that the defendant association has been conducting its affairs on the belief that no such claim existed as the plaintiff now makes; and that the defendant has suffered damage in the respects mentioned through the delay of the plaintiff in rescinding his contract. Without further recitation of the statements of the affidavit of defense, we content ourselves with saying that we think the affidavit is fuller and more specific in regard to the changed circumstances of the defendant association and the injury to the association from the plaintiff's delay in signifying his election to rescind than was the affidavit of defense in Daix's Case, 130 Fed. 101.

The action of the defendant in passing and putting into effect the offending by-law did not bind the plaintiff or affect his contract of insurance. But he thereby acquired the right of electing either to treat the attempted reduction of his certificate as a breach of the contract and ground for the rescission thereof, or else to abide by his contract. He was, however, bound to exercise his right of rescission, if at all, within a reasonable time. What is a reasonable time depends upon the circumstances of the particular case. Where the facts are in dispute, ordinarily the question is for the jury. Where the facts are not in dispute, the question is one of law for the court. *Morgan v. McKee*, 77 Pa. 228, 231.

It will be perceived that the only question we are called on to determine at this time is whether the affidavit of defense was sufficient to

prevent a summary judgment against the defendant. We think it was, as respects its averments of the great delay of the plaintiff in signifying his election to rescind the contract, and the injurious consequences to the defendant association resulting from that delay. It seems to us that the affidavit of defense fairly and sufficiently raised the defense that the delay of the plaintiff in signifying his election to rescind was both unreasonable and hurtful to the defendant, and, therefore, that the plaintiff had lost his right to treat the contract as rescinded and recover back the assessments he had paid. This is as far as it is necessary for us to go. To go further would be improper, for, comparing the plaintiff's statement of claim and the affidavit of defense, we discover that there is a dispute between the parties as to the facts of the case.

We ought to add that there are matters set forth in the affidavit of defense to which we have not deemed it necessary to refer, and that our silence is not to be regarded as importing any opinion upon the questions arising out of these matters.

The judgment against the defendant for want of a sufficient affidavit of defense is reversed, and the cause is remanded to the Circuit Court for further proceedings.

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KELLY v. MALOTT.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,105.

**1. CARRIERS—CONTRACT FOR CARRIAGE OF EXPRESS MESSENGERS—EXEMPTION FROM LIABILITY.**

A railroad company may lawfully exempt itself by contract with an express company using its cars from liability for negligence of its employees causing the injury of express messengers occupying such cars, and, where a messenger has assented to such exemption in his contract of employment with the express company, there can be no recovery from the railroad company for his injury or death.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1252-1263.]

**2. NEGLIGENCE—PLEADING—GROSS NEGLIGENCE.**

A characterization of defendant's negligence as gross, in a declaration, does not change the legal effect of the allegation from what it would have been, had the term "negligence" alone been used.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 15.]

In Error to the Circuit Court of the United States for the Southern District of Illinois.

The declaration, in two counts, alleged that Kelly, a messenger of the Adams Express Company, while in the discharge of his duties in an express car in one of defendant's trains, was killed in a collision that occurred through the "gross negligence" of the defendant. The first count charged that defendant's "gross negligence" grew out of the train crews' handling of the trains that collided; the second, out of the acts and omissions of the train dispatchers.

A plea was filed in which two contracts were set forth—one between Kelly and the express company, and the other between the express company and

defendant. The preamble of the first recites that railroad companies require of the express company, as a condition of permitting a messenger to travel upon their cars or other conveyances in the performance of his duties as messenger, that the railroad companies shall be indemnified against and released from all liability for and in respect of any damage or injury which may be sustained by the messenger in the course of his employment, whether the same be occasioned by the "negligence" of the railroad companies or otherwise. In the body of the contract Kelly fully consents to and ratifies each and every bond or other instrument or contract of indemnity against such liability, and each and every release from such liability, or other similar contract executed and to be executed by the express company to any railroad company or other carrier, and agrees to assume all risk of death or accident or damage to him or his property, and releases and discharges the Adams Express Company and any railroad company in whose cars he may travel in the performance of his duties from any and all claims, liabilities, and demands of every kind, nature, and description for or on account of his death, or any injury or damage to his person or property of any kind or nature, whether caused by the "negligence" of the Adams Express Company, or of any railroad company, or otherwise. By the second contract the defendant permitted the Adams Express Company to carry on its express business on the lines of railroad operated by the defendant, and provided for the carriage on such lines of the employees of the express company, and of the merchandise and property handled by it over such lines; and the Adams Express Company, in turn, assumed all risk of loss or damage that might arise or result from its operations under the contract, and agreed to save the defendant harmless against the same, and to protect him against claims that might be made upon him for loss or damage, either to the employees of the express company, or to the property in its charge, whether such loss or damage should occur through the "gross negligence" of the defendant or his employees, or otherwise. The plea further averred that at the time Kelly was injured he was being carried on the railroad of the defendant under the terms of the contracts between him and the express company and between the express company and the defendant, and not otherwise.

A general demurrer to this plea was overruled, and the judgment followed which is now under review.

William B. Wright, for plaintiff in error.

John G. Williams, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). The declaration counts on "gross negligence." Though the plea shows that the contract between the express company and the defendant contained an exemption from the consequences of "gross negligence," the plea can be taken only as relying on a forgiveness of "negligence," because Kelly did not authorize the express company to make a broader contract on his behalf.

If the declaration be construed to charge the defendant only with "negligence," the plea presents an absolute bar. *Baltimore, etc., R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742; *Blank v. Ill. Cent. R. Co.*, 182 Ill. 332, 55 N. E. 332; *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; *Pittsburgh, etc., R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503; *Russell v. Pittsburgh, etc., R. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214; *Payne v. Terre Haute*,

etc., R. Co., 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; *Peterson v. Chicago, etc., Ry. Co.* (Wis.) 96 N. W. 532.

So the question comes to this: Does the injection of the word "gross" into the declaration make out a case despite the plea?

Some books and cases speak of negligence as slight, ordinary, and gross. If one owes great care, his failure to come up to the mark is called "slight negligence"; if ordinary care, "ordinary negligence"; if slight care, "gross negligence." But why stop there? Why not subdivide each of the three into three further classes? For example: If one owes great care, he may have missed the mark in one instance a foot (slight), in another a yard (just an ordinary miss), and in yet another a mile (gross). And similarly if one owes ordinary care or slight care. It seems to us that the whole attempt to classify negligence has resulted from a misapprehension. "Negligence" is merely a word of denial. "Care" is the positive word. It is familiar and sound doctrine that there are degrees of care. But "care" cannot properly be divided into abstract and absolute classes. The quantum of care required in a particular case is determined from the relations of the parties and the facts of the situation, and is proportionate to the danger reasonably to be apprehended. Whatever the required degree of care, the failure to measure up to it is the ground of complaint. But failure is failure. The cause of action flows from the failure to exercise the full degree of care that was due. The injuries are what they are. The innocent sufferer is entitled to full compensation on account of the defendant's failure to bestow the fullness of care demanded by the situation. He is to receive no more, no less, than full compensation, because, though the defendant's lack may be a variable, any lack supplies a cause of action, and his injuries, which measure the value of the cause of action, are a constant.

The division of negligence into slight, ordinary, and gross may have originated in an endeavor, unconscious, perhaps, to justify exemplary damages where only compensative should be allowed. One who unintentionally fails in his duty, and thereby causes an injury, should make complete compensation. But to warrant punishment, there must be an actual or constructive intent to inflict the injury. Negligence and willfulness are as unmixable as oil and water. "Willful negligence" is as self-contradictory as "guilty innocence."

The substantive remains the same substantive, whatever the adjective. In *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, the Supreme Court said:

"In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities. \* \* \* In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it."

See, also, *Milwaukee, etc., Ry. Co. v. Arms*, 91 U. S. 489, 492, 23 L. Ed. 374; *Purple v. Union Pacific R. Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700.

The judgment is affirmed.



## In re PHILIP SEMMER GLASS CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1905.)

**1. BANKRUPTCY—COMMERCIAL PAPER—INDORSEMENT—BANKRUPT'S LIABILITY—PROVABLE DEBTS.**

The liability of a bankrupt indorser of commercial paper which did not become absolute until after the filing of the petition is a debt provable in bankruptcy.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 470, 476.]

**2. SAME—MUTUAL CREDITS—SET-OFF.**

Bankr. Act July 1, 1898, c. 541, § 1, subd. 11, 30 Stat. 544 [U. S. Comp. St. 1901, p. 8419], provides that the word "debt" shall include any debt, demand, or claim provable in bankruptcy; and section 68 (30 Stat. 565 [U. S. Comp. St. 1901, p. 8450]) declares that in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid. *Held* that, where a national bank was indebted to a bankrupt on a deposit, and he was indebted to the bank as indorser on a note, which liability did not become absolute until after the filing of the bankrupt's petition, the bankrupt's liability as indorser being a provable debt the bank was entitled to set off the deposit against such liability and prove the remainder against the bankrupt's estate.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from an order of the District Court, Southern District of New York, confirming a report of a referee in bankruptcy which allowed the claim of the First National Bank of Jersey City for \$8,519.27 against the bankrupt's estate.

Martin Conboy, for appellant.

Hamilton Wallis, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

**PER CURIAM.** It seems unnecessary to add anything to the discussion of the case, which will be found in the report of the referee, 11 Am. Bank Rep. 665. It was held in *N. Y. County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, that, in the absence of fraud or collusion, a bank which holds promissory notes of a bankrupt need not surrender a deposit balance standing to the credit of the bankrupt on the day of the adjudication in bankruptcy, but may set it off against said notes, and prove for the amount remaining due after such set-off. The appellant seeks to differentiate the case at bar on the ground that the notes held by the First National Bank were not due at the date of adjudication (they have since matured), and that the bankrupt was not the maker, but the indorser, wherefore the notes did not constitute a "debt" of the bankrupt. His argument is interesting and ingenious, but entirely disregards section 1, subd. 11, Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 8419], which provides that the word "debt," when used in said act, "shall include any debt, demand, or claim provable in bankruptcy."

That meaning must be given to the word when used in the set-off section (section 68, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]):

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid."

To determine, therefore, whether the holder of a claim is entitled to the benefit of section 68, it is necessary only to inquire whether his claim is one provable in bankruptcy.

We concur with the Court of Appeals for the Third Circuit (Moch v. Market St. Nat. Bank, 107 Fed. 897, 47 C. C. A. 49) in the conclusion that the liability of a bankrupt indorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy.

The order appealed from is affirmed, with costs.

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UNITED STATES v. AMERICAN SURETY CO. OF NEW YORK.

(Circuit Court of Appeals, First Circuit. February 3, 1905.)

No. 554.

1. UNITED STATES—BOND OF CONTRACTOR FOR PUBLIC WORK—DISTRIBUTION OF PROCEEDS.

In the distribution of the proceeds recovered on the bond of a contractor for government work, conditioned as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], the United States is not entitled to priority over laborers or materialmen who are also secured by the bond.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. United States, § 59.]

2. SAME—LIABILITY OF SURETIES.

The liability of the sureties on the bond of a contractor for government work, conditioned as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], is limited to the penalty therein named, although the bond contains two distinct obligations—one to the United States, and the other to persons furnishing labor or materials in the prosecution of the work.

In Error to the Circuit Court of the United States for the District of Maine.

For opinion below, see 126 Fed. 811.

Isaac W. Dyer, U. S. Atty.

Thomas L. Talbot, for defendant in error.

Before COLT, Circuit Judge, and ALDRICH and LOWELL, District Judges.

LOWELL, District Judge. There is no need to state the details of the litigation involved in the case at bar. The question now presented is this: In distributing the proceeds of a bond given in accordance with the act of Congress of August 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], has the United States priority as against persons supplying labor and materials in the prosecution of the work?

In *United States v. Heaton*, 128 Fed. 414, 63 C. C. A. 156, the Circuit Court of Appeals for the Third Circuit denied priority, in an extended opinion, and in an earlier stage of the case at bar this court seems to have acted upon the same conclusion. 123 Fed. 287, 59 C. C. A. 256. Under these conditions, we follow the decided cases.

The United States further contended that, even if it was entitled to no priority as such, yet it was entitled to payment of its claim in full, on the ground that the bond contained two distinct obligations—one to satisfy the claim of the United States, and the other to satisfy the claim of laborers and materialmen; the full amount of the penalty being recoverable under each head. Thus to double the sum expressed in the bond as a maximum guarantor's liability is without warrant in the terms of the written contract, and has no support from the authority of decided cases.

The judgment of the Circuit Court is affirmed, and neither party recovers costs in this court.

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WESTERN ELECTRIC CO. v. NORTH ELECTRIC CO. et al

(Circuit Court of Appeals, Sixth Circuit. January 12, 1905.)

No. 1,315.

1. PATENTS—SUIT FOR INFRINGEMENT—PLEADING.

In a suit in equity for infringement of a patent the defenses of lack of invention and noninfringement cannot be made by plea, but only by answer.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 521.]

2. SAME—DEFENSES PROPERLY MADE BY PLEA.

A defense to a suit for infringement on the ground that the patent bears date more than six months later than the notice given to the applicant of the allowance of the application may properly be taken by plea.

3. SAME—VALIDITY—ISSUANCE MORE THAN SIX MONTHS AFTER NOTICE OF ALLOWANCE.

The provision of Rev. St. § 4885 [U. S. Comp. St. 1901, p. 3382], that "every patent shall bear date as of a day not later than six months from the time at which it was passed and allowed and notice thereof was sent to the applicant or his agent," is directory merely, since the same section allows the applicant six months after notice in which to pay the final fee; and where, by reason of the accumulation of work in the office, the patent cannot be prepared and signed after such payment within the six months, and it is therefore reallowed and issued on a later date, it will not be held void for that reason, at least at the instance of a private party in a collateral proceeding.

4. SAME—VALIDITY AND INFRINGEMENT—SPRING JACKS FOR TELEPHONE SWITCH BOARDS.

The Scribner patent, No. 357,538, for improvements in spring-jack telephone switches, while for a combination of old devices, is for a new combination of great utility, and discloses invention. Also held infringed as to claims 3 and 5.

5. SAME.

The Scribner and Warner patent, No. 483,033, for a telephone switch, based in part on the device of the prior Scribner patent, No. 357,538, was

not anticipated by such patent, and discloses invention. Also held infringed as to claims 1 and 3.

6. SAME.

The Scribner patent, No. 552,729, for improvements in telephone switches, was not anticipated, and discloses invention. Also held infringed as to claims 2 and 4.

7. SAME—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

While the mere assembling in a new organization of parts of old structures to perform the same functions in their new place that they did in the old is not invention, yet where they are so taken, and are organized in a new and useful manner, so as to produce a more beneficial result, there may be invention; and where the combination displays the exercise of intuitive skill and genius beyond that possessed and exercised by those well skilled in the practice of the art, and the discovery is of something new and useful, invention should be recognized.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 27-30.]

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

De Witt C. Tanner (George P. Barton, of counsel), for appellant. Albert Lynn Lawrence, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The Western Electric Company complains in its bill of the infringement by the appellees of the rights secured by three several letters patent which it claims to own, namely, one numbered 357,538, granted to Charles E. Scribner, February 8, 1887, one numbered 488,033, granted to Scribner and Warner, December 13, 1892, and one numbered 552,729, granted to Scribner, January 7, 1896, all of which relate to improvements in spring-jack switches for telephone switch boards; and prays for an injunction and an accounting.

The appellees, who were the defendants in the court below, appeared, and interposed a plea, which, in substance, denied the allegation in the bill that the public had generally recognized the validity of the patent No. 357,538, and averred that the public refrained from contesting its validity because the Bell Telephone Company and the complainant in this suit claimed a complete monopoly of all telephonic inventions, and the public believed they had such a monopoly, and not because of the supposed validity of this particular patent. And, further, the plea denied that the invention of the patent had gone into extensive use, alleged that it had been anticipated, and denied infringement.

As to the patents Nos. 488,033 and 552,729, the plea alleged that they severally bear a date more than six months later than the time when notice was given by the Patent Office of the allowance of the applications, respectively. The complainant set this plea down for argument, and upon the hearing the court held the plea insufficient, and granted the defendants leave to answer, but without prejudice to the defendants' right to raise by answer the defenses made by the plea. We will observe, in passing, that, so far as this

plea relates to the patent No. 357,538, it is quite manifest that, except as to the defenses of lack of invention and noninfringement, it presented no defense to the bill, and with respect to those defenses it is also quite clear that they cannot be taken by plea, but only by answer. Walker on Patents, §§ 599, 600. Besides, a plea, to be maintainable, must present some single definite point on the maintenance of which the bill will be disposed of. Story's Eq. Plead. § 654. The plea as regards this patent is multifarious, in that it states several defenses to the bill. In fact, it covers the principal grounds of an answer.

The plea, in so far as it relates to patents Nos. 488,033 and 552,729, would seem to be good in form. It alleges the fact that the date of each of the patents is more than six months later than the notice given to the applicant of the allowance of the application, and states the date on which such notice was given. Section 4885 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382], provides that "every patent shall bear date as of a day not later than six months from the time at which it was passed and allowed and notice thereof was sent to the applicant or his agent; and if the final fee is not paid within that period the patent shall be withheld." The question thus raised is an important one, for the chief of the Issue and Gazette Division of the Patent Office, whose testimony is in the record, states that great numbers of patents have been issued, the dates of which are more than six months later than the time when notice of allowance was sent to the applicant. He states that it is the practice of the Patent Office, and has been for more than 20 years, to transmit to the patentee the notice of allowance as soon as may be after all the proceedings except the payment of the final fee have been taken, and the notice of allowance contains a requirement that the final fee be paid. On receiving the final fee within the six months, the patent issues. But on account of the accumulation of business in the office a considerable period of time must elapse, after the final fee is paid, before the patent can be prepared and signed. And when the final fee is paid so near the expiration of the six months that the office cannot have the patent ready for issue within that time, the office issues a notice to the applicant, which contains a receipt for the fee, and a formal notice that the application has been examined and again allowed. And it appears that this latter was the course of proceeding in the case of both the patents Nos. 488,033 and 552,729. In each case the final fee was paid, and notice of the reallowance mailed to the applicant within the six months after the original allowance; but the patents were dated and issued more than six months after the date of the original allowance, but shortly after the reallowance. It is contended for the appellees that these patents are therefore void. It is urged that the date of the patents is imperatively required by the statute, and that the Patent Office has no authority to adopt a practice which shall dispense with that requirement. There is some plausibility in the argument supporting this contention, but we think the weight of opposing reasons compels a different con-

clusion, and that the requirement should be regarded as directory, rather than absolutely essential. The full six months are allowed by the statute to the applicant, and it can hardly be supposed that Congress intended that this period could be cut short by the exigencies of the Patent Office. He has no power to coerce its proceedings. Delays in a public office are not generally allowed to prejudice the right of one who has performed all that the law requires of him to secure official action. The object which Congress had in view was to compel the applicant to follow up his application by the reasonable performance of the conditions precedent to the issue of the patent. If he entitles himself to have the patent issue within six months, that object is subserved. Said Mr. Justice Field, in delivering the opinion of the court in *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702:

"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated."

And in 2 Sutherland, Stat. Construction, § 612 (2d Ed.), it said:

"In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed or the phraseology of the statute is such that the designation of time must be considered as a limitation of the power of the officer."

Again, the statute declares that, if the final fee is not paid within the six months, the patent shall be withheld, but it does not declare that, if not dated as directed, the patent shall not issue, or, if issued, shall be void. Besides all this, the officers charged with the administration of the law have for many years construed the law as giving power to the office to exercise control over applications until the patent should finally issue, and that it was justified in resorting to a matter of form in order that the right of the citizen should not be sacrificed. So far as we know, this is the first time the practical construction of the statute now called in question has been challenged, and much disturbance of things supposed to rest on solid foundations would ensue if such an objection should be sustained.

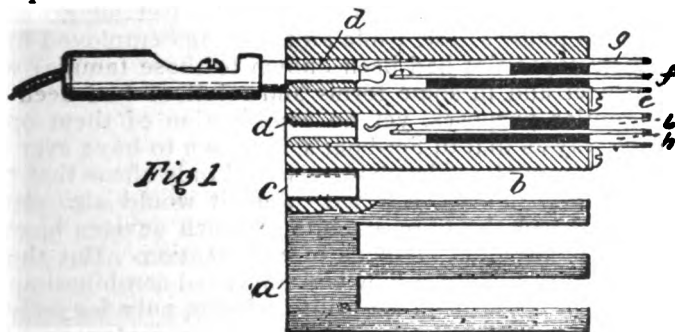
Whether the practice, if promptly challenged by the government in a direct proceeding to recall a patent would be sanctioned, we have not now to consider. We think the patents ought not to be held void for irregularity, if it be such, at the instance of a private party in a collateral proceeding.

Pursuant to the leave granted, the defendants answered the bill. They denied that the inventions covered by the several patents were new, alleged numerous anticipations, denied in general the validity.

of the patents, renewed their objection to the patents on account of their dates, and also denied infringement. The case went to hearing on pleadings and proofs. The bill was dismissed, but upon what grounds the record does not disclose.

The patent to Scribner, No. 357,538, was granted for an improvement in spring-jack switches such as were described in a former patent to the same patentee. He states that the object of his improvement is to "so construct the switches that they may be light, strong, and efficient, and easily accessible for adjustment or repairs, while occupying the smallest possible space upon the switch board." In telephone switch boards such switches are employed for the purpose of opening and closing the circuits between the patrons, and the switches are necessarily numerous. In order that as many as possible may be brought within the reach of an operator, it is important that they be compactly arranged in the switch board. The switch jacks shown in this and the others of complainant's patents occupy a space at the outer end of about one-half inch square and in length about two inches. They are arranged side by side on plates each of which contains say 20 switches, and these plates of switches are multiplied laterally, and are laid up one on top of the other to the height desired. The front edge of these plates is in the face of the switch board, and an opening in the front of the plate or frame extends back into the switch, through which opening the plug at the end of the connecting piece held by the operator is passed in to make contact with the springs of the jack, the springs being conductors in the circuit. Normally, the springs effect a closure of the circuit in the jack. But when the plug is inserted, and the springs are moved away from their normal contact, the circuit in the jack is opened and extended through the plug to the line connected therewith.

Fig. 1 of the patent No. 357,538, here shown, illustrates the invention patented:



The plate, a, contains several slots for receiving the switches. Two switches are inserted in their places. The lower one of the two is in its normal condition. The upper one shows the plug inserted in the jack and lifting the spring, g, off the contact piece on the spring below. The spring, f, has a ground connection, and is insulated

from the test-strap, e, and the latter is in connection with the test-tube, d, which makes contact with the tip of the plug, as the operator begins the insertion. The frame is of rubber or some non-conducting material, and so are the insulating strips shown in black. The spring, strap, and insulating strips compose the jack, and are made to completely fill the slot in the frame at the rear end thereof when all are pressed down edgewise to their place. The test-strap connection with the test-tube enables the operator to find out, through the test-wire with which it connects at the rear, whether the line is in use or not. The springs and strap are all made of thin conducting material, to economize space. This explanation is not of all the characteristics of the switch jack, but is sufficient to an understanding of the claims involved.

The claims of this patent which are said to be infringed are the third and fifth, as follows:

"(3) In a spring-jack switch, the combination, with the strap, e, connected with the test-piece at the front of the board of the ground-piece, f, and the lever, g, said strap, ground-piece, and lever being punched out of sheet metal and placed in substantially parallel planes and insulated, substantially as shown and described."

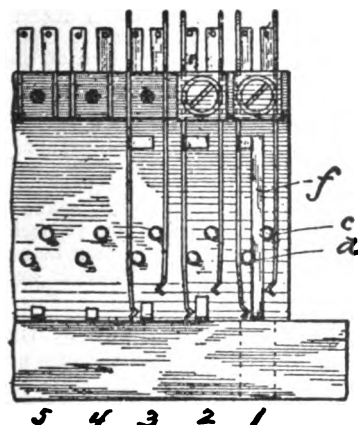
"(5) The combination, with the rubber frame or support provided with the holes and slots, of spring-jack switches inserted therein and completely filling the slots at the rear, whereby the teeth or sections of said frame are rigidly supported, substantially as shown and described."

A great number of patents had been issued in this country and abroad for switch jacks in telephone and other electrical apparatus before Scribner devised the switch jack above described. The defendant's counsel say that every element employed by Scribner is to be found in the prior art, and in structures already patented, and that there was no invention in reassembling them to perform their accustomed functions in another organization. And we have no doubt that the fact is thus correctly stated. But we do not think the conclusion follows; for, while all the things employed by Scribner and their capacities had been known to those familiar with the general subject and in some forms and relations had been applied to effect similar purposes, yet no combination of them operating in the same way as that of Scribner's is shown to have ever existed. An examination of the older devices would only show that the concession we have made is justified. And it would also show that the more recent of the prior patents for such devices have rested upon distinctions in the methods of combination. But the patent under consideration is for a new and improved combination and we are convinced it is one of much utility. Being only for an improvement, the patent must be so limited as not to cover any combination shown by the prior art. But, when so limited, it is manifest that the defendant company infringes it. As it does not build upon the older models, but copies that of the complainant's, it bears witness to the value of Scribner's improvement. We shall recur to this subject after the examination which we propose to make of the other patents described in the bill and claimed by the complainant.

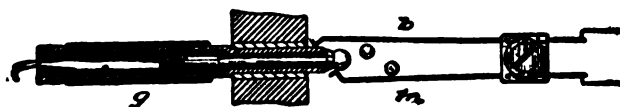


Patent No. 488,033, issued to Scribner and Warner, was for a form of construction based in part on the Scribner invention, already considered, and consisted in the application of it to metallic circuits with certain necessary additions and changes. It was stated in the application that the object of the invention was to provide ready means of looping or connecting together such circuits. It included a switch jack proper and the plug to operate it.

Fig. 3 illustrates the switch jack, and a part of Fig. 7 the opening in the frame in front of the jack, and the loop-plug.



*Fig. 3.*



*Fig. 7.*

In Fig. 3 a plate is shown having spaces, 1, 2, 3, 4, 5, for five jacks laid side by side. Three of the spaces are filled with jacks. The invention consisted of the two springs, preferably of different lengths, adjusted to press normally toward each other and upon different contact points (the posts *c* and *d*), a guide-tube in front of the ends of the springs; and a loop-plug, *g*, is shown in Fig. 7, adapted to be inserted in the tube and to spread the springs, which are line terminals, apart so as to separate them from their normal contacts, *c*, *d*, and closing each spring with a different terminal in the loop-plug. The loop-plug has a metallic sleeve larger than the tip of the plug, and when the plug is inserted one of the springs is pressed

off its contact and comes in contact with the sleeve through which the circuit is extended when the other end of the loop is connected with the line beyond it by a similar plug and switch. The loop-plug also presses off the other spring from its contact, and, the tip of the plug being in contact with that spring, another circuit connection is formed and extended through the plug. Proper insulation is provided throughout the apparatus described.

The claims of the patent involved in the present controversy are the first and third, as follows:

"(1) A circuit-changing device consisting of two springs or line-terminals, each spring adjusted to normally press against a different contact-piece, and a tube or guide placed in front of said springs, in combination with a loop-plug having a tip smaller than the metallic sleeve of the shank thereof, said loop-plug being adapted to be inserted in said guide to separate said springs from their contacts, respectively, while each spring is at the same time closed to a different terminal of the loop-plug."

"(8) In a circuit-changing device, the combination, with two insulated springs of different lengths, having their free ends in the same direction, of a guide in front of said springs and a plug provided with two terminals, one terminal upon the tip and the other upon the shank thereof, whereby on inserting the plug into the guide the springs are respectively closed to different terminals of said loop-plug, the shorter spring being closed upon the tip and the longer spring upon the sleeve, substantially as and for the purpose specified."

Anticipation of this invention is claimed by the defendants upon similar grounds as those raised against the former patent to Scribner, which has been already considered; and that patent is itself relied upon as an anticipation of Scribner and Warner's. But this patent seems much less open to the defense of anticipation than the Scribner patent; for, although the elements employed in this invention and some of the details of methods of arrangement in respect of some of those elements are to be found in many former structures, there is nothing in the proof that shows the same combination, or anything similar to those of the patent under consideration. The reference to the Scribner patent, No. 357,538, as an anticipation, is unavailing. It is true that the means employed in that patent are to some extent utilized. There are similar springs, a plug, and a similar method of opening the circuit and of extending it. But it has not the test-strap of the Scribner combinations, nor are the normal contact-points the same. Besides, this patent has special provisions not only in the switch jack proper, but in the loop-plug also, and relatively to each other, for changing and extending the circuit, while nothing of the kind is shown in the former patent to Scribner. But, even if it had adopted the Scribner invention, the improvement upon it would nevertheless be patentable.

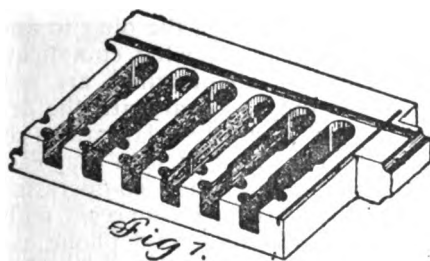
The Scribner and Warner invention appears to us to be of very considerable merit, and a marked improvement upon anything before attained. We have no doubt whatever of the patentability of the claims relied upon. Nor can there be any doubt, as we should suppose, that infringement is proven. The grounds for this latter conclusion will be stated when we have reached our conclusion in regard to the other patent involved in the controversy.

Patent No. 552,729 to Scribner had for its object the provision of an improved frame for switch jacks, compact and durable switch jacks suitable for use with metallic circuit lines and for controlling the continuity of both limbs of such circuits, and whose contacts should be accessible for testing the insulation and continuity of the circuit wires. The existing state of the art on which he proposes his improvements is rehearsed by the patentee as follows:

"In telephone switch boards of the multiple type it is usual to provide a spring jack or terminal socket upon each section of the multiple switch board for each line. The first spring jack of the series is arranged in the form of a switch which is adapted to disconnect the remainder of the circuit through the switch board. The long-distance connections or other connections requiring the highest insulation and greatest freedom from disturbance are made with this first spring jack of the series by means of the usual loop-plug, in order to free the line from the disturbances arising from cross-talk or induced currents taking place in the cables of the switch board, and the shunting effect of the annunciator which is permanently connected with the switch-board circuit. The necessity also frequently arises of testing to locate defects upon the line, which defects may be either in the switch board or upon the line circuit, and such tests have been provided for by a second switch in the line or switch-board circuit adapted to open the line circuit in order that the circuit through the switch board and that through the line might be separately tested. The spring-jack switches have usually been arranged in groups of twenty, the different members of the group being mounted upon a common base-plate, the aggregation being denominated a 'strip of spring jacks.'"

The purpose of the invention was to provide a simple and durable strip of spring-jack switches having contact-points not only adapted to make connection with the corresponding portions of ordinary connecting plugs, but which are also accessible for testing by means of a special testing plug provided for the purpose, whereby separate circuits may be closed through the switch-board circuit and through the line circuit simultaneously. The spring jack is also provided with local contact pieces which are connected with the annunciator for the purpose of restoring it and for testing purposes.

The frame specially devised for this patent is shown in part by Fig. 7 here reproduced:



It is made of hard rubber or other insulating material. The recesses for the jacks are narrowed at the rear end for about one-third of their length, so that they may pinch and hold tight the springs of the jacks when pressed into them with their insulating strips between. Forward of this holding place the space is made

wider, to give play to the springs; and forward of this wider space is an opening extending through to the front of the plate to receive the plug when pushed into the jack.

A part of Fig. 1 shows the arrangement of the switch jacks in a part of the frame, and also shows the springs in their relation to each other and their insulations (in black):

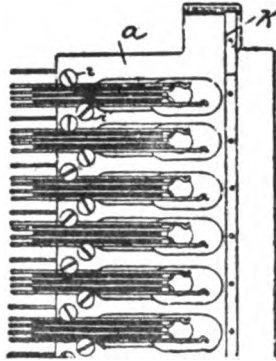
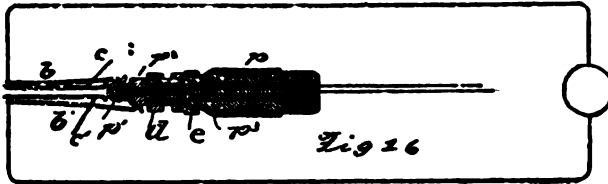


Fig. 16 shows the plug and its relations to the springs of the jack and the connecting wires:



This plug is provided with several contact-points, which, with the springs when they come in contact therewith, close the circuit, which is extended thereby through the plug to another line or limb of a line. It (the plug) is a somewhat complicated and ingenious affair, performing functions all of which are not involved in the present suit. We have only to deal with the organization of the frame and the switch jacks and the adaptations of the latter to the plug. By referring to Fig. 16 it is seen that each jack comprises a pair of line-springs, *b*, *b'*, and their co-operating switch contact-anvils, *c*, *c'*. The springs, *c*, *c'*, are connected with the limbs of the circuit through the remainder of the telephone exchange, including the annunciator, and they are adapted to contact with points on the tip of the plug when the latter is pressed in and has separated the main line springs from their contact with the springs, *c*, *c'*.

There are 11 claims in this patent, but only the second and fourth are claimed to be infringed. They are as follows:

"(2) The combination with a plate of insulating material having transverse grooves in one face and a plug-opening from the edge of the strip into the

transverse groove, of line springs placed on edge and forced into the groove, the springs being separated by an interposed tongue of insulating material, substantially as described."

"(4) The combination with the plate, a, having the grooves, a', formed in it, of the line springs, b, b', and their contact springs, c, c', separated by interposed tongues of insulating material, forced on edge into the groove, substantially as described."

Nothing in the prior art is shown to us which anticipates these claims. We might properly repeat the observations we have made regarding the conditions existing at the date of the other patents as correctly stating the conditions existing at the date of this invention; that is to say, no such combinations of means are to be found in the prior art. All three of these patents may well stand upon the rule which has several times been affirmed in this court, namely, that while the mere assembling in a new organization of parts of old structures to perform the same function in their new place that they did in the old is not invention, yet where they are so taken and are organized in a new and useful manner, so as to produce a more beneficial result, there may be invention; and when the combination displays the exercise of intuitive skill and genius beyond that possessed and exercised by those well skilled in the practice of their art, and the discovery is of something new and useful, invention should be recognized. As we have already indicated, we think that each of these patents shows a distinct advance in the progress of the art with which it is concerned. And the number of patents relating to this subject which had been taken out is strong evidence that the results which had already been reached had already exhausted the common skill and learning of the craft.

With respect to the matter of infringement, the defendants North and Steele are not shown to have been individually guilty of any infringing act. There is therefore no excuse for joining them as parties, unless it be that they were officers of the offending corporation, and this is no excuse. It may be, however, that the complainant mistakenly supposed the officers were active participants in the infringement, and has been disappointed in its proofs. However this may be, the bill was properly dismissed as to them, and so far the decree of the Circuit Court will be affirmed, with costs of both courts to those defendants.

As to the corporation, the charge of infringement is clearly proven. The claim that it built upon old structures, known to the public before the inventions of the patents in suit, is groundless. Its manufacture resembles the older art only as the complainant's does. The only difference between the manufacture of the defendant and that of the complainant's patents which has been pointed out in the thorough and elaborate argument of counsel for defendants, or that we have been able to discover, that deserves to be mentioned, is this, which has reference to that element of the combinations of the last patent termed the "frame" or "plate," which in that patent is described as made of hard rubber or other insulating material. The defendant's frame or plate has a floor made of alu-

minum, upon which are mounted the parts which support the switch jacks and bind them at the rear, which, as well as all the other parts of the frame except the floor, are made of hard rubber; and it comes to this: that all the parts of the defendant's frame whereof the kind of material is of any consequence is the same as the complainant's. The frame is in all substantial respects the equivalent of the Scribner frame.

The decree of the Circuit Court must be affirmed, with costs as to the defendants North and Steele, and reversed as to the defendant North Electric Company, with costs to complainant in the Circuit Court and in this court, and the cause remanded, with directions to enter a decree for the complainant against that defendant and for further proceedings therein. The decree will not include an order for an injunction in respect to any of the complainant's patents which have expired at the time of entering such decree.

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BUCHANAN et al. v. PERKINS ELECTRIC SWITCH MFG. CO.

(Circuit Court of Appeals, Third Circuit. February 7, 1905.)

No. 16.

PATENTS—VALIDITY AND INFRINGEMENT—INCANDESCENT LAMP SOCKETS.

The Perkins patent, No. 626,927, for an incandescent lamp socket, was not anticipated, and is not for a mere aggregation of parts, but covers a true combination of old elements into a new and complete unitary structure in such a way as to produce a new and highly beneficial result, and to show invention. Claims 3, 4, and 9 also held infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 129 Fed. 134.

Marcellus Bailey, for appellants.

Hubert Howson, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This is an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. 129 Fed. 134. The appellee brought suit by a bill in equity against the appellants, for infringement of claims 3, 4 and 9 of letters patent No. 626,927, granted June 13, 1899, to the appellee, as assignee of Charles G. Perkins, for improvements in incandescent lamp sockets. The decree of the court below sustained claims 3, 4 and 9 of the patent in suit, and found the defendants to have infringed the same. The claims involved are as follows:

"(3) In combination in a lamp-socket, a cap, a shell, two blocks of insulating material with recesses arranged to form two insulating-chambers, a plate with a binding-screw located in one of the chambers and having its ends secured to the respective blocks, a plate with a binding-screw located in the other of the chambers and having its ends secured to the respective blocks, and

grooves in the edges of the upper block for the passage of the circuit-wires of the respective binding-screws, substantially as specified.

"(4) In combination in a lamp-socket, a shell, two blocks of insulating material with recesses arranged to form insulated chambers, a plate with a binding-screw located in one of the chambers, a plate with a binding-screw located in the other of the chambers, and a switch-block located in one of the chambers and adapted to make contact with the end of the plate in the same chamber, substantially as specified.

"(9) In combination in a lamp-socket, a cap, a shell, two blocks of insulating material located within the shell, insulated chambers formed by recesses in the insulation, and plates bearing outwardly-extending binding-screws located in the recesses and having their ends secured by screws to the respective insulating-blocks, substantially as specified."

The defenses set up were nonpatentability, for lack of invention, and noninfringement. The first, viz., nonpatentability, was the most seriously urged, and was and is the controlling issue in this case. The patentee says, in regard to the subject matter of his patent:

"This invention relates to a receptacle for incandescent lamps, having a switch mechanism enclosed in a chamber that is insulated from the shell and from the chamber containing the parts forming the other side of the circuit through the socket."

A trouble incident to all lamp sockets, and present to a greater or less extent in all the numerous devices prior to that of the patent in suit, arose from the juxtaposition of the poles or terminals of the circuit, owing to the necessarily confined space in which they were inclosed. The danger of short circuits, from contacts of the raveled ends of the wires inserted in the posts, and from arcing, was one that, according to the evidence, had only been imperfectly prevented in the sockets of incandescent lamps. That this danger was entirely eliminated or minimized by the device of the patent in suit, is not denied. The appellant, however, cites the prior art, not so much to prove anticipation of the device of the patent in suit, as to show that the state of the art was such, that the combination set forth in the claims was a mere step in the direction of increased efficiency of such lamp sockets as would readily suggest itself to one skilled in the art, and did not involve patentable invention.

Of the numerous patents and devices for incandescent lamp sockets prior to the patent in suit, only four have been cited by the defendant below, to illustrate the state of the art into which the lamp socket of the complainant below was introduced. These are the "Snow" patent, No. 554,896, dated February 18, 1896, the "Wirt" patent, No. 560,667, dated May 26, 1896, the "Hubbell" patent, No. 565,541, dated August 11, 1896, and the "Pass & Seymour" patent, No. 568,919, dated October 6, 1896. In each of these patents, except the "Pass & Seymour," the insulating discs of porcelain, in which the switch mechanism is placed and into which are brought the terminals or poles of the circuit, to be connected through the high resisting lamp filament, are covered by a thin metal case. In the "Snow" and "Hubbell" patents, it is only necessary to refer to the latter as more clearly demonstrating the advance of the art in the direction of the device of the patent in suit.

In both the "Hubbell" and "Snow" patents, the two discs of porcelain are separated and held apart for a distance of half to three-quarters of an inch, by the metal standards on their opposite sides, to which they are united by binding-screws. Grooves are made in the discs to hold the ends of the standards, and for the passage of the wires which connect with the standards as part of the circuit, the moving part of the mechanism being located in the open space between the upper and lower disc. In this type of lamp socket, there is nothing to prevent short circuiting, by the coming in contact of the raveled ends of the twisted cords constituting the terminals of the circuit on the opposite sides of the disc. Unskillful or careless connection of the ends of these cords with the posts, as shown by the evidence, makes this a frequent source of trouble in this type of lamp socket. So also, there is an ever-present danger of arcing of the current, upon sudden turning of the switch. Mr. Waterman, complainant's expert, testified that, within his "own experience, sockets of this general open type have given trouble continually from breaking of the porcelains, the loosening of the parts and consequent development of bad contacts and burning of the socket, from short circuits due to arcing, to loose strands of the circuit wires and to broken pieces falling so as to connect opposite poles."

It was to overcome these difficulties and produce a socket that would be "mechanically strong and electrically well insulated, so that the danger of short circuit" might be entirely obviated, as well as arcing between the opposite terminals prevented, that the lamp socket of the patent in suit was devised. That the patentee accomplished his purpose and furnished a socket, not only mechanically strong but electrically well insulated, and one that was small, light, simple, easily wired, and cheap to manufacture, is not denied, and is fully established by the evidence. This was accomplished by bringing the two porcelain discs of the "Hubbell" and "Snow" patents into close contact, and by thus shortening the electrically conducting standards which hold the two discs together, giving strength and solidity to the structure; the faces of the two porcelain discs being so recessed as that, when brought together, the recesses and partitions between them coincide, and forming separate and completely insulated chambers on opposite sides of the socket, into which the terminal wires are introduced.

The "Wirt" socket, which belongs to the single porcelain block type, was referred to principally to show the peripheral recesses on practically opposite sides of the porcelain block, to receive the two plates that carry the binding-screws, and clearly these peripheral recesses in the patent in suit are not new with reference to the "Wirt" patent. In other respects, however, the single block Wirt devised, is subject to the danger arising from the close juxtaposition of opposite poles of the circuit, where the central contact passes through the screw contact shell. The loose ends of the circuit wire are liable to make contact between the two, and so establish a short circuit.



The "Pass & Seymour" socket belongs, as said by complainant's expert, "to an entirely different class of constructions." It has no metallic case, but is entirely a porcelain construction. There is no cap or shell, and no two blocks of insulating material so fashioned as, when brought together, to form two insulating chambers. There is a little ridge in the single large chamber, marked 10 in the drawing of the patent, but this does not form two insulating chambers. Terminal wires are brought through apertures in the porcelain, directly into the binding posts located in the chamber, and any stray or raveled ends of such wires are liable to get over the ridge and make a short circuit with the opposite pole. The learned judge of the court below has, in our opinion, correctly and clearly stated the essential difference between the "Pass & Seymour" socket and that of the patent in suit, as follows:

"In the Pass and Seymour the ends of the circuit wires are left in close proximity in the same chamber with nothing but a low and narrow rib of porcelain intercepting them, which there is constant danger that the frayed strands may bridge over and short circuit. But in the Perkins this is doubly prevented; first, by locating the contact plates at diametrically opposite sides of the blocks; and second, by giving to each a separate recess or chamber therein. It is true that the wall between the chambers is slight, and that the imperfect contact of the upper and lower blocks leaves a small air space which divides it; and in a badly fitted socket, like that produced by Mr. McIntire, this may be so great as to do away in great part with the benefit to be derived from this construction. But in the ordinary and proper form made in accordance with the patent, the two chamber feature has an important and distinctive function which is not anticipated by anything to be found in the Pass and Seymour, any more than in the rest of the preceding art."

It is true that the elements of the combination, described in these three claims of the patent in suit, are in a sense old, yet the two perfectly insulated chambers, the dominating element of the combination, is in a sense new. It is not found in any of the patents cited, in such fashion as to produce the beneficial effects due to it in the combination of the patent in suit. With this and the other elements of the combination, we have a new and complete unitary structure, combining old elements in such way as to produce a new and highly beneficial result. Mr. Waterman, complainant's expert, thus describes what he calls the essential feature of the combination:

"The essential feature of the construction, in so far as claims 3, 4 and 9 are concerned, as I understand the patent, consists in the form of the insulating blocks and the disposition of the several necessary electrical contact portions in such manner that they are effectively separated from one another and serve to hold together the insulating pieces to make the interior mechanism and its insulation substantially a unit, exceedingly simple and strong in its construction, and successfully meeting the requirements of practical use. This is attained by the use of two opposed chambered insulating blocks united by plates, serving also as electrical connections, to form substantially separate enclosures, whereby conducting parts of opposite polarities are separated from one another in a substantially perfect manner."

Whether, in a given case, there has been an exercise of the inventive faculty, within the meaning of the patent laws, is always a delicate and sometimes difficult question addressed to the sound judgment of the court having to pass thereon. It is difficult, per-

haps impossible, to prescribe general rules for the exercise of this judicial function. It demands careful consideration of the prior art and the essential and distinguishing feature of the device or combination, as to which invention is alleged, and appreciation of the practical working of the mental faculties. But it must often happen, and is unavoidable, that what is evidence of inventive genius to one mind, may only suggest the exercise of mechanical skill to another equally sincere and intelligent.

The fact that a new combination or device may be simple and obvious to the ordinary understanding, when once produced in concrete form, is not necessarily proof that invention was not involved. This is almost a commonplace in the jurisprudence of patent law. It is also true that admitted benefits resulting from the combination or device, and widely extended adoption, are facts relevant to the novelty and usefulness of the alleged invention. These facts are abundantly established, in regard to the patent in suit, by the evidence in this record. The results attained by the device of the patent in suit are the prevention of short circuits, by stray wire ends from the flexible conductors making contact between the two branches of the electric circuit, the prevention of arcing in the opening of the switch, and a construction mechanically strong and compact, with the metallic parts well protected. We think the combination of which this device consisted, was the product of more than mere mechanical skill, and required such an exercise of the inventive faculty as the patent laws were designed to protect. As to the contention that the combination described in claims 3, 4 and 9 is a mere aggregation of parts, and not a patentable combination, we cannot do better than adopt the language of the learned judge of the court below:

"It is further urged that the elements drawn together in the patent amount to a mere aggregation; but this loses sight of that which is involved. The object of the invention is the production of an electric lamp socket, an important commercial appliance, which, to meet the demands upon it, must have certain characteristics and qualities. It is necessarily made up of different parts, designed for different purposes, some of which contribute one thing and some another. The cap, the shell, the upper and lower blocks, the insulating chambers are nothing apart and in themselves; but together they unite to form a complete socket to be taken and used as a whole. This is not an aggregation of separate elements, each acting or standing by itself, but a composite construction in which the several parts co-operate to produce a common and combined result which the law accepts and sustains."

The defense of noninfringement is not seriously urged by the learned counsel for appellant, who says in his brief, in regard to the defendant's structure as compared with that of the patent in suit,

"The only bond they have in common, which is not also found in the prior 'Hubbell' patent, is that the two legs or standards, which mechanically unite the two blocks and at the same time form part of the electric circuit, are separated from one another by an insulating wall or partition, formed by properly fashioning and recessing for this purpose the meeting faces of the two blocks."

While this statement takes no note of other features which the two structures have in common, not found in the prior "Hubbell"

patent, such as the bringing into close contact the two porcelain discs, fastened together externally by the two legs or standards let into external grooves in the porcelain, it does admit that the defendant's structure possesses the controlling characteristic of complainant's combination, viz., the perfect separation by an insulating wall of these two metallic standards and the opposite poles of the electric circuit, "by properly fashioning and recessing for this purpose the meeting faces of the two blocks."

We think, therefore, that claims 3, 4 and 9 of the patent in suit covered a patentable combination, and that the court below was right in sustaining the validity of the same. The decree of the court below is therefore affirmed.

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MOSSBERG et al. v. NUTTER et al.

(Circuit Court of Appeals, First Circuit. January 23, 1905.)

No. 537.

1. PATENTS—CONSTRUCTION OF CLAIMS.

The claims of a patent are to be fairly construed in the light of the specification and drawings, so as to cover, if possible, the invention, and thus save it, especially if it be a meritorious one.

[Ed. Note—For cases in point, see vol. 38, Cent. Dig. Patents, § 235.]

2. SAME—INFRINGEMENT—BICYCLE BELLS.

The Ericson patent, No. 491,012, for a bicycle bell, was not anticipated, and the device shown discloses patentable invention, and represents a distinct advance in the art as compared with prior bells. Claims 1 to 4 construed, and *held* infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 128 Fed. 55.

Benjamin Phillips (William R. Tillinghast and Alfred H. Hildreth, on the brief), for appellants.

James E. Maynadier and George A. Rockwell, for appellees.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

COLT, Circuit Judge. This appeal relates to the Ericson patent, No. 491,012, dated January 31, 1893, for improvements in tire bicycle bells.

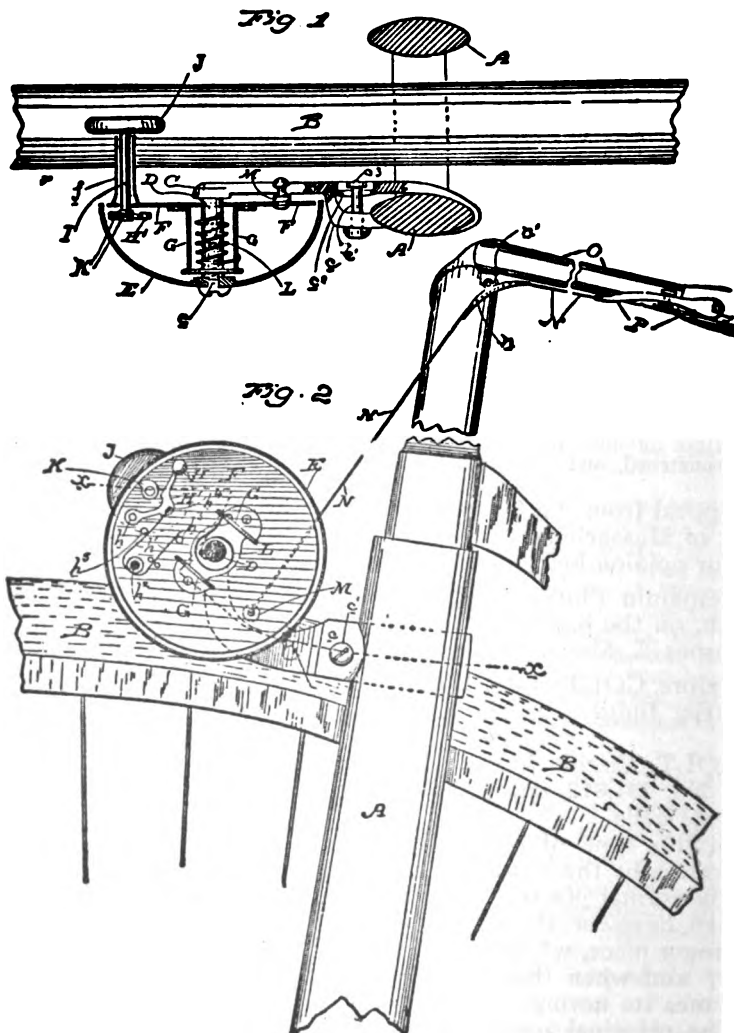
In this type of bicycle bell, the striking mechanism is set in operation by the contact of a friction roll with the tire of the wheel. In its normal position, the roll is held out of contact with the tire. When, however, the rider desires to ring the bell, he presses a lever or finger piece, which causes the roll to move into contact with the tire; and when this pressure is withdrawn, the roll immediately resumes its normal position.

The principal parts of the bell mechanism comprise a bracket secured to the frame of the wheel, a gong, striking mechanism,

friction roll, and a lever, disk, or plate carrying the striking mechanism and roll, and which by its movement throws the roll into and out of engagement with the wheel.

The Ericson patent is for a novel arrangement of parts for producing a more compact and effective bell. The distinguishing feature of this organization is an oscillating disk, carrying the striking mechanism and roll, centrally pivoted inside the gong on a fixed pin; the gong being also mounted on the end of this pin.

The construction of the Ericson bell is shown in the following drawings from the patent:



The specification of the patent, in so far as it is material in the present suit, may be summarized as follows: The object of the invention is to provide a simple, compact, and effective bell for bicycles, which can be readily adjusted, and which can be thrown into and out of action with ease and rapidity. The invention consists essentially in an oscillating plate or disk carrying the striker and operating mechanism; the plate or disk, by its movement, being adapted to throw its striker-operating mechanism into and out of engagement with the bicycle wheel. There is a rigid bell-supporting bracket secured to the wheel. The forward end of this bracket has a side-projecting pin, upon the outer end of which the gong is secured and held in a fixed position at all times. The plate or disk is pivoted upon this projecting pin and lies within the inner side of the gong. It thus forms a cap for the gong, but without touching it. The plate has an axial or rotary oscillating movement on the pin. Carried on the plate is the swinging striker, adapted to strike the gong. Extending through the plate in a suitable bearing is a shaft, on the outer end of which is carried the friction roll. This roll is adapted to be brought down into contact and to be raised from contact with the wheel rim. There is a spring encircling the projecting pin in such a way that it normally keeps the plate turned so that the friction roll is raised above and out of contact with the wheel rim. There is likewise a pin mounted on the plate on the opposite side from the striking mechanism. Attached to this pin is a wire which extends upwardly to a pivoted finger lever on the outer end of the handle bar. By pressing the finger lever the plate is made to turn. This carries the friction roll down into contact with the wheel rim, thereby causing the striking mechanism to operate. As soon as the finger lever is released, the plate is turned back again to its normal position by the action of the spring, whereby the friction roll is thrown out of contact with the wheel.

The foregoing drawings and description clearly disclose the Ericson conception of a bicycle bell and the way in which he embodied this conception. The fundamental idea of Ericson was to mount the whole bell structure upon a short pin at the forward end of a rigid supporting bracket secured to the wheel. In the carrying out of this idea he first mounted the gong on the outer end of this pin; the effect being that the bell-shaped sides of the gong encircled the pin. Within the gong he then mounted on the pin, with the pin acting as the pivot, an oscillating disk carrying on its inner face the striking mechanism and roll. This idea of mounting all the parts on the end of the rigid bracket, and the form of its embodiment, were new in the art. None of the numerous prior patents or devices introduced in evidence reveals any such conception of a bell structure. The more the prior art is examined, the stronger grows the conviction that the Ericson organization discloses patentable novelty and represents a distinct advance in the art as compared with prior bells.

There are only two bells in all the prior art upon which the appellants rely, either as anticipations or as limiting the scope of the

**Ericson invention:** The bell disclosed in the Kührt & Schilling German patent, No. 43,908, and the old Hill & Tolman bell. The Kührt & Schilling bell is far removed from the Ericson conception. We have in this German bell a comparatively long pivoted lever with an oscillating movement. The gong is secured to the lever near the pivot, and the striking mechanism is located further along on the lever and near one end, the result being that the entire striking mechanism lies outside the gong in an exposed position. This organization of parts only serves to emphasize the novelty and utility of the Ericson construction.

While the Hill & Tolman bell more closely resembles the Ericson, it lacks the dominant characteristic of the Ericson invention. In Hill & Tolman we find a long oscillating lever expanding into a circular disk or plate at one end. This disk is located at the rear of the gong and forms a cap therefor. It also carries on its inner face the striking mechanism and operating roll. In the last two features it is like the Ericson bell. But, notwithstanding this resemblance, Hill & Tolman never reached the Ericson conception of mounting the entire bell on a pin at the outer end of the rigid bracket. In place of the Ericson disk pivoted on this pin on the inner side of the gong, we have in the Hill & Tolman structure a long lever whose pivot lies several inches to the side of the gong, or the bell proper; the effect being that the whole bell moves bodily through the air with a pendulum-like swing. The Hill & Tolman oscillating lever is not the Ericson oscillating disk. In the Ericson structure the long arm of the Hill & Tolman lever has been discarded, and the lever pivot transferred to the pin within the gong. This is a substantial change and possesses patentable novelty. It is an important structural modification, producing an improved mode of operation, in that the whole bell structure no longer swings bodily through the air. Upon the comparison of the two devices it is apparent that the Hill & Tolman bell is wanting in the simplicity of construction and the efficiency in operation which characterize the Ericson bell.

The first four claims of the Ericson patent are in issue. They read as follows:

(1) In a bell for bicycles and other velocipedes, an oscillatory plate or disk mounted to turn in the rear of the gong, and complementary striking mechanism carried by said plate and adapted by the movement thereof to be thrown into and out of action by contact with and removal from the bicycle or velocipede wheel.

(2) In combination with a gong carried by the frame of a bicycle or other velocipede, an oscillatory plate or disk carrying a striker adapted to operate on said gong, mechanism carried by said plate or disk for transmitting the power of the bicycle or velocipede wheel to operate the striker, and means for turning said plate or disk to throw its power-transmitting mechanism into and out of contact with said wheel, substantially as herein described.

(3) In combination with a gong carried by the frame of a bicycle or other velocipede, an oscillatory plate or disk fitted and adapted to turn freely in the inner side of the gong and carrying a striker adapted to operate on said gong, mechanism carried by said plate or disk for transmitting the power of the bicycle or velocipede wheel to operate the striker, and means for turning said plate or disk to throw its power-transmitting mechanism into and out of contact with said wheel, substantially as herein described.

(4) A bell for bicycles and other velocipedes, consisting of a bracket secured to the fork of the machine and extending beside its wheel, a gong supported upon the outer end of the bracket, a plate or disk centrally pivoted on the outer end of the bracket and fitted and adapted to turn freely in the inner side of the gong and carrying a striker adapted to operate on said gong, mechanism carried by said plate or disk for transmitting the power of the bicycle or velocipede wheel to operate the striker, and means for turning said plate or disk to throw its power-transmitting mechanism into and out of contact with said wheel, substantially as herein described.

A considerable portion of the appellants' brief is taken up with a critical analysis of these claims. They maintain, as a result of this analysis, that claims 1 and 2, according to the ordinary import of their language, are clearly anticipated by prior bell structures, and that claims 3 and 4 should be limited to the specific form of mechanism described. The claims of a patent are to be fairly construed, so as to cover, if possible, the invention, and thus save it, especially if it be a meritorious one. In approaching a patent, we are to look primarily at the thing which the inventor conceived and described in his patent, and the claims are to be interpreted with this particular thing ever before our eyes. In confining our attention too exclusively to a critical examination of the claims, we are apt to look at them as separate and independent entities, and to lose sight of the important consideration that the real invention is to be found in the specification and drawings, and that the language of the claims is to be construed in the light of what is there shown and described.

There is much similarity in the foregoing claims of the Ericson patent, and the language is of a somewhat general character. This difference, however, may be noticed. Claim 2 is somewhat broader than claim 1, and claim 1 is somewhat broader than claims 3 and 4. Upon their face alone, it may be that claims 1 and 2 are broad enough in their terms to include the Hill & Tolman and some other prior bells. The claims, however, must be read in connection with the drawings and specification; and, so construed, we find, in each of these claims, appropriate language descriptive of the vital feature of the Ericson invention. In claim 1 we find "an oscillatory plate or disk mounted to turn in the rear of the gong"; in claim 2, "a gong carried by the frame of a bicycle" and "an oscillatory plate or disk carrying a striker adapted to operate on said gong"; in claim 3, "a gong carried by the frame of a bicycle" and "an oscillatory plate or disk fitted and adapted to turn freely in the inner side of the gong"; and in claim 4, "a gong supported upon the outer end of the bracket" and "a plate or disk centrally pivoted on the outer end of the bracket and fitted and adapted to turn freely in the inner side of the gong." These several phrases, when read with the drawings and specification, were manifestly intended to cover, and do distinctly cover by their language, the primary feature of the Ericson invention. If these terms are susceptible of a broader interpretation, they must by construction be limited to Ericson's actual invention.

Upon the question of infringement, there is no doubt that the appellants have substantially embodied, in both forms of their bell,

the essential features of the Ericson invention. Their bell is founded upon the Ericson conception of mounting the entire bell upon the outer end of the fixed bracket, thereby bringing the gong, oscillatory lever, or disk, and striking mechanism, into close proximity; the parts being so organized that the oscillatory lever carrying the striking mechanism lies practically within the inner side of the gong.

In what is called "Defendants' Bell No. 1," there exists the slight modification that the gong is not made stationary on the end of the pivot, but is pivoted with the lever, and so rotates with it. This difference is unsubstantial. It is true that the Ericson patent contemplated a gong which was always stationary, but this was not an essential part of the invention. The Ericson bell operates equally well when the gong oscillates with the disk. Under the circumstances, this construction is manifestly the equivalent of the Ericson bell, since it contains all the vital features of the Ericson organization.

The defendants' bell No. 2 presents a somewhat different question. This bell discloses separate pivots for the gong and lever. The pivot for the lever is located a little at one side of the pivot for the gong; in other words, the two axes are not coincident. The consequence is that the gong both rotates with the lever and also has a slight bodily movement. While this is true, there is still present in that organization, in a modified form, the essence of the patented structure. Considering the merit of the Ericson invention, it is entitled to a fairly liberal application of the doctrine of equivalents. This arrangement of parallel axes, instead of axes strictly coincident, carries with it substantially the Ericson mode of operation and all the advantages of the Ericson bell. For these reasons, we must also hold that defendants' bell No. 2 comes within the proper construction of the Ericson invention and of the claims in issue.

The Ericson patent was before this court in *Nutter v. Brown*, 98 Fed. 892, 39 C. C. A. 332. The record in that case was not the same as the record in the case at bar, and that case also presented an essentially different question of infringement.

The decree of the Circuit Court is affirmed, with costs of this appeal to the appellees.



## KENNEY MFG. CO. v. WELLS &amp; NEWTON CO.

(Circuit Court, S. D. New York. December 22, 1904.)

## PATENTS—INFRINGEMENT—WATER-CLOSET VALVE.

The Cooper patent, No. 871,431, for a water-closet valve, the essential feature of which is a flange projecting downward from the valve to retard the flow of water while the valve is closing, was not anticipated, and is valid. Also held infringed as to claims 1 and 2.

In Equity.

Frank L. Crawford, for plaintiff.

Edward Rector, for defendant.

WHEELER, District Judge. This suit is brought for alleged infringement of the first two claims of patent No. 371,431, dated October 11, 1887, granted to William S. Cooper, and owned by the plaintiff upon a valve for water-closets, which has a down-projecting flange of a little less diameter at its lower edge than the discharge pipe to restrict the flow as it enters the pipe, and a lessening diameter towards its upper part, permitting an after-flow for sealing the traps. The claims are:

"(1) The combination, in a water-closet supply valve, of a discharge chest, a valve constructed to close the mouth of the chest and having a depending flange or projection somewhat less in size than the said mouth, and means for raising the valve so that the lower end of the flange is above the top of the mouth, whereby when the valve is first opened a full flow of water through the chest is permitted, which flow is diminished when in the closing movement of the valve the flange of the same enters the mouth of the discharge chest, the diminished flow continuing during the remainder of the movement, all substantially as specified.

"(2) The combination, in a water-closet supply valve, of a discharge chest, a valve constructed to close the mouth of the chest, and having a depending flange less in size than said mouth, but constructed to enter the same and restrict the flow as the valve commences to close, and means, substantially as described, for retarding the closing movement of the valve, all substantially as specified."

The defenses are anticipation by several prior patents and denial of infringement. There are six of these prior patents—that to Jones, No. 98,599; to Craigie, No. 126,270; to Moore, No. 175,728; to Gale, No. 190,304; to Quinn, No. 205,903; and a German patent to Moller, No. 20,349. These well show a down-projecting flange from the valve, which restricts the flow of water as the valve nears its seat and prevents water hammer; but none of them appears to show such a continuing after-flow provided for by a passage around the flange. This well appears from the testimony of the defendants' expert, Mr. See, at X 2.45, Record, pp. 140.1, where he says, summarily, fol. 563: "That the earlier patents referred to show devices for retarding the closing motion of the valve in connection with the preliminarily entering plug, and that, allowing for dimensions, proportioning, and so forth, the devices will all have substantially the same action in the respects considered." The plug referred to is the projecting flange, and the retarding the closing motion of the valve by the flange appears to be a different

thing from providing for the after-flow by the passage around the flange or plug. This view is affirmed by X 2.46 following, and the answer; and confirms the testimony of the plaintiffs' expert Mr. Fraser, when he says, at page 41, fol. 161, of the record: "I understand from the patent specification that this particular means for retarding the closing movement of the valve forms in itself no part of the invention of claims 1 and 2 of this patent." Upon these considerations those claims appear to be valid.

The question of infringement turns largely upon this distinction between the means of producing the after-flow of the patent and those for retarding the closing motion of the valve. As to the latter, the appliances of the defendants' valve resembles as well those of the earlier patents as those of the patent in suit; but, as this after-flow does not appear in the earlier patents, the means for producing it cannot be compared with them, and must be with this. When so compared, the after-flows appear to be produced by equivalent means in substantially the same way.

Decree for plaintiff.

**SOCIETE FABRIQUES DE PRODUITS CHIMIQUES DE THANN ET DE MULHOUSE v. GEORGE LUEDERS & CO.**

(Circuit Court, S. D. New York. December 22, 1904.)

**1. PATENTS—VALIDITY—PRODUCT OF PREVIOUSLY PATENTED PROCESS.**

A patent for the product of a process is void where the same product had previously been produced by other processes.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 7.]

**2. SAME—ARTIFICIAL MUSK.**

The Baur patent, No. 451,847, for artificial musk, is void in view of a disclaimer limiting it to the product of the process of patent No. 416,710 to the same patentee.

In Equity. Suit for infringement of letters patent No. 451,847, for artificial musk, granted May 5, 1891, to Albert Baur. On final hearing.

C. A. L. Massie and Philip Mauro, for plaintiff.

Arthur v. Briesen, for defendants.

WHEELER, District Judge. This suit is brought upon patent No. 451,847, dated May 5, 1891, granted to Albert Baur, and owned by the plaintiff, for artificial musk. The specification sets forth that:

"The present invention relates to a new product or compound termed 'artificial musk,' which is characterized by the same fine and penetrating odor as natural musk, and is adapted to be substituted therefor. In letters patent No. 416,710, granted to me December 10, 1889, I have described and claimed a certain process of making artificial musk, by mixing toluene with a halogen compound of butyl, such as butyl-chloride, butyl-iodine, or butyl-bromide, and with aluminium bromide or chloride, distilling the compound, treating the vapors with fuming nitric and sulphuric acid, dissolving in alcohol, and then crystallizing. The product thus obtained, whose properties and characteristics are hereinafter fully defined, is a solid crystalline body, and is chemical-

ly a trinitrated hydrocarbon. To produce the artificial musk which constitutes the present invention, it is not necessary to proceed in the manner above described. It may be made by various processes. For example, instead of taking as a base toluene, I employ xylene, or other similar substance, and mix first with a butyl halogen compound. The resulting compound, such as isobutyl-xylene, the formula of which is  $C_{12}H_{18}$ , when treated with fuming nitric and sulphuric acid under the conditions above stated, will yield a mixture of nitrated bodies, from which by a fresh nitration a trinitrated body can be separated. In producing the product claimed herein, whether toluene, xylene, or other substance be taken as the base, I may proceed by employing hydrocarbons of the propyl or amyl series. The present invention, being independent of any process of manufacture, may be obtained in other ways than those herein described; they being given merely as examples of mode of procedure by which the artificial musk may be made."

The claim is for:

"The artificial musk herein described, being a trinitrated hydrocarbon derived from toluene or its homologues, in solid crystalline form, characterized by the odor of natural musk, as set forth."

Since suit brought, the plaintiff, as assignee, has disclaimed the article patented when produced otherwise than by the process of the prior patent, leaving the claim to stand as for the distinctive product of that process. The disclaimer implies that there was such a product derived from other sources in existence prior to the patent. If that was so, this patent, which is distinctively for the substance, and not for the process, would be void. *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. 455, 28 L. Ed. 433. Besides this, if the patent can be held valid for the product of the precise process to which it is limited by the disclaimer, it would not be infringed but by a product so produced, and the defendants' article is not shown to have been so produced. Its ingredients only are shown, and they may have been brought together by some of the processes by which the articles disclaimed are produced, and not be the article of this patent. *Id.* It is difficult to distinguish this case from the one above cited, which was upon a chemical patent for a product of a process, as this is, and that was confined to that product.

Bill dismissed.

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## UNITED STATES MITIS CO. v. MIDVALE STEEL CO.

(Circuit Court, E. D. Pennsylvania. August 18, 1904.)

No. 81.

### 1. PATENTS—PROCESS—INVENTION.

The patentability of a process is to be determined by its effect. However simple, it may disclose invention if it produces an improved result.

[Ed. Note.—For cases in point, see vol. 88, Cent. Dig. Patents, §§ 7, 15-18.]

### 2. SAME—SCOPE OF INVENTION—ERRONEOUS THEORY—BENEFICIAL RESULTS NOT CLAIMED.

Even where a theory is erroneously advanced by an inventor in his specifications to explain a patented process, the scope of the invention is not to be narrowed thereby, so as to preclude him from laying claim to

other beneficial results. It is the process, not the theory, which is patented, and the inventor is entitled to all the benefits legitimately to be derived therefrom.

**3. SAME—METALLURGICAL PROCESS—USE OF INHERENT AND WELL-KNOWN NATURAL PROPERTIES OF REAGENT.**

Where a metallurgical process consists, not simply in making use of certain natural properties of a deoxidizing agent such as aluminum, but in making use of them at a certain time, in certain quantities, and in a certain way, it cannot be objected, to a patent for such process, that it seeks to monopolize properties which are inherent and well-known.

**4. SAME—INFRINGEMENT—ASSIGNMENT OF DIFFERENT OBJECT—EVIASION.**

Where a patent deals with a metallurgical process, with regard to which there is not only a difference of opinion, but some obscurity, it would invite evasion and destroy the value of the patent by which the process is protected, if, while pursuing its terms, the charge of infringement could be successfully met simply by assigning the attainment of a different object.

**5. SAME—VALIDITY AND INFRINGEMENT—PROCESS FOR MAKING WROUGHT IRON AND STEEL CASTINGS.**

The Wittenström patent, No. 333,373, for a process for making wrought iron and steel castings, consisting of the addition of a small quantity of aluminum to the iron or steel after it has been fully melted, and just as it is about to be poured into the mold, the effect being to render the casting more solid and free from cavities, without injury to its quality, was not anticipated, and discloses invention, and the patentee is entitled to all the benefits legitimately to be derived from the practice of the process, including the use of aluminum in such casting as a deoxidizing agent, when used in the quantities, in the way, and at the time set forth. Also *held* infringed.

**6. SAME—MARKING OF PATENTED ARTICLES—PROCESS PATENT.**

Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388], requiring that articles made under a patent shall be so marked, is not applicable to the case of a process patent, and the omission is not a bar to recovery for infringement where the defendant has been notified, and continues the infringement in disregard of such notice.

In Equity. Suit for infringement of letters patent No. 333,373, for a process for making iron and steel castings, granted to Carl Gustave Wittenström December 29, 1885. On final hearing.

Joseph C. Fraley, for complainants.

George J. Harding, for defendants.

ARCHBALD, District Judge.<sup>1</sup> The process for making wrought iron and steel castings which is the subject of this suit was invented by Carl Gustave Wittenström, a Swede. It was patented in Great Britain, France, and Belgium, July 8, 1885, and in the United States December 29 of the same year, and, while the patent has now expired, it had not at the time suit was brought, and the complainants, who are the owners, are entitled to damages if it was infringed while it was in force. *Chinnock v. Pater-son*, 112 Fed. 531, 50 C. C. A. 384. Infringement is denied, and the validity of the patent vigorously assailed, and these are the questions, therefore, which are presented for determination. The patent was considered and sustained by Judge Acheson in a suit

<sup>1</sup> Specially assigned.

against the Carnegie Steel Co. (C. C.) 89 Fed. 343, and it would be sufficient, so far as the one issue is concerned, to rest upon the opinion which he expressed; but, as it is contended that the matter is somewhat differently presented here, an independent examination of it in the light of the present argument will be undertaken.

The process described in the patent is a simple one, consisting merely in the addition of a small piece of aluminum to the iron or steel after it has been fully melted, and just as it is about to be poured into the mold. The object sought to be attained is the making of a solid and more perfect casting, free from superficial blisters and internal cavities known as "blow holes." The great difficulty in securing this without a deterioration of the product was the problem to which the mind of the inventor was addressed, and his invention consisted in successfully solving it. High-water mark in steel casting up to that time is admittedly represented by the so-called "Terre Noire" process, patented in France in May, 1876, and in the United States in April, 1879. It consisted in the organized use of manganese and silicon, with specific reference to the casting, as distinct from the refining art; but, much as it added to existing metallurgical knowledge, it had its recognized limitations. While the resulting product was undoubtedly more solid and homogeneous, its quality was affected, being made more brittle or red short. The process was only serviceable where the steel was hard, and the preservation of its intrinsic character was not important; and it was entirely inadequate, therefore, for the production of castings of wrought iron or mild steel, of which there were none at the time Wittenström brought forward his invention. Referring to this state of the art in his specifications, the inventor says:

"It is well known that one of the great difficulties in making castings from steel is to get a product which is solid, sound, homogeneous, or free from blisters or cavities. Lately the manufacture has been much improved by adding to the metal ferro-manganese and other compounds containing carbon, silicon, and manganese; but, although all these admixtures make the product somewhat more solid, they deteriorate the quality in other respects, as the product gets harder and more brittle or red short."

Proceeding thereupon to disclose the discovery which was the basis of his invention:

"I have found," he says, "that castings of wrought iron or mild steel may be obtained solid without changing the intrinsic quality of the metal by the addition of the metal aluminium either alone or in the shape of an alloy, such addition to be made after the iron or steel has been melted, and preferably just before the pouring is commenced."

With regard to the quantity to be used he states:

"I have found that the use of a minute quantity, never exceeding one per cent. by weight—preferably from one-fifth to one-tenth of one per cent. by weight—of metallic aluminium added to the molten iron has the desired influence, and even a very much smaller percentage has an appreciable influence." "By this, my new invention," as he declares, "I have succeeded in making perfect castings from the softest wrought iron, which castings in every respect retain their ductility and nature of wrought iron, though their tensile strength is greatly enhanced."

In thus making possible that which was not so before, there can be little question that the inventor rendered a material service to, and made an important advance upon, the existing art.

An effort is made, however, to limit the invention by the suggestion that all that was in mind was the production of an aluminum alloy, use being made of the well-known principle that the alloy of two metals has a lower melting point than that of either of them, the fluidity necessary to make a proper casting being thereby obtained without injurious superheating. This contention is based upon that part of the specifications where it is said:

"The melting point of aluminium is about 800 Fahrenheit, and the effect of such addition [referring to the aluminium] is to lower the melting point of the mixture, and thereby render it more fluid (as it at once becomes superheated) so that the gases in the metal pass away easily, the metal runs freely into the mold, and a more perfect product is obtained."

The object in thus seeking to narrow the scope of the invention is to deprive it of other beneficial results, particularly the deoxidizing of the metal, which now, according to the better opinion, is the real effect of the addition of the aluminum, and for which purpose, in the defendants' ingot practice at least, it is admittedly employed. It was not a theory, however, that was patented, but a process; and, even if a theory was advanced to explain it which was erroneous, the inventor is not precluded from laying claim to all the benefits legitimately to be derived therefrom. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064; *Thomson Meter Co. v. National Meter Co.*, 65 Fed. 427, 12 C. C. A. 671. But the truth is, no mistake was made. While the invention no doubt fundamentally consists in increasing the fluidity of the molten metal, the inventor unquestionably had in mind the deoxidizing effect of the aluminum as an essential part of it, and did not stop short with the idea of simply creating an alloy. That idea was thrown up to him in the course through the Patent Office, as disclosed by the file wrapper, and distinctly repudiated.

"This invention," he there says, "does not relate to the production of a new alloy, or a new method of producing iron or steel. \* \* \* My invention makes use for the production of castings from wrought iron or steel of one quality of metallic aluminium which I have discovered, \* \* \* that of making the molten iron or steel highly fluid, \* \* \* and this quality is of the utmost importance when making castings, as the metal will run freely into the finest parts of the mold." "The quality possessed by aluminium of rendering wrought iron fluid enough for castings without changing it to steel I regard as my discovery."

The reducing of the melting point on the other hand is referred to as a distinct, if not subordinate, feature, as follows:

"Another important feature in my production of castings in wrought iron is that by the trifling addition of aluminium the melting point is lowered; that is, whereas the wrought iron alone would solidify by a very slight decrease of temperature, it will, after the addition of aluminium, stand a considerable cooling before solidifying. This is of great importance, as it gives time for casting the wrought iron in a practical way into a series of molds."

The rejection of the idea of an alloy is further shown in the patent itself, where the inventor disclaims the purpose of obtaining

any product made up of aluminum and iron, such as "Wootz steel," or any product in fact in which the aluminum and iron or steel are fused together. In that connection he explains that, while "a superheated state of the metal is essential for the practical performance of casting into several molds," yet "by adding the aluminium to the wrought iron or steel, and fusing them together, a superheating would result in injury, as the metal would become red short, or take up gases, whereas by first melting the iron or steel, and then adding the aluminium before pouring, the 'superheating' (if it may be so called) produced by a sudden lowering of the melting point does not injure the metal." That the inventor understood that the addition of aluminum when the metal was in a molten state had the effect of deoxidizing it, or freeing it from gases, is also disclosed by the file wrapper. "Furthermore," as it is there said in one of the communications, "the sudden creation of a greater fluidity just before pouring allows all gases to pass easily away; whereas, if the aluminium is melted together with the iron, some gases are always taken up during the melting, and the product becomes unsound." This is repeated in the specifications in the very part relied upon by the defendants, where, speaking of the lowering of the melting point, and the rendering of the mixture more fluid, it is pointed out, that as the result "the gases in the metal pass away easily, the metal runs freely into the mold, and a more perfect product is obtained." But it is not necessary to prolong this part of the discussion further. Without intending to withdraw the force of anything that has been said, even if the deoxidizing effect of the process was more dimly disclosed than it is, a certain liberality of treatment is to be accorded it, sufficient to protect this feature, the inventor having claimed, as he has, as the particular desideratum and aim of the process, the increased fluidity of the metal, which is now recognized as resulting from the removal of the oxygen through its affinity with the aluminum by which the mass is made less wild. And although he may have had in mind the production of a momentary or theoretical alloy, as a means for reducing the melting point—which is certainly as far as it can be carried in view of what he declares to the contrary—this is not the exclusive idea, and the invention is not to be confined to it.

But it is urged that, even assuming the patent to cover all that is claimed for it, the deoxidizing effect of aluminum, the same as that of manganese and silicon, was well understood, and its use as a reagent for removing the gases from iron involved nothing patentable or novel. Its price, it is said, was prohibitive prior to the date of the invention, and it has come to be used since then simply because this fell and made it possible. Nothing—in this view—was contributed by Wittenström to the metallurgical art, or at least nothing in practical results; the theoretical interest at first aroused in his so-called discovery disappearing when it was found out how little he had done. But the fact is that, whatever had been the case with steel, wrought-iron castings had not been made up to the time of the invention. And if Mr. Ostberg, at whose works

in Sweden the experiments were made which brought about the discovery of the process, is to be believed, the metallurgical world was astonished at the result, most of the papers reproducing his Pittsburg address, and the president of the British association at the next annual meeting making a part of it his own. It will hardly do in the face of this to say that nothing was contributed by the inventor to the art in which it stands, the high testimony to the contrary given at the time being safer to be trusted than expert opinions, after long familiarity with it, controversially expressed. Nor can the extended use into which it has gone since, which equally disproves the assertion, be entirely attributed to the cheapening of the price of aluminum, however much it may have been aided thereby. Furthermore, whatever knowledge of the deoxydizing property of aluminum there may have been, its utility in producing iron and steel castings without a deterioration of the product certainly was not understood before, nor yet the time and manner of applying it, which were also involved. One had to know not merely that aluminum was a deoxidizer like manganese and silicon, but that, in marked contrast with both, it could be made to disappear in the process, and leave no bad effect. This it was left to Wittenström to discover and give to the world, and it does not do to belittle his achievement after the fact. The process which he evolved may be a simple one—merely casting a bit of aluminum into the molten mass at the moment of pouring—but it is not to be judged by its simplicity, but by its effect (*Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 429, 22 Sup. Ct. 698, 46 L. Ed. 968), and of this we can hardly doubt.

But, again, it is said, the Marbeau and Abel patents disclose the use of aluminum in iron compounds in the same minute quantity (the fraction of a per cent.), at the same point in the process (the moment of pouring) for the same purpose (the removal of the last vestiges of oxygen), and with the same object in view (a more solid and homogeneous product); and that it involved no invention to extend this process bodily (as was practically done) to iron and steel. The Marbeau patents, to which reference is thus made, consist of a series or group of patents, embodying the discoveries of the eminent French metallurgist Henry Marbeau, taken out in France in 1883 in the name of the "Société Anonyme Dite Fonderie de Nickel et Métaux Blanc," and carried down to January, 1885, by sundry certificates of addition, with intermediate partial counterparts in England and the United States. There were also two independent English patents of October, 1885, and March, 1888, respectively, and a still later one, taken out in the United States by Marbeau himself in 1890. Although much is made of these patents by the defendants as establishing a prior analogous use, I am far from convinced that they are to be given any such effect. The subject to which they are addressed is not the casting of wrought iron or steel, but the manufacture of ductile and malleable nickel and cobalt, and the compounds, known from the admixture of iron, as fero-nickel and fero-cobalt. The use of a small quantity of aluminum at the moment of pouring is, indeed, suggested; and



the asserted purpose is to profit by the properties thereby contributed, in order to produce a better molded casting when the resultant product should come to be so used; although the facilitating of a homogeneous alloy of the metals is also brought forward. But, in addition to the fact that the process is thus made to relate to the manufacturing, if not to the alloying, in contradistinction to the casting art, which is metallurgically important, the subject is always treated from the nickel, and not the iron, standpoint, which is recognized by the inventor as controlling, even where, as in the formula given in the British patents of 1884 and 1885, the relative proportion of the two metals is reversed, the nickel being reduced to 25 per cent. and the iron raised to 75. For proof of this we have his own words in the United States patent of 1890, where, distinguishing the process embodied in the latter from those which had preceded it, he says:

"Heretofore I have obtained ferro-nickels and steel nickels with a high percentage of nickel, varying from ninety-nine per cent. to twenty-five per cent. of nickel, possessing the peculiar properties of the latter metal, such as brilliancy, incapability of oxidation, etc., and which are capable of being substituted for nickel for many purposes. \* \* \* In pursuing experiments in this direction I have now succeeded, by reducing the percentage of nickel below twenty-five per cent., in producing a series of alloys, which, although belonging to the same [general] class as those formerly described and patented, are possessed, on account of their constitutive elements and mode of production, of new properties, and constitute a distinct class of alloys, forming a new manufacture."

It is true that it is somewhat arbitrary to say that, when the percentage of nickel is 25 or under, the alloy may be compared to steel and iron, and when above that not; nor do we have to accept his say-so for it. But that is aside from the argument. The contention is that the device of Wittenström is merely the case of an analogous use, so prefigured by that which had preceded it, and particularly by the Marbeau patents, that any one of ordinary metallurgical skill would have had no difficulty in extending the process which is there disclosed for the manufacture of nickel and cobalt and their compounds to the making of castings of wrought iron and steel, the same deoxidizing property of aluminum being employed in the same way and at the same time. But here we have the most significant proof—whatever may be now asserted to the contrary, when we have the full light of subsequent advance thrown back upon it—that one who was deep in the subject did not grasp the possibility of this until the very last; Wittenström in the meantime having developed and perfected it. Marbeau may have been advancing along the same lines as Wittenström, but this does not deprive the latter of the merit of his invention, nor establish that his discovery was so little beyond that which was well understood as to be practically obvious. It is proved by Marbeau also that the exact influence of the common re-agent employed by both was not a matter of ordinary knowledge. Speaking of its action in his British patent of 1885, he says:

"And, lastly, the aluminium prevents a change in the molecular condition of the iron; that is to say, the latter does not lose its original fibrous condition and pass into a crystalline state in consequence of its fusion with the nickel."

This is far from grasping the deoxidizing effect of this element such as is now recognized, and it is emphasized by the fact that in the same connection he does attribute to manganese and ferro-cyanide of potassium the expulsion of the oxide as fast as formed from between the molecules, equivalent, as he says, to a constant molecular scouring. Undoubtedly nickel and cobalt, with their alloys, are to be classified chemically, and to a certain extent, it may be, metallurgically, in the same group with iron, including the differentiated form of it, difficult to define, which is known as steel. But if there are resemblances between these metals, there are also decided differences, which would seem to preclude the possibility of similar treatment, relating as they do to the behavior of each with carbon and oxygen, and particularly with certain common deoxidizers. Metallurgical processes, moreover, often depend on delicate and obscure reactions, which cannot be forecast with certainty, and with regard to the exact character of which there is not always complete agreement in the end. The present state of the art has been brought about by prolonged and painstaking experimentation, and it is to this, rather than to analogy, that resort must be had to determine what will be efficacious in any given case. To the oft-repeated argument, therefore, that any one with ordinary skill could have accomplished all that was done by the inventor by the mere application of existing knowledge, it can with even more than the usual confidence be said in the case before us that no one up to that time had done so, in proof that his discovery was a real achievement. If the present process was an obvious one when Marbeau brought forward those which he discovered, why, pray, did he stop short at nickel and cobalt, and not go on to steel and iron, which were quite as important metallurgically? He did so, as we have seen, in the end, in the course of his progressive work; but that he did not, at the outstart, nor until Wittenström had independently produced the process which we have here, goes far to prove its entire novelty and inherent invention.

The Abel British patent of 1884 is also relied on, but, if those of Marbeau do not suggest the process in suit, it can hardly be claimed that this does either. It also relates to the manufacture of nickel and cobalt (without mention of their iron compounds), and a small quantity of aluminum is employed at the termination of the process to remove the oxygen, by which means, as it is said, compact and malleable castings of the best quality can be obtained. But substantially the same answer is to be made as to the patents to Marbeau. The analogies are not so close between nickel and cobalt on the one hand and iron on the other that the metallurgical treatment found efficacious for the one can be extended to the other without investigation, leaving room for inventive discovery such as we have here.

The validity of the patent being established, the question of infringement remains. So far, at least, as the defendants' ingot practice is concerned, this is clear. The molding of ingots is certainly a species of casting, and, use being made of aluminum in the manner and for the purpose described in the patent, the process is ap-

propriated and the patent infringed. This is conceded if it is held to extend to the use of aluminum as a deoxidizing agent, and it was for the purpose of escaping from this that effort was made to have it construed simply as intending to produce greater fluidity by the formation of an alloy. When that was disposed of, therefore, infringement stood confessed. Nor is this overcome by the suggestion, already considered, that the deoxidizing properties of aluminum cannot be monopolized by a patent, being inherent and well known. The process in controversy consists not simply in making use of these properties, but in making use of them at a certain time, in certain quantities, and in a certain way, all of which have been duplicated by the defendants, who therefore unquestionably offend.

It is strenuously denied, however, that such is the case with regard to their commercial castings, in which the aluminum is employed, not, as it is said, to make a more perfect casting, which was not called for, the defendants having long since succeeded in making these castings of the highest grade, and free from blowholes, without it, but for the purpose of preventing leakage about the stopper of the ladle in passing from one mold to another, for which it had been found effective. The defendants, as it is testified, began to make use of aluminum in 1895, being led into it because it was said to produce good skins or surfaces, and their competitors were doing it; but after a series of intermittent experiments they found there was little, if any, improvement from it, and so gave it up. They discovered, however, as they say, that when it was used they secured a good shut-off, and therefore resumed its use for this distinct and limited purpose. The theory on which this result is explained is that, while aluminum, when added to iron to remove the oxide which is present, makes it more fluid, passing off itself as alumina in the slag; when added after the oxide has been removed—as is the case as it is claimed at the time the defendants apply it—it remains in the metal, and makes it thick or viscous. On the other hand, it is maintained that the molten mass, when “wild,” before the aluminum has been added, has a tendency to cool and get in the way of the stopper, impeding a close fit; whereas by the addition of the aluminum, which admittedly makes it more fluid, it is enabled to retain its heat, and so avoid this difficulty. The weakness of the defendants’ theory is that it is based on the entire removal of the oxide before the aluminum is added, when experience teaches that it is almost impossible to effect this, the molten iron taking up oxygen from the very air to which it is exposed. It may be relatively free, but not absolutely so, nor able to be kept so. It is somewhat remarkable, moreover, that aluminum is employed by the defendants in their ingot practice in order to remove the oxide and quiet the metal, so as to obtain a more homogeneous and solid product, and yet, when the delicate matter of making commercial castings is in hand, in which the greatest fluidity is required in order that the metal may flow freely into every configuration and corner, aluminum is added, according to the defendants, for the deliberate purpose of thickening it, and that for the comparatively insignificant object of saving a

little escaping metal. But I am relieved from the necessity of passing on the question of motives, or the relative value of opposing theories. The inventor is entitled to every beneficial result legitimately flowing from his invention, and it does not detract from it that it accomplishes more than was expected if that is true of it. Dealing, as we are, with a metallurgical process, with regard to which there is not a little difference of opinion, if not some obscurity, it would invite evasion and destroy the value of the patent by which it is protected, if, while pursuing its terms, the charge of infringement could be successfully met simply by assigning the attainment of a different object. The defendants, in their commercial, the same as in their ingot, practice, throw into the metal when molten the fraction of a per cent. of aluminum at the moment of casting. This follows the directions of the patent, and constitutes an infringement upon it. That it results in a more perfect product in the one case, the same as it admittedly does in the other, as designed by the inventor, can hardly be doubted. That it does more than this—if such be the case—by stopping the leakage of the ladle, as asserted by the defendants, does not entitle them to appropriate it upon the plea that this is their only object.

It is finally said that the complainants have not complied with section 4900, Rev. St. [U. S. Comp. St. 1901, p. 3388], which requires that articles manufactured under a patent shall be so marked. But, as was held by Judge Acheson in the Carnegie Case (C. C.) 89 Fed. 206, this requirement is inapplicable to the case of a process, nor is the omission a bar to a recovery where the defendant has been notified, and continues to infringe in disregard of it; and that is the case here. The defendants persisted in the use of the process after they were served with the bill, and would be liable for that, if nothing else.

Let a decree be drawn sustaining the patent and referring the case to a master to assess the damages.

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#### DECKER v. SANFORD.

(Circuit Court, N. D. New York. February 8, 1905.)

No. 8,460.

#### PATENTS—INVENTION—BASEBOARDS AND WAINSCOTING.

The Decker patent, No. 346,899, for baseboard and wainscoting construction, consisting essentially in fastening the carpet strip or bottom molding to the floor, and not to the baseboard, and using, if desired, a top molding extending below and in front of the top of the baseboard, and fastened to the wall only, and not to the baseboard—the purpose being to cover by such moldings the spaces caused by the shrinking of the baseboard and the floor—is void for lack of patentable invention, and also for anticipation in the prior art.

Action at Law for Damages for Alleged Infringement of Letters Patent No. 346,899, dated August 10, 1886, granted to George F. Decker, for baseboard and wainscoting. Jury was duly waived.

Ward & Cameron, for plaintiff.  
Osgood & Davis, for defendant.

RAY, District Judge. The patent in suit, for baseboard and wainscoting, No. 346,899, relates to the art of house carpentry. Same was applied for October 20, 1883—no model—and, after rejection and amendment was, as amended, finally allowed, and letters patent issued August 10, 1886, to the plaintiff, George F. Decker. The patentee, Decker, in the specifications, states the objects of his alleged invention to be as follows:

"My invention relates to improvements in the manner of making and putting up of baseboards and wainscoting, and the manner of joining the ends of baseboards together; and the objects of my improvements are, first, to prevent apertures or spaces being formed between the baseboard and wainscoting and the floor, or between the baseboards and the plastering; second, to prevent wind entering into the room through said spaces; and, third, to prevent the warping and shrinking of said baseboards. I attain these objects in the manner illustrated in the accompanying drawing, in which"—

Then follows a description of his drawings, and he then continues:

"A is a molding of any form placed on the floor; B, the center board; C, the molding on the top of the center board; D, a wedge of any material. I do not restrict my invention, in its use, to any material. In carrying out my invention, I securely fasten a molding, A, to the floor; then place in the groove formed in the upper face of such molding, or at the back of said molding, extending to the floor, and between the molding and the wall or studding, a center piece, B, of any material, without fastening the said center piece to either the top or bottom molding, or to the wall or floor. I then, if it is desired, place above and partly in front of said center piece the upper molding, C, and securely fasten said upper molding, C, to the wall or studding. The center pieces may be in one strip, as in a baseboard, or in several perpendicular strips, as in wainscoting. Where a bottom molding only is used, I securely fasten the upper edge of said center board to the wall. The center board being entirely loose where two moldings are used, or at its lower edge where only one molding is used, it does not affect either the upper or lower moldings, and, being of sufficient width, cannot admit of the formation of a space either above the lower molding or below the upper molding, if the latter is used, or between the wall and the center board, where an upper molding is not used. Where in long lengths of baseboard it is necessary to make a joint, I cut a groove in the two ends of the center boards at such joint, and insert in the cavity thus formed at the union of the two ends of the said center board a wedge of any material, in order to prevent a warping of the wood forming such center board.

Having thus described my said invention, what I claim, and desire to secure by letters patent, is:

"(1) In a baseboard or wainscoting, the combination, with a center piece secured to the wall, with freedom to shrink, of a molding secured to the floor, and presenting an upward projection to overlap the lower edge of said center piece, as and for the purposes set forth.

"(2) In a baseboard or wainscoting, the combination, with a center piece secured to the wall, with freedom to shrink, of moldings, one secured to the floor and presenting an upward projection, and the other secured to the wall and presenting a downward projection, said projections overlapping the edges of the center pieces, as and for the purpose described."

It will be noted that Decker states the object of his improvements to be "to prevent apertures or spaces being formed between the baseboard and wainscoting and the floor, or between the baseboards and the plastering; second, to prevent wind entering into

the room through said spaces; and, third, to prevent the warping and shrinking of said baseboards."

In house construction of wood, we have sills around the outside of the whole house, with certain cross-sills which may or may not coincide with the partition walls; then floor joists supported by the sills, and on which the floors are laid; then upright studs forming the supports for the partitions and the sides of the main building. On the outside are nailed clapboards, with or without a paper lining, and board sheathing, and on the inside lath is nailed to the studding. The plaster is laid upon the lath. When wainscoting is used, it usually consists of narrow strips of wood placed upright and tongued together, extending from the floor upwards from three to four feet, except at windows, and about the entire rooms, except at door spaces. The wainscoting may extend only from the top or near the top of the baseboard upward. This wainscoting may be next the studding, or it may be placed after the sides are lathed and plastered down to the floor, or only to the top of the baseboard. The baseboard is a board placed lengthwise around the room, next the floor, and is usually from 6 to 10 inches in width. It is also called base and mop board.

It is well known that all green timber will shrink when severed from the stump; that all dry timber will absorb moisture, when exposed to it, and swell, and shrink again when exposed to heat. The shrinkage of timber contracts its width and thickness much more than its length. However thoroughly seasoned they may be, timbers and boards are found to shrink some in course of time after being put into a building. The result is that by reason of the greater shrinkage of sills and floor timbers and floor boards, which are laid horizontally, than that of the studding and wainscoting, standing upright, the baseboard, if fastened to the studding or lath, will be held in position, while the floor will be drawn down or away from it, or, more properly, the floor will shrink away from it. This result is, to some extent, also due to the shrinkage of the baseboard itself. No amount of fastening or nailing will prevent this shrinkage and the consequent formation of apertures or spaces between baseboard and floor or wainscoting and floor, or between baseboard and plastering, or wainscoting and plastering in some cases. It is also evident that the means employed by the patentee, as described and specified in the patent, will not prevent or tend to prevent the formation of these apertures or spaces. What the patentee in fact has attempted to do, and does, is to provide a means for hiding and concealing these apertures, and of obstructing the ingress of air or light through them. The patent calls for a molding extending lengthwise and parallel with the baseboard, fastened to the floor (not to the baseboard or wainscoting). Hence such molding will follow the floor. It is independent, in its action, of the baseboard and side walls. When the shrinkage before described occurs, if the molding is wider (that is, higher) than the space caused by the shrinkage, the molding will stand on the floor next the space so formed, and in front of it, and hide it, but will neither close nor occupy such space, nor prevent its forma-

tion. It will also form an obstruction to any current of air coming from the outside, but will not absolutely stop it. The same is true whether the baseboard or wainscoting, as the case may be, goes to the floor behind this molding, as in figure 2 of the drawings, or only into a groove in such molding on the top back thereof, as in figure 4 of such drawings. In either case all we have is the placing of a molding or strip of wood laid along in the angle formed by the floor and baseboard or wainscoting, either to conceal, or obstruct ingress and egress by air or vermin into or through, an aperture that is quite certain to be formed by the shrinkage of the adjacent timbers. So far as the first declared object of the patent is concerned, it is inoperative and worthless. As to the second, it is a partial preventive, as the shrinkage of the molding and baseboard away from each other will not leave the aperture wholly unobstructed. The construction pointed out, and means employed, will in no sense "prevent the warping and shrinking of said baseboards." No human power, except the maintenance of a uniform degree of moisture in the timber, will prevent timbers or boards from shrinking. The means employed might prevent the warping of the baseboard if the molding described is used both at the lower and the upper edges of the baseboard, for they would act to keep it in one position in spite of the nonuniform action of heat on the timber when impregnated with sap or moisture.

It is evident that the means of preventing warping to which the specifications refer is the insertion of a wedge in two grooves—one in the end of each baseboard where the two come together. No infringement of the patent in this respect is alleged or claimed. Nor can I see invention in such a device. I can well remember baseboards fastened together at the ends by holes bored in lengthwise of the boards, and plugs inserted, over 40 years ago. Such expedients as are pointed out in the patent in question for preventing warping would naturally and readily occur to any well-informed mechanic, or to the farmer experienced in building board fences.

The claims relate to the construction of (1) a baseboard; and (2) a wainscoting. In this construction of a baseboard we have, in claim 1, the following combination of elements: (a) "a center piece secured to the wall, with freedom to shrink"; and (b) "a molding secured to the floor, and presenting an upward projection to overlap the lower edge of said center piece." The baseboard itself is the center piece referred to, and, as it comes next the floor, the other element is a molding—any molding—secured to the floor, and forming an upward projection adjacent to and in front of the baseboard. As the baseboard proper, or center piece, stands at right angles to the floor, this molding forming the upward projection is simply fitted into the angle, and will conceal the opening caused by the shrinking of the floor away from the board. The plaintiff, Decker, when on the stand, conceded and stated that baseboards scribed to the floor so as to form a tight joint were common in house construction long before he conceived his alleged invention. He also says that long before that the floor would shrink away from the baseboard, more or less, forming an aperture; that it was common

then to use an ogee molding in the angle formed by the floor and baseboard, to serve the same purpose as his invention—to hide and close such crack or aperture and shut out wind, etc. He says that this ogee molding was nailed to the baseboard, and not to the floor, for the reason that the ogee molding was not thick enough, in proportion to its height, to be held in position by nailing it to the floor. But while the drawing of the patent shows a quarter round, the claim is not confined to that, and covers any molding. Again, for such purposes an ogee molding is the well-known equivalent of the quarter round, and the ogee molding might have been nailed to the floor as securely as this molding or quarter round shown in the drawings, by making it thicker. Any square stick of suitable proportions for such a purpose would be the equivalent of the quarter round or ogee molding. The plaintiff substantially stated that his invention resided in the conception of a molding fastened to the floor so as to be drawn down with it, as it might shrink, leaving the baseboard proper freedom to shrink all by itself, in place of one fastened to the baseboard. In short, his invention is the conception that such a molding for such a purpose should be nailed to the floor, not the base. The plaintiff attempted to convey the impression that the quarter round was unknown prior to his invention, and that his invention brought it into use. He concedes, however, that by going a short distance from his home he found a mill with machinery that turned out the quarter round. Whether the molding used is rabbeted, or has a groove in the upper back edge, into which the baseboard proper may fit, the result is the same, as the principle is the same. Just what is meant by "secured to the wall, with freedom to shrink," is not apparent. The center piece is the baseboard or wainscoting, as the case may be; and, if it is ten feet long and eight inches wide, the only way to fasten it to the wall, and leave it perfect "freedom to shrink," is to use one screw or nail or bolt. If we use two, placed any distance apart, even if the same distance from the edge, the shrinkage will be somewhat interfered with. I can find no patentable invention in this intangible idea, "freedom to shrink." When, as described in the specifications, the baseboard or wainscoting, as the case may be, is held in place by the molding at the bottom, and another at the top—the one presenting an upward and the other a downward projection outside the lower and upper edges of the baseboard, or ends of the wainscoting, respectively—the baseboard or wainscoting has perfect freedom to shrink; that is, acted on by heat, the fibers close upon each other, and no nail, spike, bolt, or screw interferes. In such case the baseboard would, of its own weight, follow the floor in its shrinkage. In such case the only office or function of the lower molding would be to keep the baseboard in place; that is, back against the wall. When both an upper and lower molding are used, the baseboard or wainscoting is not necessarily fastened to the wall by nailing or by screws; but, when only the lower molding is used, the upper edge of the baseboard or wainscoting must be securely fastened to the wall. So say the specifications. In both claims, however, the center piece is secured to the wall. This is done by spikes or nails or screws, or their equivalent. Hence we have no such thing in the claims as a center piece held by the moldings.

The whole alleged invention is the holding of a baseboard or



wainscoting in place by strips of wood fastened to the floor in front of and next to the lower edge or ends of the baseboard or wainscoting, the other edge or ends being fastened to the wall; also a provision for adding, if desired, a molding at the upper edge of the baseboard or wainscoting, where they meet the plaster. If the plastering only comes to the upper edge of the baseboard or wainscoting before the shrinking, the molding, being fastened to the wall, independent of the center piece, will cover the space formed by the shrinkage. Claim 2 only differs from claim 1 in having the upper molding, to which attention has been called. These ideas are not only old in theory and practice, but the construction is old, long antedates the patent, and is so simple that it would occur to any carpenter and joiner possessing ordinary skill in the art. Take, for instance, the construction at the base; a piece of wood an inch square nailed to the floor in the angle formed by floor and baseboard accomplishes the purpose of the patent. A molding substituted presents a better appearance, but is not more useful. Or a strip of wood 2 inches wide and 1 inch thick, running under the baseboard, with another strip nailed on the front edge thereof in front of the baseboard, makes the shoe, when a shoe is desired, and accomplishes the purpose of the patent. At the upper edge of the baseboard or wainscoting a strip of any width, and one-eighth or one-sixteenth of an inch thicker than such center piece, nailed to the wall next such upper edge, with another strip of any thickness, but of sufficient width to extend down some distance in front of such upper edge of the baseboard or wainscoting, forms the molding spoken of in the patent, or its equivalent, and performs all its functions. Such construction was old and in common use over 40 years ago, but, in any event, is so simple and obvious that this court cannot find invention in plaintiff's device, or sustain his patent.

It is proven beyond reasonable doubt that substantially the same form of construction pointed out in the plaintiff's patent was in common use in the vicinity of plaintiff's residence in the construction of buildings, long before he filed his application for a patent. Woodward's National Architect, copyrighted in 1869, shows and describes substantially the same construction. See Miscellaneous "Details, Bases, &c.," plate No. 94. In specifications, design No. 1, "Inside Finish," providing for baseboards, it is prescribed, "All the base to tongue down three-eighths inch into a molded carpet strip, rebated to receive it." "Rebated" means the same as "rabbeted." This construction is shown in plate 94, and plaintiff's figure 4 is almost identical with it. So in plate 94 we have almost an exact reproduction of the upper part of figure 2 in the Decker patent, showing the same molding, and same connection or use with a center piece or baseboard or wainscoting. Again, in carpenters' specifications of design No. 10, "Inside Finish," we find (after providing for baseboards), "Insert the foot of the base into ogee molded carpet strips rebated one-half inch to receive it." In the carpentry art the carpet molding is the molding at angle of baseboard and floor.

In view of the prior art, as shown in prior patents in evidence, and prior publications relating to the art, it is found that there is no invention disclosed in plaintiff's patent. I also find that plaintiff's construction shown in his patent had been in public use some years before the date of his alleged invention, and long before the filing of his claim for a patent. In the Toussaint patent, relating to the construction of doors, No. 140,799, dated July 15, 1873, we find in the construction of doors, which is a part of the art of carpentry, rabbeted grooves in moldings to let in the adjacent parts and prevent the formation of openings, and also to prevent warping and shrinking. The drawings show the same construction in relation to a door that plaintiff's patent shows in relation to a baseboard and wainscoting. In the Fickett patent, No. 187,528, dated February 20, 1877, relating to the construction of frame houses, we find in the drawings, figure 1, precisely the same construction of a baseboard described and shown in the drawings of the plaintiff's patent. We have in the Fickett patent the rabbeted shoe for the bottom of the baseboard, and also a molding on top, which molding however, does not project over upon the face of the baseboard. In the Curtiss patent, No. 274,284, dated March 20, 1883, application filed January 19, 1883, relating to strips for repelling and destroying vermin, we find carpet moldings shown in the drawings and described in the specifications which are the same in principle and the same in construction as the plaintiff's. These carpet strips, which are the moldings in the angle formed by the floor and baseboard, are shown in figures 4, 5, and 6 substantially as a quarter round. Figure 7 has a rabbeted molding extending under the baseboard, and upward on the face thereof. Figure 10 has a quarter round in front of the lower part of the baseboard next the floor, then extending under the baseboard, and upward into a groove of the same, or behind the baseboard. In the Curtiss patent the specifications speak of figures 4, 5, 6, 7, 8, and 10 as representing various forms and arrangements of carpet or base moldings in cross-section. Further on in the specifications the patentee says:

"Referring to Figs. 4, 5, 6, 7, and 10, showing carpet moldings, I would remark that it is preferable that the moldings shown in these figures be nailed down to the floor, close up to the base, so that, as the floor beams shrink and take the floor with them, the vermin-proof molding will still close the aperture that may be made or increased between the floor and base, and still keep back and destroy any vermin that may attempt to pass through or between them. In Fig. 4 the molding has a groove, c, in the back, into which the vermin-proof felt or material, b, is folded and held fast. In Fig. 5 the felt is held in a similar groove by a wedging-strip, d. The backs of these moldings may be rabbeted, as shown, so as to let in the edge of the felt and allow the lip or top edge of the wooden molding to impinge directly on the face of the base or wall, as illustrated."

The whole construction of plaintiff's patent is shown in the Curtiss patent, and the very idea upon which the plaintiff's patent rests—the nailing of a molding to the floor instead of the baseboard—is specifically mentioned in the specifications of the Curtiss patent, as will be seen from the above quotation. It is well to mention that Curtiss did not patent the moldings, or the mode of putting

them together with baseboard and wainscoting. The patent relates to the insertion and addition of strips, covered with vermin-destroying material, to the moldings, baseboards, wainscoting, etc.

The complaint of the plaintiff must be dismissed, with costs.

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DAVIS CALYX DRILL CO. V. PLUNGER ELEVATOR CO.

(Circuit Court, S. D. New York. December 22, 1904.)

**PATENTS—ANTICIPATION—ROCK-DRILLING MACHINERY.**

The Davis patents, Nos. 694,534 and 694,535, one for a rock-boring apparatus, and the other for the process of boring rock by similar apparatus, which consists of a hollow drill, which cuts around a core and is carried by a hollow drill rod, the essential feature of the invention of the patents being a cup placed on the drill rod into which the drillings are forced by a jet of water up through the drill rod, are void for anticipation by the prior patent, No. 555,640, to the same patentee, which shows a similar cup.

In Equity. On final hearing.

James C. Chapin, for plaintiff.

Harold Binney, for defendant.

WHEELER, District Judge. This suit is brought upon patents Nos. 694,534 and 694,535, dated March 4, 1902, and granted to Francis H. Davis, assignor to the plaintiff; one for a rock-boring apparatus, and the other for the process of boring rocks by similar apparatus. The object of the inventions is the deep boring by an annular drill head around a core turned by a hollow drill rod of successive lengths working on shot to abrade the rock, down which water is carried for wetting the working face of the drill and bringing up the detritus. Formerly the detritus was brought to the surface by the water, which, as the boring became deep, required great force. The principal feature of this invention is a cup on the boring rod above the bit for receiving and holding the detritus, into which it will be carried by water of sufficient force to raise it to that height, however great the depth may be. The specification sets forth such a receiver or cup thus:

"Carried by the boring rod and bit, in which the grindings or millings may be received at a point intermediate of the bottom and top of the hole, and said cup will always occupy substantially the same relative position to the shot and bit, no matter what may be the depth of the hole being bored."

The claim of the mechanical patent is:

"In an apparatus for boring holes in rock or similar material in the earth's strata, the combination with a hollow boring rod, a hollow bit carried thereby, the working face of which is adapted to co-operate with shot substantially as described, and means whereby water may be forced into said bit, and thence upward around same, at a substantially uniform pressure, regardless of the depth of the hole, to carry away the millings or grinding therefrom; said means including a cup disposed above the bit for catching the said millings or grindings, said cup carried by the drill rod, and adapted to be lowered and raised therewith as the drill rod descends and ascends, substantially as set forth."

The defenses are, among others, anticipation by a prior patent, No. 555,640, dated March 3, 1896, and granted to Davis himself, and reissued in No. 11,597, dated April 27, 1897, for a core-boring apparatus, whereby the rock is flaked up by teeth on the boring face of the drill and carried by water through the drill rod up into a cup above the boring head on the drill rod, at a uniform distance from the working face of the drill, whatever the depth from the surface may be. The specification of the reissue says:

"Having, then, provided such a cup, which is definitely able to contain all the débris aforesaid, and having a jet of water no more powerful than is necessary to carry the débris above the top of the chip cup, at which point the speed of the current diminishes on account of the widening of the water space in the bore, the result is that the chips fall into the cup and fill it in regular order as they are produced.

"Now, in all diamond and other hydraulic drilling machinery, the whole, or almost all, of the cuttings or chips are caused to pass with the water up the bore to the surface, and to do this these drills require extremely powerful special steam pumps when any considerable depth is attained.

"I proceed on totally different principles. I provide that the chips and débris shall never be carried up to the surface by the ascending water."

And the fourth and sixth claims include the chip cup in the combination. The boring heads appear to be interchangeable, and the cup would operate in the same way to collect the chips, débris or detritus, so that it could be drawn up by the boring rod, instead of forced up by the water. It does not seem possible mechanically to distinguish the cup of that patent from the cup of this material patent, or the operation of it there from the operation of the cup in this process patent. What is shown in a prior patent cannot be claimed again by the same inventor. *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786.

Bill dismissed.

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#### HAARMANN-DE LAIRE-SCHAFFER CO. v. LEUDERS et al.

(Circuit Court, S. D. New York. November 9, 1904.)

##### 1. EQUITY—ORIGINAL BILL IN THE NATURE OF SUPPLEMENTAL BILL.

Where a bill to restrain infringement of a patent by an assignee conformed in form and substance to the requirements of an original bill in the nature of a supplemental bill, it was not objectionable on the ground that it was a supplemental bill only.

##### 2. PATENT—INFRINGEMENT—ACTION BY ASSIGNEE.

Where, pending a suit to restrain infringement of a patent, it was assigned, and the assignee filed an original bill in the nature of a supplemental bill, and claimed no title through persons not complainants in the original bill, but who joined in the assignment, the defendants could avail themselves of any equity or defense which had arisen since the original bill was filed, or which could be urged against the new complainant, but which did not exist against the original complainant; but in all other respects the assignee was entitled to the benefit of all the proceedings in the original suit.

C. A. L. Massie, for complainant.  
Hans von Briesen, for defendant.

WALLACE, Circuit Judge. The defendants have demurred to an original bill in the nature of a supplemental bill filed by leave of the court. The objection that the bill is a supplemental bill, and not an original bill in the nature of a supplemental bill, is without merit. The bill conforms in form and substance to the requirements of an original bill in the nature of a supplemental bill. Story's Equity Pleading (9th Ed.) § 353; Beach, Modern Equity Practice, § 512. Nor is there any merit in the contention that the complainant is asserting a different and more extensive title than that held by the complainants in the original suit. The original complainants were members of the copartnership of Haarmann & Reiner, some being dormant and others active partners, and this copartnership was the assignee and owner of the patent in suit. The assignment of this patent since the suit was brought to the corporation which is the present complainant occasioned the necessity for the present bill. It is true that some of the persons who appear to have joined in this assignment were not complainants in the original bill; but the present complainant does not allege that it has acquired any title from these persons; its bill avers that the original complainants have assigned to it the entire right, title, and interest in the patent. If these persons were in fact co-owners of the patent with the original complainants, the present complainant cannot under its bill set up any title derived from them. On the other hand, if the original complainants were not the sole owners of the patent, the defendants can avail themselves of the defense as fully as they would be entitled to in the original suit. They have a right to avail themselves of any equity or defense which has arisen since the original bill was filed, or which may be urged against the new complainant, but did not exist against the original complainants. In other respects the present complainant is entitled to the benefit of all the proceedings in the original suit. If the case made by the bill and proofs is one in which the original complainants would have been entitled to the relief sought by their bill if they had not transferred their interest, the present complainant is entitled to the same relief.

The demurrer is overruled, with costs.

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#### KIRCHBERGER v. NATTRASS & MENDES.

(Circuit Court, S. D. New York. December 10, 1904.)

##### PATENTS—INFRINGEMENT—ACETYLENE GAS BURNERS.

The Dolan patent, No. 589,342, for a process of burning acetylene gas, and for a burner tip adapted to carry out such process, *held* infringed on a motion for a preliminary injunction.

In Equity. Suit for infringement of letters patent No. 589,342 for an acetylene gas burner, granted August 31, 1897, to E. J. Dolan. On motion for preliminary injunction.

Louis C. Raegener, for the motion.

LACOMBE, Circuit Judge. The burners submitted in this case manifestly infringe the Dolan patent. Examination of them shows that they are identical with burners advertised in the Acetylene Journal of October, 1904, by the Crescent Novelty Company as the "Gem" burner. Apparently they are offered to the trade on some theory that they have been so altered from the burners in the former suit, which went to the Circuit Court of Appeals (128 Fed. 599), as to escape infringement. Indeed, another advertiser in the same journal states that its burners are made precisely in the way directed by the final decision, and quotes a single passage from the opinion, as follows:

"If the defendants are correct in their contention that the Bullier burner is practical, successful, and operative when made of lava or steatite, they are at liberty to use the same, or they are at liberty, having closed the aperture at the extreme end of the tip, which admittedly furnishes the air envelope for the gas, to use the aperture whereby the mixing of air with gas is secured."

This quotation must be read with the rest of the opinion, particularly with that part of it which describes the Bullier burner, the air passages of which "are located at such a distance below the head as to afford an opportunity for \* \* \* a thorough mixing of air and gas; while in the patent in suit the small chamber end orifices are so located at the uppermost end of the burner as to apparently prevent such mixing." The air apertures in these burners and in those shown in the advertisement are by no means Bullier apertures located so far below the orifice of combustion as to afford opportunity for the mixing of air and gas, but are Dolan apertures, so close to the tip as to facilitate the formation of the air envelope which is the feature of that patent.

Complainant may take order for preliminary injunction.

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UNITED STATES v. SOUTHERN RY. CO.

(District Court, S. D. Illinois. March 2, 1905.)

No. 10,637.

1. RAILROADS—CARS USED IN INTERSTATE TRAFFIC—STATUTE REQUIRING AUTOMATIC COUPLERS.

In an action against a railroad company engaged in interstate commerce to enforce the penalty for violation of section 2 of Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], which provides that "it shall be unlawful for any such interstate carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars," where it is shown that defendant hauled over its line and used in moving interstate traffic a car on which the safety coupler was broken, and which could not be uncoupled without the necessity of men going between the ends of the cars, it is not a defense that defendant exercised reasonable care and diligence to keep the coupling apparatus on its cars in repair.

**2. SAME—CARS USED IN INTERSTATE TRAFFIC.**

A car loaded with coal, to be delivered to a consignee in another state, is "used in moving interstate traffic," within the meaning of Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 8174], by the railroad company which takes it from the place of loading, although such company only undertakes to deliver it to a connecting carrier within the same state.

**3. SAME—CARE IN INSPECTION.**

Where government inspectors found nine cars with defective coupling appliances among those cut out by defendant railroad company at one time for delivery to a connecting carrier, defendant cannot be held to have exercised reasonable care and diligence to discover and remedy the defects.

**4. SAME—CAR NOT TO BE USED IF COUPLING DEFECTIVE.**

What is forbidden by the act is the use of cars which cannot be coupled automatically by impact and uncoupled without the necessity of men going between the cars; and unless the car is so equipped it is not to be put in service, and not to be used.

**5. SAME—PLACING "M. C. B. DEFECT CARD" ON CAR DOES NOT RELIEVE DEFENDANT FROM RESPONSIBILITY.**

Placing an "M. C. B. defect card" upon a car, and noting on such car defects forbidden by the safety appliance act, which is notice to all connecting lines that the defendant sent the car out defective, and that other lines using the car would not have to account to defendant for the particular injury or defect noted on the card, is such a deliberate violation of the statute as to amount to a defiance of the law.

This action is brought under section 6 of the act in regard to safety appliances, approved March 2, 1893, c. 196, 27 Stat. 532, as amended April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175], which provides a penalty of \$100 for every violation of the act, and refers to the violation covered by section 2 of said act (27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]).

The material averments of the declaration are as follows: First, that the defendant is a common carrier engaged in interstate commerce by railroad; second, that on the 29th day of November, 1904, in the county of St. Clair, in the Southern District of Illinois, the defendant hauled and used on its line of railway coal car No. 1,353, and marked "L. E. & St. L. O. R.;" which car had on the "A" end thereof an inoperative uncoupling mechanism, so faulty that in handling said car it could not be uncoupled without the necessity of a person going between the end of said car and the one to which it might be coupled; third, that said car was then used in moving interstate traffic. The declaration also negatives the proviso contained in section 6 by averring that the car was not a four-wheel car, nor an eight-wheel standard logging car. In support of the first averment it was admitted on trial by counsel for the defendant that the defendant at the time stated in the declaration operated a line of railroad from East St. Louis, Ill., to Louisville, in the state of Kentucky. In further support of this averment the plaintiff introduced the waybill on which said car was hauled by the defendant, showing that it was billed by the defendant company from New Baden, Ill., to East St. Louis, Ill., consigned to the St. Louis Coal Company (the name of C. A. Ringhoff, Howard Station, "Bridge," and "Pacific," being written on the bill), and that at East St. Louis, Ill., the defendant company issued another waybill for the same car to the Missouri Pacific Railroad at St. Louis, Mo., and under the heading "Consignee and Final Destination" appeared, "C. A. Ringhoff, Howard Station, St. Louis, Missouri." It appeared that the car was loaded with coal from certain mines at New Baden, Ill., and that said coal was conveyed by the car to its destination at or near St. Louis, Mo. Said waybills were also offered to support the third averment in the declaration, namely, to show that the car at the time was engaged in moving interstate traffic. In support of the second averment, Messrs. Wright and Belnap, inspectors of the Interstate Commerce Commission, tes-

tified that they first inspected this car between 2 and 3 p. m. on November 29, 1904, on track No. 14 in the new yard or the Denver-side yard of the Southern Railway Company at East St. Louis, Ill., and found that the clevis, which is a part of the chain (also called "pin-chain") connecting the lever of the uncoupling mechanism with the lock pin, was missing from the "A" end of the car, rendering the uncoupling mechanism entirely inoperative on that end of the car. It further appeared from the testimony of said witnesses and the witnesses J. J. O'Brien and J. J. Devanney, that, with the uncoupling mechanism of said car in the condition in which it was found, it was impossible to uncouple the car at its "A" end from the car to which it might have been coupled without the necessity of a man going between the ends of the cars in order to lift the lock pin, or "lock block," as it is sometimes called. There was no testimony contradicting these statements. Said car was discovered in its defective condition at about the same time that eight other cars in the same drag were discovered to be in bad order as to their safety appliances. The yard of the defendant company in which the car was found is about two miles from the yard of the Terminal Railroad Association, near the Eads Bridge, to which it was delivered by the defendant company about 4:25 p. m. on November 29, 1904. The Terminal Railroad Association, to which the car was delivered, is a road engaged in transfer business by which passengers and freight are transferred to and fro between St. Louis, Mo., and East St. Louis, Ill., by way of the Eads Bridge, and the Terminal received this car upon the billing of the defendant company for the purpose of transferring it to its destination in Missouri. It further appeared from the evidence that, after the second or transfer billing was made out by the defendant company, the car was hauled by it under said billing from its Denver-side yards, a distance of about two miles, to the yards of the Terminal Railroad Association. The inspectors of the Interstate Commerce Commission went with said drag of cars, including the car involved in this case, from the Denver-side yards of the defendant company to the yards of the Terminal Railroad Association, and there called the attention of Mr. J. J. Devanney, foreman of the car department of the Terminal Railroad Association, to its defective condition. He noted the defect, and ordered the car repaired by the agents of the Terminal Railroad Association, and it was repaired by its employes C. E. Jones and John Waddell before the car crossed the river to St. Louis. At the time that Mr. Devanney ordered this car to be repaired, there was no mark upon it, made by the agents of the defendant company, showing that it was in bad order, and no directions were given by any agent of the defendant company for its repair. Morris Mehan, switchman for the defendant company at its Denver-side yards, testified that he frequently had to go between the ends of said cars to make uncouplings.

The defendant, as a defense, insisted, first, that the car in question was hauled by it from New Baden, Ill., to East St. Louis, Ill., and from there it was consigned to the Terminal Railroad Association for delivery across the Mississippi river from East St. Louis, Ill., to its destination in St. Louis, Mo., and that at the time when the defendant company hauled said car the car was not engaged in hauling interstate traffic, and that the defendant company did not transfer the car across the river. Secondly, it was insisted on behalf of defendant that the car in question had been originally so supplied with safety couplers as to comply with the federal statute, that in handling such a car the defendant could only be required to exercise reasonable diligence to see that it was kept in repair, that it had exercised such diligence in this case, and that it could not be held responsible for any defect which was not discovered by the exercise of such reasonable care. In support of this position it attempted to show by its chief car inspector and other inspectors that all cars were carefully inspected when they came into its yards, and that this car and others involved in these cases had been so inspected soon after they entered the yard; also that it again inspected cars made up in trains to go out to the eastward, but did not again inspect cars made up in drags to go to the Terminal. It was further insisted that an arrangement existed between the defendant company and the Terminal Railroad Association by which cars were delivered by the former to the latter, and, if found defective in any respect, they were to be repaired, and the ex-



pense charged to the defendant company. In this connection the defendant offered an "M. C. B. defect card," which says, among other things, "will be received at any point on this company's lines with the following defects." This card was to be tacked on the car on which the defect was found. It was admitted by Mr. Holloway, the chief inspector for the defendant, that this card was used by the defendant to cover defects under the safety appliance act, as well as other defects. Mr. O'Brien, foreman of the car department of the Terminal Railroad Association, testified that his company would not put this card on a car to cover defects under the safety appliance act, and that the card was used to show that connecting lines would not be charged with the defects noted thereon. Counsel for defendant further insisted that it was not practicable to again inspect these cars before sending them to the Terminal Railroad Association; that the original inspection given them when they arrived in the Southern Yards was sufficient, and a further inspection was unnecessary, as the Terminal Railroad Association was in duty bound to inspect these cars upon their receipt from the Southern Railway Company, and before sending them across the river. But the chief inspector for the defendant company further testified that it would have been practicable to further inspect them before sending them to the Terminal Railroad Association if a sufficient force of inspectors was provided. It further appeared that the defendant company is now inspecting the drags before sending to the Terminal. It further appeared from the evidence that at the time this car was discovered the defendant employed one day and one night inspector, and one day and one night light repairer, in the switchyards, and eight repairers on the repair tracks, while now it has three light repairers in the switchyards and twelve men working at the repair tracks; making an increase of 200 per cent. in light repairs since the filing of these suits, and 50 per cent. increase on their repair tracks. The inspection cards used by the yard inspector of the defendant were introduced in evidence, showing that the cars in question were not marked in bad order; but on cross-examination the inspector admitted that it was not his custom to note on the card such defects as appear in this case, but that he called the attention of the light-repair man to them, and directed him to make the repairs. Upon this showing it was insisted upon behalf of the plaintiff that these cards become entirely valueless as evidence, as they were not even supposed to show the defect in question. The evidence further showed that this particular car arrived in the Denver-side yards on November 28, 1904, and was delivered to the Terminal on the afternoon of November 29, 1904. As a part of defendant's evidence there was offered circular No. 98, dated July 8, 1904, approved by S. R. Kennedy, superintendent, addressed "To all concerned," and stating that the defendant after July 10, 1904, would decline to receive from any connecting line any cars offered with defective safety appliances. In rebuttal plaintiff offered circular No. 53, issued June 11, 1904, by the Terminal Railroad Association, stating that after July 1, 1904, it would refuse to receive any cars having defective coupling appliances; also circular No. 118 of the Terminal, dated December 1, 1904, again calling attention to its circular No. 53, stating that "the only way to handle satisfactorily is for each line to make repairs to cars with defective safety appliances before offering to connections," and "refusing to receive from connections all cars with defective safety appliances." It appeared from the evidence that all the cars involved in cases against this defendant were found in one drag, and were all forwarded by the Terminal across the river upon billings furnished by this defendant, and were all destined for delivery to St. Louis, Mo.

The propositions of law which the defendant asked should be held by the court as applicable to the case are as follows:

"(1) It appears from the evidence in this case that the defendant had equipped the cars in question with couplers coupling automatically by impact, and which would be uncoupled without the necessity of a man going between the ends of the cars, and that they had been provided with grab irons and hand holds in the ends and sides of each car, for the greater security of men in coupling and uncoupling cars, as required by the act of Congress of March 2, 1893, amended April 1, 1896, and it is only contended by the government that the defendant is liable on account of not keeping these equipments in

repair. It is held as the law in such case that the defendant is only required to exercise reasonable care and diligence to keep such coupling apparatus and grab irons in repair.

"(2) The court holds that a railroad company engaged in interstate commerce, which has equipped its cars with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, and has provided its cars with grab irons or hand holds in the ends and sides of each of its cars for greater security of men in coupling and uncoupling cars, as provided by the act of Congress of March 2, 1893, amended April 1, 1896—that such railroad company has not violated such act of Congress by hauling or permitting to be hauled or used on its line a car with such coupling apparatus or grab irons or hand holds out of repair, if it appears from the evidence that such railroad company has used reasonable care and diligence to keep such coupling apparatus and grab irons and hand holds in good repair."

Thos. Worthington, U. S. Atty., and H. A. Converse, Asst. U. S. Atty.

Edward C. Kramer, for defendant.

HUMPHREY, District Judge (after the above statement of facts). The defendant at the time in question was a common carrier engaged in interstate commerce. The coupling device was defective and inoperative, and the car at the time in question was being used in moving interstate traffic. The evidence is conclusive upon all these points. The courts have spoken so frequently and so plainly in defining interstate commerce, and the use of cars engaged in such commerce, that it should suffice to say that the evidence adduced as to the character of the defendant as an interstate carrier, and of the particular service in which the car 1,353 was being moved, meets all the conditions laid down by the courts as a test of interstate commerce, even to the latest expression of the Supreme Court of the United States, announced in *Johnson v. Southern Pacific Company* (December 19, 1904) 25 Sup. Ct. 158, 49 L. Ed. —.

The evidence was overwhelming that the car was defective as to its safety appliances, and there was no contention on the part of the defendant that it was not in the defective condition claimed and proven by witnesses for the government. The defense rested on the contention that, if the car had been originally equipped with the coupling device required by law, it would not be liable under the statute for using a car whose safety appliances were defective, if it had exercised reasonable care and diligence to discover and repair the defect before placing the car in service. The defendant introduced evidence tending to show care and diligence in the employment of inspectors and repairers, and, at the close of the case, asked the court to hold propositions of law based upon this theory of defense.

The act of 1893 (Act March 2, 1893, c. 196, 27 Stat. 531), amended in 1896 (Act April 1, 1896, c. 87, 29 Stat. 85), provided:

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." [U. S. Comp. St. 1901, p. 3174.]

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any

car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation." [U. S. Comp. St. 1901, p. 8175.]

What the act plainly forbade was the use of cars which could not be coupled automatically by impact, and uncoupled without the necessity of men going between the cars. Unless a car was so equipped, it was not to be put in service. It was not to be used. The act plainly prohibited its use, and fixed a penalty therefor.

While the act is penal and to be construed strictly, the construction given it by the courts must fairly carry out the legislative intent as described in the act. *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; *Johnson v. Southern Pacific*, *supra*. What is the legislative intent here? It is clearly expressed in the first words of the preamble, "An act to promote the safety of employees," etc. Sections 1 and 2 of the act express the same purpose. The Supreme Court, in the *Johnson Case*, *supra*, in construing this act, has clearly indicated that it should be given such a construction as will accomplish the purpose for which it was intended. The construction contended for by defendant would practically nullify the act. The statute says that a common carrier shall not haul or use cars in a certain described condition. The defendant asks the court to hold, in effect, that they cannot haul the car in that condition, provided they have failed to use diligence to discover its defective condition, but that, if they have used due diligence, they may haul the car in its defective condition. In all such cases it would be impossible for the officers of the government to determine in advance whether a statute has been violated or not; but, before a prosecution could be properly instituted, they should go to the defendant company; ascertain what care it had used in regard to a certain car; determine as a matter of fact and law, whether the acts of the defendant constituted due diligence, and from that determine whether a prosecution might be safely instituted. It is evident that such a defense would take the very life out of the act in question, and render its enforcement impossible except in a few isolated cases. The courts cannot by judicial legislation read into the act any language which will excuse offenders, any more than they can read into it language which would increase their liability. Courts must enforce the law as they find it.

In *State ex rel. Barton Co. v. Kansas City, Ft. S. & G. R. Co.* (C. C.) 32 Fed. 722, Justice Brewer, in rendering his decision in a case against a railroad company for violating a statute regulating railroad crossings, says in part:

"Whatever criticism may be placed upon the use of the word 'conditions,' the intent of the Legislature is plain; and, although this is a penal statute, it is not to be so construed as to defeat the intent of the lawmaking power, giving full force to the intent of the Legislature. It is obvious that it meant to enact that a failure to comply with this mandatory provision cast upon the delinquent the prescribed penalty."

I have been unable to find that this character of defense has been sustained in any case which reached the courts of last resort. Counsel for defendant has not cited any authority in support of this doctrine of due diligence as a defense to a penal action. It is in the same cate-

gory with the question of intent under the revenue laws, and of good faith under statutes against handling adulterated goods, drugs, etc. It is certainly well established that the good intentions or the lack of evil intent on the part of a liquor dealer is no defense to a prosecution for the statutory penalty. If this is no defense in a quasi criminal action, it certainly would be none in a civil action involving the same facts. It has been held, under statutes called "police regulations for the public health," that the good faith, diligence, or good intentions of the vendor are no defense, if the facts are that he has sold goods in violation of the statute. Statutes providing that "whoever sells or keeps, or offers for sale, adulterated milk, or milk to which water or other foreign substances have been added," shall be punished, etc., have been held to throw the risk upon the seller of knowing that the article he offers for sale is not adulterated, and it is not necessary, in an indictment under such a statute, to allege or prove criminal intent or guilty knowledge. 1 Am. & Eng. Enc. of Law (2d Ed.) p. 744, note 1, and criminal cases cited. The same rule applies to cases forbidding the sale of oleomargarine or other imitations of dairy products unless express notice be given to the purchaser. *State v. Newton*, 50 N. J. Law, 549, 18 Atl. 77; *Com. v. Gray*, 150 Mass. 327, 23 N. E. 47. In *Reg. v. Woodrow*, 15 M. & W. 404, a dealer in and retailer of tobacco was held liable to the penalty imposed by statute for having in his possession adulterated tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect it was not so. One may be convicted of selling adulterated green tea under statute 35 & 36 Vict. 74, although he did not know that the tea was adulterated. L. R. 9 Q. B. 494. To convict one of violating the act making it a misdemeanor to sell adulterated wines, it is not necessary to prove that he knew the wines to be adulterated. *Altschul v. State of Ohio*, 8 Ohio Cir. Ct. R. 214, 4 O. C. D. 402. "The acts are properly construed as imposing the penalty when the act was done, no matter how innocently; and in such case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that, if he fails to so do, he does it at his peril." *Wills, J.*, in *Reg. v. Tolson*, 23 Q. B. Div. 163. "Many statutes which are in the nature of police regulations, as this is, impose criminal penalties, irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270 (the opinion in above is by Cooley, J.); *People v. Snowberger* (Mich.) 71 N. W. 497, 67 Am. St. Rep. 449.

The propositions of law submitted by defendant are therefore denied. However, the case does not depend on the holding of the court on the propositions of law. The defendant did not exercise reasonable care and diligence to discover and repair the defects. The evidence shows that the inspection made by defendant's servants for the purpose of discovering and repairing defects in safety appliances before putting the car in use was so weak as to be almost farcical. The force of inspectors and repairers was wholly insufficient at the time, and has been largely increased since. The government inspectors had no difficulty in discovering the defects. They found eight other cars in a de-

fective condition in the same cut of cars. Such wholesale failure to discover defects implies method, and the evidence further supplies the reason. The defendant company, in the conduct of its business, contemplated and expected that in some instances it would put cars in use with defective safety appliances. The testimony of the chief inspector, Holloway, shows this. He testified that the company used what is called an "M. C. B. card." When this card was placed on a defective car, with the defect described on the card, it was notice to all connecting lines that the defendant sent the car out defective, and that other lines using the car would not have to account to defendant for the particular injury or defect noted on the card. He also testified that in some instances these cards were used for cars defective as to safety appliances. Here is such deliberate violation of the statute as to amount to defiance of the law.

The act is so highly meritorious, so generous in its purposes, so in harmony with the best sentiment of a humane people and a progressive government, that it appeals strongly to the courts for its prompt and vigorous enforcement.

The defendant is found guilty, and judgment will be entered for the statutory penalty.

## THE THETA.

(District Court, S. D. New York. February 8, 1905.)

## 1. SALVAGE—AMOUNT OF AWARD—SAVING OF DERELICT.

A steamship bound from Norfolk to Boston, laden with coal, when off the coast of Delaware picked up a lumber-laden schooner which had been seriously injured in a collision and abandoned by her crew, and towed her to the port of New York. When found, the schooner's main deck was under water, and the towing was slow and difficult, owing to strong winds, and required  $2\frac{1}{2}$  days, with the assistance of tugs later employed by the steamer, which had previously broken two hawsers. It was also attended with some danger to men who were sent on board the schooner to steer her. The steamer was worth \$275,000, and the saved value of the schooner and cargo was about \$10,000. A considerable expense was incurred by the steamer. *Held*, that she was entitled to an award of 50 per cent. of the saved value of the schooner and cargo after paying the expenses.

[Ed. Note.—Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

## 2. SAME.

In making a salvage award for the bringing into port of a derelict, the danger to navigation from her remaining afloat should be taken into consideration, and the award should be liberal, and such as to encourage the rendering of such services.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, §§ 69, 83.]

In Admiralty. Suit to recover salvage.

Butler, Notman & Mynderse, for libellants.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This action was brought by the United States & Porto Rico Navigation Company, the owner of the steamer *Pathfinder*, the New York and Porto Rico Steamship Company, the

charterer of the same, Arthur D. Curran and Smith P. Burton, Jr., the sub-charterers of the same, and James B. Parse, the master of the same, on behalf of himself and 27 other members of the crew, against the British schooner Theta and her cargo of lumber, to recover salvage compensation for bringing the schooner and cargo into port.

The steamer was bound from Norfolk to Boston with a full cargo of coal. On Sunday morning September 11th, 1904, about 9 o'clock A. M. she sighted the schooner. The steamer was then about 15 miles S. S. W. from the Five Fathoms Bank Lightship and steering N. N. E. The schooner was directly ahead of the steamer and about 10 miles from the lightship and still had some of her sails set. She was heading about N. W. It is alleged in the answer, verified by the master of the schooner, that she had been in a collision that morning with a steamer, about 1 o'clock, while on a voyage from Brunswick, Georgia, to Dorchester, New Brunswick, and so much injured that the hull filled and she threatened to capsize. She was abandoned by her master and crew about 5:30 o'clock of the same morning.

The steamer approached the schooner under reduced speed and steamed around her to investigate her condition. When it was found that she was abandoned, a life boat was launched, with some difficulty, and manned with the second mate and 4 men, who went aboard. At the time there was a strong wind from the north-east, which caused a choppy sea. When these men came back to the steamer and reported the schooner's plight, a new 6 inch manilla hawser, 130 fathoms long, was prepared as a tow line and run to the schooner with the life boat, by means of a small line and the schooner's hand winch. The main decks of the schooner were under water, also part of the deck cargo, and 3 or 4 feet of water were upon the cabin floor. The wheel of the steering gear was carried away, with the blocks and tackle attached to it. The schooner's starboard quarter was cut off. It was about 2 o'clock in the afternoon when the towing preparations were completed and the steamer started slowly ahead but in about 5 minutes the hawser parted in the middle, about half way between the vessels. The whole length of the hawser was out in addition to about 20 fathoms of the schooner's anchor chain, to which it was shackled. The steamer had a steel hawser aboard, which was then fastened to the schooner's port anchor chain and the towing was resumed about 5:30 o'clock. The vessels proceeded very slowly until daybreak the next morning, and up to that time made some 15 or 16 miles. The schooner had sheered a good deal during this towing, which caused more or less of a strain upon the steamer's engines. No men from the steamer had been left aboard the schooner during the night but in the morning of the 12th, the steamer was stopped and the life boat launched again, this time manned by the master, second mate and 5 men. The object of the visit was to rig up steering gear, for which purpose blocks and tackle, with other necessary gear, were taken from the steamer. Over the schooner's starboard quarter, where it was cut off, a spanker gaff was rigged from which a tackle was run to the tiller. On the port side a tackle was hooked outside of the quarter of the schooner, to assist in the

steering. This work occupied about 2 hours. The master returned to his steamer but the men remained on the schooner all day steering her, which was troublesome work but done effectively. During the day, the wind shifted to the south-west and there was a fresh breeze which created a choppy sea in the afternoon. The sea had gone down during the morning, so that it was better for towing than it had been the preceding day. Towing was continued during the day but at 8 o'clock that night, the steel hawser parted from an increase of the sea. The master then signalled to the men on board the schooner to anchor, which they did, with some difficulty, in 12 fathoms of water about 4 miles off Shrewsbury. About this time two tugs appeared on the scene and were employed by the master of the steamer. They attended the tow thereafter and did part of the towing. The hawser had been buoyed as a matter of precaution, so that it would not be lost if parted. The steamer stood by and the men were taken off, excepting 2. When those who came to the steamer had obtained something to eat, the second mate, the carpenter and 1 man were sent back to the schooner to remain during the night. That night, the wind shifted to north north-east and blew strongly, making a choppy sea, and it rained hard. On the 13th, the wind was high from the north-east, making some sea. In the morning, the second mate came to the steamer and the master sent 3 or 4 men back with him to heave up the anchor, but one of the chain shackles jammed on the windlass and it was cut off with considerable trouble. In the meantime, the steamer had picked up the hawser and the towing to New York was resumed. After that the hawser held until the turn around the Southwest Spit was being made.

The Pathfinder was a 1400 horse power, 3 years old steel freighting steamer, 1800 tons net and 2900 tons gross register. She was 318 feet long, 44 feet 11 inches beam and had 24 feet depth of hold. She was fully loaded with coal and left Norfolk September 10th. After she had brought the schooner into port, she proceeded, on her voyage to Boston.

The Theta appears to have been a British schooner of 420 tons register. She was 134 feet long, and 35 feet beam and 12 feet depth of hold, built in 1901, and hailing from Windsor, Nova Scotia. She had when starting on the voyage a full cargo of 385,000 feet of lumber, partly on deck.

The saved lumber, some 257,690 feet, was sold in New York and brought \$2,557.52, net, and it is stipulated that this amount constitutes the avails of the cargo for salvage purposes.

There is a dispute as to the value of the vessels.

The libellants contend that the Pathfinder was worth \$275,000. This valuation was partly based upon a sale of the steamer to the U. S. & Porto Rico Navigation Company in December, 1902, at \$319,000, a portion of which was paid in bonds of that company. After allowing for depreciation, it is testified that the vessel at the time she rendered these services, was worth the sum contended for and I find nothing in the record to overcome or affect the estimate. It is therefore adopted.

The libellants contend that the salvage value of the schooner was \$11,875, as testified by an expert called to appraise her in her damaged condition. This was based upon an original cost of \$28,000, when she was launched in June, 1901, as stated by the managing owner; an annual depreciation of 6% for  $3\frac{1}{4}$  years, and the cost of repairing, estimated at \$10,000. It, however, appears by the testimony of the managing owner that he confounded this vessel with another when he stated that this one cost \$28,000, and that her actual cost was \$21,200. Testimony as to similar vessels built about the same time shows that the estimate of \$21,200 fairly represents the original value. Proceeding upon that and allowing for the testified depreciation and cost of repairs, \$7300 may safely be assumed to represent the damaged value when she was saved. Adding the agreed value of the cargo to this amount, it appears that \$9857.52 represents the total saved value.

Some expenses were incurred by the steamer incident to the towage. They were as follows:

Value of manilla hawser, practically destroyed.....	\$106 00
Value of wire hawser do do .....	125 00
40 extra tons of coal at \$4.....	160 00
Watching Theta and cargo.....	118 00
Towage services of tugs, viz: Atwood.....	125 00
Unique.....	100 00
	<hr/>
	225 00
Wharfage paid for lighter in discharging lumber.....	4 00
Entering at Custom House, New York.....	8 17
Tugs shifting lighter.....	8 00
Pilotage on Theta.....	47 32
Medical inspection on Theta.....	8 00
Wharfage do 30 days.....	153 00
Longshoremen docking Theta.....	3 20
Kerosene oil & wicks used on lighter.....	1 64
	<hr/>
Making a total of.....	\$957 33

The libellant, the New York & Porto Rico Steamship Company paid these items and is first entitled to recover this sum. *The Le Jonet*, 1 Asp. Mar. Cas. 438; *The Agnes Manning* (D. C.) 59 Fed. 481.

The libellants claim to be entitled to a salvage remuneration of 50% of the balance of \$8900.19, on account of the Theta being a derelict, the probability of her drifting ashore, and thereby becoming a total loss, and the removal, in any event, of a dangerous obstruction to navigation; and further because the libellants' services were highly meritorious, prompt and successful and were performed at some risk to the steamer.

The master of the Theta, as claimant, while admitting that the services were of a meritorious character, urges that they were not extraordinary and involved no elements of hazard or special difficulty; he also urges that whatever mishaps attended the venture were due to the ignorance and inexperience of the Pathfinder's officers as to ocean towing; and that the salvors are therefore entitled only to a moderate compensation.

The services were certainly timely and successful. Without them, the probability is that the schooner would soon have drifted ashore, in the vicinity of Cape Henlopen, and become a total loss. The tow-



age, owing to the fact that the vessel was wholly submerged, was very difficult and required great patience and care. The deviation of the steamer from her course to Boston to tow the schooner into New York must also be considered, and the risk of danger to the steamer by getting the broken hawsers entangled in her screw. I do not find that there was any lack of skill in conducting the enterprise but, on the contrary, that it was carried on to the successful end with care and prudence.

In many cases cited by the libellants, 50% has been allowed. In many others, cited by the claimant, a less percentage has been awarded. It is said that the rule to allow 50% in case of a derelict no longer obtains. The Janet Court, 8 Asp. Mar. Cas. 223. That was a case of salving an abandoned barque of the value, with cargo and freight, of £7350. £3000 were allowed to a steamer of the value of £15,000, as a salvage for 8 days' services. It was there said (224):

"In this case a derelict vessel, an iron barque of 900 tons register, was picked up to the westward of and not very far from the Bermudas, and it was decided on account of the weather, and probably wisely, to tow her to St. Thomas. The main element, of course, in this case is that the vessel was derelict. The fact that the subject of a salvage is a derelict does not now, and I doubt if it ever really did, carry with it a right to remuneration consisting of one-half, or a third, or any specific proportion of the value of the property saved. There is no magic in the term 'derelict'; but what is important is that it imports a certain condition of things introducing elements which tend, on the general principles of salvage, to raise the amount of salvage reward. There are three conditions which a derelict generally fulfills. The first, and perhaps the main, element to be considered, in an award of salvage, is the risk to which the salvaged ship and her cargo are exposed. In the case of a derelict this risk is generally very high; and in this particular case it is difficult to my mind, to imagine circumstances under which the risk to the vessel salvaged could have been greater. She was abandoned by her crew. She was dismantled, and therefore not easy to be seen by a passing vessel; and, more than that, she was left by her crew in such a position, with the hatches open, that she probably would before very long have foundered. I do not say that the abandonment was in any way wrongful, for they no doubt believed that she was in a hopeless condition, and that it was the best thing to be done. She had already some water in her, and every wave that washed over her added to it, and made it more likely she would founder. The second consideration to which the case of a derelict gives rise, is that she has no men on board her, and has to be approached without such aid as they could afford; that, although in calm weather there is no great difference in approaching a derelict as compared with any other vessel, if there is any sea the difficulty is increased, because there is nobody to let down a ladder or throw a rope, or otherwise assist in the attempt to board from a boat. In the present instance, perhaps, this difficulty was not very great. Then there is another condition which, in this case, was fulfilled to a very considerable extent, because it was necessary to put four men on board the vessel, whose position was not without risk—the Trinity Masters tell me that the risk ought to be considered—and the labour cast on the remainder of the crew of the salving vessel left on board their own vessel was, of course, very considerably increased."

The services in the case at bar did not exceed  $2\frac{1}{2}$  days, but the value of the towing steamer was much greater than in The Janet Court and the saved value much less. The element of removing the dangerous wreck at once from the crowded waters where its condition exposed other vessels to considerable danger is an element not apparently considered, if presented, in The Janet Court. A larger allowance in a

case of this kind will be more in accordance with the majority of decisions in this country and act as an incentive to steam vessels to take derelicts in tow and bring them to port. In *The Agnes Manning* (D. C.) 59 Fed. 481, 482, Judge Benedict said (482):

"The appraised value of the *Manning* is \$27,000, and her cargo \$2,000. The service was performed at an expense to the owners of the *Exeter City* of \$850. The remarks of this court made in deciding the case of *The Anna*, 6 Ben. 166, Fed. Cas. No. 398, more than 20 years ago, where it is said: 'For the taking in charge and saving of a wreck so situated the reward should be such as to insure at all times the rendering of any amount of labor, the incurring of any risk, and the deviation by any vessel from any voyage, in order to supply the wreck with a crew, and make her presence safe,' may be repeated here.

The libellants are entitled to a liberal salvage compensation for the services rendered. The only question is what would be a liberal compensation. It is claimed on behalf of the libellants that the amount awarded should very much exceed the average amount heretofore given in cases of derelict, it being now apparent that the rewards given are not sufficient to induce vessels to incur the hazard of towing a wreck, so that commerce is impaired by the number of floating wrecks left abandoned, and the government itself has felt it its duty to send national vessels out in order to destroy these obstructions to navigation. This consideration is not without weight in determining the amount of salvage in a case like this. In my opinion, 50 per cent. of the value of the property saved will be a liberal reward, deducting first the sum of \$850, expended by the salvors, which sum is to be first paid to them."

The same proportion of value has been allowed in a number of cases of derelicts.

Mr. Justice Story said, in *The Henry Ewbank*, 11 Fed. Cas. 1166, citing cases, (1170):

"I have hitherto adhered with an unshrinking confidence to the general rule of a moiety in cases of derelict."

And in *The Boston*, 3 Fed. Cas. 929, he said (936):

"In cases of derelict, the well known and favored rule in ordinary cases is, to allow one half as salvage."

In *The Lahaina* (D. C.) 19 Fed. 923, Judge Benedict said (924):

"In regard to the schooner, where an appearance has been entered for the owners, and they have been heard upon the question of the amount of salvage proper to be allowed of the proceeds of the vessel, considering, in connection with the circumstances already mentioned, the small value of the property saved, the value of the salving ship, and the fact that, had not the schooner been taken in tow, she would have been abandoned, a water logged wreck, in the track of vessels bound to New York, I am of the opinion that one-half of the net proceeds of the schooner must be allowed to the salvors for salvage."

All salvage cases are, of course, to be determined on their particular facts and no general rule can be laid down. Here, it seems to me that the interests of commerce will be best served by an allowance of 50 per cent of the saved value, after deducting the expenses indicated above.

Three-fourths of the salvage will be divided equally between the chartered owner, the New York & Porto Rico Steamship Company, and the sub-charterers, Curran & Burton, in conformity with the charter between them, wherein it was provided:

"23. All derelicts, salvage and towage to be for Owners' and Charterers' equal benefit, after deducting expenses incident thereto, and the settlement of such claim shall be attended to by Owners."

The master and crew of the steamer should receive the remaining fourth of the salvage, which will be divided into parts, the number of parts to be increased so as to give the master three parts and the second officer and men who went on the schooner two parts each. The division will be according to wages. If necessary, a reference may be had to properly apportion the award to the master and crew.

Decree accordingly.

**EMPIRE STATE CATTLE CO. et al. v. ATCHISON, T. & S. F. RY. CO.**

**MINNESOTA & D. CATTLE CO. v. SAME.**

(Circuit Court, D. Kansas, First Division. January 25, 1905.)

Nos. 8,155, 8,157.

**1. NEGLIGENCE—WHEN ACTIONABLE—PROXIMATE CAUSE OF INJURY.**

To give a right of action for an injury on the ground of defendant's negligence, the injury must have been the natural and probable consequence of such negligence, and such as, under the circumstances of the case, might and ought to have been foreseen.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 60-82.]

**2. CARRIER—LOSS OF PROPERTY THROUGH ACT OF GOD—NEGLIGENCE.**

A carrier is not liable for a loss of property in shipment through an act of God, which could not reasonably have been foreseen, although, but for its previous negligence, by which the shipment was delayed, the property would have escaped the danger, and the loss would not have occurred. In such case the negligence is not the proximate cause of the injury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 525, 530, 540-542.]

**3. SAME—NEGLIGENCE—DIVERSION OF SHIPMENT TO ANOTHER LINE.**

Where a contract for a through shipment of stock by railroad did not specify the lines over which the shipment should be made, but the stock was routed by the initial carrier over certain lines, it was not negligence for an intermediate carrier to divert the shipment to a different line, where, owing to floods, it could not be delivered to or taken by the next connecting carrier, and where no danger of loss or injury by reason of the diversion could reasonably have been anticipated.

**4. SAME.**

Defendant railroad company had a large shipment of cattle owned by plaintiffs, to be taken over its line and delivered to a connecting carrier at Atchison, Kan. Owing to floods, it was unable to reach that place with the shipment, and was also notified by the connecting carrier that it could not receive and forward the cattle from there, because of washouts on its line. Neither road had yards in which they could be placed at Atchison, and defendant arranged with another company to forward them from Kansas City, and took them there, placing them in the stockyards. These yards had been in large use for many years, and, while the Kaw river, near them, was known to be very high, no flood had ever extended to the yards. However, on the night after the cattle were placed therein an unprecedented rise occurred—many feet higher than had ever been known before—doing an immense amount of damage to property of all kinds in the valley, and flooding the stockyards. To prevent the cattle from drowning, they were driven into overhead viaducts leading from one portion of the yards to another, where they remained for more than a week; a large number dying from starvation, and the remainder being seriously

injured. *Held*, that the proximate cause of the loss was the flood, and that defendant was not chargeable with negligence in not anticipating the same, nor liable for the loss.

At Law. On motion for direction of verdict.

Botsford, Deatherage & Young and R. E. Ball, for plaintiffs.

A. A. Hurd, O. J. Wood, and Angevine & Cubbison, for defendant.

POLLOCK, District Judge. The above-entitled cases arose over the shipment of about 3,000 head of cattle from New Mexico and Texas points to Evarts, S. D. The petitions of plaintiffs count on a violation by defendant of its duties as a common carrier for hire, resulting in loss to plaintiffs. In the interests of time, by agreement of parties, the cases were consolidated for the purpose of this trial, and are now being tried together.

The answers of the defendant allege the contracts for the shipment of the cattle to have been made in writing by plaintiffs with the Pecos Valley & Northeastern Railway Company, limiting the common-law liability of the defendant. These contracts are set forth in extenso in the answers filed, and are admitted by the pleadings in the cases.

It is the contention of the defendant that the damage and loss for which these actions have been brought by plaintiffs accrued to plaintiffs from a flood in the Kaw river, of such an unprecedented and unexpected nature as to constitute what is known in law as an "act of God." Defendant also files a cross-demand against plaintiff the Minnesota & Dakota Cattle Company, in case No. 8,157, for money paid the stockyards company at Kansas City, and for pasturage on the cattle during carriage.

The trial of the cases has consumed much time, and the largest latitude has been granted counsel for the respective parties in the bringing out of all the facts and circumstances of the cases. The matter is now before the court on requests for instructions. The facts are practically undisputed, and briefly, in substance, are these:

The cattle were shipped by plaintiffs from Kenna, N. M., Bovina and Hereford, Tex., which stations are on the line of the Pecos Valley & Northeastern Railway Company, on the 25th and 26th days of May, 1903, destined to the pastures of the plaintiffs, in the neighborhood of Evarts, in the state of South Dakota. The contracts of shipment are in writing, and are in the usual form of live stock shipping contracts, limiting the common-law liability of the carrier, and were made between plaintiffs and the Pecos Valley & Northeastern Railway Company. The parts of the contracts material to this inquiry are:

(1) "That the live stock covered by this contract is not to be transported within any specified time nor delivered at destination at any particular hour nor in season for any particular market."

(2) "The company agrees to stop cars at any of its stations for watering and feeding where it has facilities for so doing whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than twenty-eight con-

secutive hours without unloading the same for rest, feeding and water for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes."

(3) "The shipper hereby assumes and releases the company from risks of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto caused by \* \* \* injury to tracks or yards, storms, washouts, \* \* \* or from any and all other causes whatever. The liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit."

It is further stipulated that the conditions of said contract shall apply and inure separately in favor of each of the several connecting carriers. It is further provided in the contract:

"And on so delivering to such connecting carrier, all liability of the company whatever, for carriage of or on account of said stock, shall be thereby ended, it being understood the company assumes no obligation whatever on account of the carriage of said stock beyond its road, and that the company shall not be liable for any damage to, injury of or delay of said stock, or of anything whatever that may happen to the same after such delivery or tender of delivery in case such connecting carrier shall refuse to receive the same. Each carrier in the route shall receive such stock when delivered to it, transport the same over its road to the succeeding carrier in the route, and it is distinctly understood that the responsibility of each carrier shall not begin until it receives such stock from the consignor or from the connecting carrier, and shall cease when it delivers the same to the connecting carrier, or, if the last carrier, at the place of destination."

The contracts entered into do not specify the route of shipment from points of shipment to destination, but the waybills upon which the cattle were shipped, and other evidence, disclose that the cattle were by the initial carrier routed over its own line to Amarillo, Tex.; thence over the defendant's line of road, by way of Wellington, Strong City, and Topeka, to Atchison, Kan.; thence over the Burlington Road to Council Bluffs, Iowa; and from thence to point of destination over the Milwaukee Railway. The evidence further shows that when a part of the shipment arrived at Strong City and another part arrived at Wellington—stations on defendant's line of road—the cattle were unloaded for feeding, water, and rest. The cattle were accompanied at all times by owners of the stock, or their representatives in charge, signing the contracts. During the time the cattle were at these stations on the defendant's line of road for feed, water, and rest, the defendant company was notified by the Burlington Road that on account of washouts on its line near Hamburg, Iowa, it could not receive the shipments at Atchison or carry the same as contemplated. Thereupon the defendant company commenced negotiations with the Missouri Pacific Railway to receive the cattle at Kansas City and carry them to Council Bluffs, Iowa; thus performing the part of the service which it was originally contemplated the Burlington should have performed from Atchison, Kan., to Council Bluffs, Iowa. After the defendant was first notified by the Burlington that it could not carry the cattle as contemplated, the Burlington thereafter notified the defendant that its road was in repair, and that it would receive the cattle. A portion of the cattle were thereupon loaded upon the cars of the defendant company and started forward, when the defend-

ant was again notified by the Burlington Company that its line was again washed out, and it would not receive the cattle at Atchison. Neither the Burlington Railway nor the Atchison, Topeka & Santa Fé Railway had stockyards at Atchison at the time to accommodate the cattle if forwarded there. A portion of the cattle, consisting of 42 cars, were forwarded to Kansas City, and were received and transported by the Burlington Railway. It was arranged between the defendant and the Missouri Pacific that the latter company should receive and transport the remainder from Kansas City. These negotiations delayed the cattle on the 27th and 28th days of May at Strong City and Wellington after their arrival at these points. Thereafter, under the arrangement with the Missouri Pacific, the cattle were forwarded to Emporia, Kan., and from thence, by way of North Ottawa, to Olathe, Kan., and thence to the Kansas City stockyards over the Frisco tracks, and were there received in the night of the 29th and morning of the 30th days of May, 1903. Twenty cars of the cattle were transferred by the defendant to the Missouri Pacific tracks, and were by that company placed at its stockyard chutes, and were unloaded by the stockyards company. The remainder of the cattle were unloaded from the cars where placed by the defendant company in the stockyards. Efforts were made by the representatives of the plaintiffs accompanying the cattle, on the 30th day of May, to have the cattle forwarded to point of destination, but without success. The Missouri Pacific Railway made an attempt to move a portion of the cattle, but did not succeed in so doing; and the cattle were left in the stockyards at Kansas City on the day and night of the 30th of May, and for many days thereafter, as hereinafter stated.

It appears from the evidence that during the greater part of May, 1903, unusual and unprecedented rains fell in the watershed of the Kansas river, which empties into the Missouri river at Kansas City. To such an extent was this true that a vast amount of property located in the valley was inundated and destroyed by high water in the Kaw river following in consequence of such rain. The railways running along and across this valley were overflowed, and the property destroyed. The railway and other bridges crossing the river were in almost every instance carried away by the flood. Many thousands of homes in Kansas City were submerged, and the inhabitants fled to the hills and other places of safety, with nothing saved from destruction but the clothing they had on. Business houses and contents were submerged and destroyed. The water in the river covered the entire valley to a depth of from 10 to 20 feet. Nothing like it ever before occurred in the history of the valley. It was, in fact, as shown by the evidence, a great public calamity to Kansas City and other cities and towns in the valley. The stockyards in which the cattle in question were located were, for the first time in history, inundated on the night of the 30th and the morning of the 31st of May. To save the cattle in question from drowning, they were driven up into overhead viaducts leading from one portion of the yards to another, and were there kept for more than a week, during the continuance

of the flood, without sufficient feed or water, from which cause more than 500 of the cattle died, and the remainder were weakened and greatly injured.

At the time the cattle were carried to Kansas City by the defendant company, its lines of road from Topeka to Atchison and from Topeka to Kansas City were submerged by the flood, and could not be operated. After the subsidence of the flood, owing to the fact that the cattle were in such a starved and weakened condition, the defendant, seeking to minimize the loss and damage to the cattle, and with the consent of plaintiffs, and after the plaintiffs had refused to receive the cattle from the defendant, carried the remainder of the herd to pastures in Lyon county, Kan., where they were held until about the 10th of July following, when they were forwarded by defendant company on the original billing to Atchison, Kan., and from thence to point of destination over the Burlington and the St. Paul Railways. Before removing the cattle from the pastures in Lyon county, plaintiffs gave bond to pay the freight charges at the point of destination, and also to repay the defendant the amount of the charges of the stockyards company for care of the cattle while held in the stockyards (in amount, \$2,428.60), and paid the pasturage of said cattle in Lyon county, Kan. (in amount, \$2,820.38), which amounts are stipulated by the parties to be reasonable and necessary in the event it should finally be determined plaintiffs were liable therefor. A cross-demand for these amounts has been filed by the defendant against the plaintiffs in case No. 8,157.

The damages sustained by plaintiffs, including the loss of cattle which died, damages the remainder sustained which occurred by reason of their weakened and starved condition when received at point of destination, and extra charges and expenses incurred in the delay in shipment and the holding of the cattle in Lyon county, and the lateness of the season when they reached their destination, are quite large; and, while there is a variance in the amount of damages sustained by plaintiffs, as testified to by different witnesses of the plaintiffs, yet the evidence of plaintiffs in this respect is wholly uncontradicted by any testimony of the defense.

The grounds upon which plaintiffs base their right of recovery in this matter, as specifically set forth and alleged in the petition of the Minnesota & Dakota Cattle Company, are as follows:

"Plaintiff states and charges the fact to be that by the exercise of due and reasonable care in the carriage and transportation of said cattle from the point of shipment aforesaid to Atchison, Kansas, all of said loss and damage could have been avoided, and that defendant was guilty of negligence therein in the following particulars, to wit:

"First. Defendant did not exercise due and reasonable care, but was negligent, in its detention of said cattle at Wellington, Kansas, and at Strong City, Kansas, and, by the exercise of due and proper diligence, could have carried and transported said cattle to Atchison, Kansas, by way of Topeka, Kansas, and delivered the same to the connecting carrier at that point, and thus escaped the peril and destruction of the flood.

"Second. That defendant was guilty of negligence, after having so long detained said cattle at Strong City and at Wellington, Kansas, in not further detaining or holding them in some place of safety until the unprecedented

flood in the Kaw river, hereinbefore mentioned, had subsided, so that the transportation of said cattle might be safely resumed.

"Third. That defendant was guilty of a wrongful and negligent act in diverging and deviating the shipments of said cattle to Kansas City, Missouri, off of the line of transportation over which said cattle were directed by the plaintiff to be carried.

"Fourth. That the defendant negligently and carelessly, and knowing that an unprecedented flood was descending the Kansas river, hauled said cattle into the low lands at the mouth of said river, and unloaded and left them in front of the approaching flood.

"Fifth. That defendant, after having wrongfully transported said cattle to Kansas City, Missouri, as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril in the stockyards at Kansas City, Missouri, as defendant had reasonable time and opportunity to do, but the same were overtaken by the flood.

"Sixth. That the defendant did not exercise due and reasonable care and diligence, and was negligent, in not properly or sufficiently feeding and watering said cattle, both while the same were at Strong City, Kansas, and at Wellington, Kansas, and while the same were in the yards and viaducts of the Kansas City Stockyards Company at Kansas City, Missouri.

"Plaintiff further states that all of the several injuries, damages, and losses to and of said cattle hereinbefore specified, and the losses and expenses aforesaid, were each and all caused by the several negligences and want of due and reasonable care in the transportation and carriage of said cattle by the defendant."

The specific grounds of negligence alleged on the part of the plaintiff the Empire State Cattle Company are of identical legal import.

That the flood in question was unprecedented in its character is alleged by plaintiffs in their petitions. That it was extraordinary in its nature is attested by the fact that the water rose many feet higher than ever before known in the history of the valley, and rose very rapidly in the latter part of the night of the 30th of May and the forenoon of the 31st day of May. That it was wholly unanticipated in height and destructive force is manifest by the undisputed fact that millions of dollars worth of property was placed and left in the valley here at Kansas City by the owners thereof, which was inundated and destroyed, much of which could have been carried to a place of safety, had it been possible to have anticipated the calamity. As it was, the owners fled to the hills and other places of safety in conveyances, in boats, and in every possible way, to save their lives and the lives of the members of their families. That the flood was of such unprecedented nature and character in its height, suddenness, and destructive force as to constitute what is known in law as an "act of God" admits of neither doubt nor argument. Does this fact, established by the undisputed evidence in the case, relieve the defendant of liability?

Under the undisputed evidence, what was the direct, efficient, and proximate cause of the loss sustained by plaintiffs? The defendant contends, "the act of God." The plaintiffs contend, "the negligence of defendant." Which contention is correct?

It is not enough in this case that plaintiffs show that some act of negligence of the defendant furnished the occasion for the loss, or that some act of negligence of the defendant contributed to the injury; but, before plaintiffs may recover in these actions, it



devolves upon them to trace the loss which they have sustained to the negligence of the defendant, as the direct and proximate cause of the injury.

While the authorities in this country are not in harmony upon this proposition, yet the federal decisions all agree therein. In *Chicago, St. P., M. & O. Railway Company v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582, Judge Sanborn, delivering the opinion, says:

"The rule of law which governs this case is not difficult of statement, but, like many other rules, the difficulty is solely in its application. '*Causa proxima non remota spectatur.*' An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it but for the interposition of some new, independent cause, that could not have been anticipated. Obviously, the relation of causes to their effects differ so widely and are so various that no fixed line can be drawn that will in each case divide the proximate from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case as it arises. The effect sometimes follows immediately upon its moving and proximate cause, and, again, that cause works out its effect with unerring accuracy after a long period of years."

In *Railway Company v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, Mr. Justice Strong, speaking for the Supreme Court, said:

"It is generally held that in order to warrant a finding that the negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Hoag v. Railroad Co.*, 85 Pa. 293, 27 Am. Rep. 653, it is said:

"The true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from the act."

In the light of these and other authorities, and the undisputed evidence in these cases, have the plaintiffs so alleged and proven?

It is first contended by plaintiffs that the delay of the trains at Strong City and Wellington on the 27th and 28th days of May was negligence, and the cause of the injury to plaintiffs. It is true that if this delay had not occurred, and the cattle had been promptly forwarded to and through Kansas City, they would not have been injured as they were at Kansas City. But it is equally true this delay or failure to longer delay was not the cause of the injury. The question here is, if the carrier delayed the shipment for an unreasonable time, but for which he would have been able to deliver the cattle safely, or to deliver them to a connecting carrier by whom they would have been carried beyond danger from an act of God causing loss, is the carrier liable for the consequences of such delay? Upon this question the courts differ widely. The courts of New York, Illinois, and other states hold the defendant liable in such case. The rulings in the federal court are to the contrary. *Insurance Company v. Tweed*, 7 Wall. 44, 19 L. Ed. 65;

Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 1070; Railway Co. v. Insurance Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; The R. D. Bibber, 50 Fed. 841, 2 C. C. A. 50; Thomas et al. v. Lancaster Mills, 71 Fed. 481, 19 C. C. A. 88.

Again, it is alleged by plaintiffs that the cattle should have been forwarded, as originally intended, by Atchison, and not by Kansas City, and, if so, that the injury would not have occurred. The written contract of shipment made, as has been seen, does not specify the route to be followed, but upon this question the contract is silent. The route originally contemplated by the parties was to Atchison, and thence by the Burlington. While the cattle were en route to Atchison, and stopped at Wellington and Strong City for feed, water, and rest, the Burlington notified the defendant that, on account of a washout on its line near Hamburg, Iowa, it could not receive the cattle. The cattle were delayed by defendant pending negotiations for a different carriage. During the pendency of such negotiations the Burlington notified defendant that its line was again open. The cattle were ordered forward, and were loaded and started en route. Again the defendant was notified by the Burlington that its line was out, and it could not receive the cattle. A portion of the cattle were again returned and unloaded at the stockyards at Strong City. At the time neither the defendant nor the Burlington had yards at Atchison to accommodate the cattle. Arrangements were completed for the Missouri Pacific to receive them at Kansas City and transport the cattle from there. By this time it was impossible for the defendant to carry the cattle over its line to Atchison, or to carry them to Kansas City otherwise than the way they were carried. That the contract of shipment and the circumstances, common business prudence, and the law, as well, authorized a departure from the originally intended route of shipment, I have no doubt, unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered. *Snow v. I. B. & W. Ry. Co.* (Ind. Sup.) 9 N. E. 702; *Hutchinson on Carriers*, § 311; *International & Great Northern Railway Co. v. Wentworth* (Tex. Civ. App.) 27 S. W. 680. There is no evidence in the cases which in any wise sustains the allegation of plaintiffs that the cattle were not properly fed and watered while at Strong City and Wellington.

Again, it is alleged by plaintiffs that the defendant —  
“Negligently and carelessly, and knowing that an unprecedented flood was descending the Kansas river, hauled said cattle into the low lands at the mouth of said river, and unloaded and left them in front of the approaching flood; that defendant, after having wrongfully transported said cattle to Kansas City, Missouri, as aforesaid, carelessly and negligently failed and neglected to move, or cause to be moved, the same from their position of peril in the stockyards at Kansas City, Missouri, as defendant had reasonable time and opportunity to do, but the same were overtaken by the flood.”

As to whether the act of the defendant in bringing the cattle to Kansas City, and there leaving them in the stockyards, constitutes such negligence as was the proximate cause of the loss to plain-

tiff, must be measured, not in the light of subsequent events, and as we see them to-day, but by what a person of ordinary care, skill, and prudence would have done in his own affairs, with the knowledge of circumstances and conditions as they were or should have been known to him at that time to exist. At this time it was known the stockyards where the cattle were placed were used for this purpose at all times and at all seasons of the year, and that many millions of cattle had been therein placed with the utmost safety, and that cattle that had been therein placed would be properly cared for by the stockyards company and its employés; that, in all the history of these yards, they had not been overflowed or endangered by overflow; and that the safety of cattle placed therein had not been questioned. "That which never happened before, and which, in its character, is such as not natural to occur to a prudent man to guard against its happening at all, cannot, when, in the course of years, it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening, and guarding against the remote contingency of its happening." *Railroad Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338. The officers of the defendant company on Saturday, the 30th day of May, after investigating the conditions around Kansas City, and after considering the information on the subject of the rise in the Kansas river, moved the company's own property and the property in its charge for shipment, consisting of 1,400 loaded cars of freight, upon ground no higher than that where the cattle in question were left, with perfect assurance of safety from the flood, which property and much of the company's most expensive equipment were inundated. So far as shown in this case, all others acted in the same manner. Late that night and during the succeeding day the flood rose rapidly to more than 10 feet higher than ever before known. The property of all alike was inundated and destroyed, and plaintiffs' cattle were by the stockyards company placed in the overhead viaducts to prevent them drowning in the stockyards. In such location, and on account of the flood conditions, the height of the water, the swiftness of the current, the floating of débris, the lack of equipment, they were not, and could not be, properly cared for, and the loss thus accrued. It may be conceded that the cattle need not have been brought into Kansas City in the first instance, or, being in, that they could have been removed in the cars in which they arrived, or in others, or on foot. Guided by events that followed, as now seen by us to-day, the cattle undoubtedly should and unquestionably would have been removed from their place of peril. That these circumstances and acts of the defendant company furnished the occasion for the loss is unquestionable, but that the direct and proximate cause of the loss and damage was the unprecedented and unexpected flood and attendant disaster that came wholly without anticipation on the part of the defendant company, or the plaintiffs and their agents accompanying the stock, is shown by all the testimony in the case. It was a serious loss and great hardship upon plaintiffs, but, in my judgment, it must be borne by them, as like losses are borne by

others with property unfortunately situated in this unhappy valley in that ill-fated time.

It therefore follows, on the main case, the request for instructions to the jury to return a verdict for the defendant must be sustained, and the like request of plaintiffs must be denied. This will be done.

On application of attorneys for the defendant, the cross-petition is dismissed, without prejudice, at cost of defendant.

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**KIRKPATRICK v. EASTERN MILLING & EXPORT CO. (1.)**

(Circuit Court, D. New Jersey. July 14, 1904.)

**1. INSOLVENT CORPORATION—INTERVENING PETITION AGAINST RECEIVERS—PARTIES.**

A bank made a loan of money to a corporation, taking its note, and, as collateral security, an issue of bonds of the corporation, together with an assignment of an underwriting agreement by which the subscribers agreed to take the issue of bonds at a stated price, but were to have also common stock of the company equal to 75 per cent. of the face value of the bonds. The corporation becoming insolvent, the bank filed its petition against the receivers to require them to turn over the stock which had been issued and was in their possession, to enable it to enforce the underwriting agreement against the subscribers. The answer of the receivers disclosed that a suit was pending in another state, brought by the subscribers against the bank, claiming the right to have the underwriting agreement surrendered and canceled. *Held* that, in view of such controversy as to the validity of the agreement, the court could not determine the rights of the bank thereunder in a proceeding to which the subscribers thereto were not parties.

**2. CORPORATIONS—EXECUTION OF INSTRUMENT—SEAL AS EVIDENCE OF AUTHORITY.**

The corporate seal affixed to an assignment purporting to be the act of a corporation by its president is *prima facie* evidence that the assignment was executed by corporate authority.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1729.]

**3. ACTIONS—STAY OF PROCEEDINGS—ANOTHER ACTION PENDING.**

The rule that, where two suits between the same parties and for the same cause of action are pending in different states, the remedy of the defendant is to apply to the court in which the second suit is brought to stay proceedings until the first suit is determined, cannot be applied where the parties to the two suits are not the same.

In Equity. Sur petition of Corn Exchange National Bank for an order on receivers to deliver certain certificates of stock.

Samuel Dickson, for Corn Exchange National Bank.  
Burr, Brown & Lloyd, for receivers.

LANNING, District Judge. The petition in this case is filed by the Corn Exchange National Bank of Philadelphia against William G. Audenried, Jr., and F. Morse Archer, receivers of the Eastern Milling & Export Company of New Jersey. By the petition and the exhibits thereto annexed, it appears that on May 13, 1903, the Eastern Milling & Export Company of New Jersey executed and delivered to

the Corn Exchange National Bank a promissory note for \$25,000, payable in two months after that date; that the promissory note contained a declaration to the effect that the maker had deposited with the petitioner, as collateral security for the payment of the note, "six hundred thousand dollars of first income bonds of Eastern Milling and Export Company and underwriting for same." On the same day (May 13, 1903) a paper purporting to be an assignment of the "underwriting" by the maker of the note to the petitioner was delivered to the petitioner. This alleged assignment appears to have been executed by the president of the Eastern Milling & Export Company of New Jersey, and to have had the corporate seal of that company thereto affixed. The "underwriting" was an agreement between the Eastern Milling & Export Company of New Jersey and certain other parties whereby the other parties agreed, upon the terms therein contained, to purchase an issue of \$600,000 of first income 5 per cent. 40-year collateral trust bonds of the Eastern Milling & Export Company of New Jersey and the Eastern Milling & Export Company of Pennsylvania, and that one of the provisions of this agreement was that the Eastern Milling & Export Company of New Jersey should deliver to each of the underwriters, upon the payment of his subscription for bonds, common stock of the Eastern Milling & Export Company of New Jersey to the amount of 75 per cent. of the face value of the bonds allotted to him. The petition alleges that upon the execution of the promissory note above mentioned, and the assignment of the underwriting agreement, the maker of the note delivered to the petitioner the bonds, of the par value of \$600,000, but, "through inadvertence, accident, and mistake," failed to deliver to the petitioner stock to the amount of 75 per cent. of the par value of the bonds; that is to say, stock to the amount of \$450,000. The averments of the petition are, further, that the company is insolvent; that the stock has no value; that it is necessary, in order that the petitioner may enforce its rights against the subscribers to the underwriting agreement, that the petitioner shall be in a position to tender to them not only the bonds now in possession of the petitioner, but the certificates of stock now in possession of the receivers; and that the receivers have refused to deliver up the certificates of stock to the petitioner. The prayer of the petition is that an order may be made requiring the receivers to show cause why they should not make such delivery. The receivers have filed their answer, and in it say, on information and belief, that the Eastern Milling & Export Company of New Jersey did not authorize any assignment to the petitioner of the underwriting agreement, and that it was not through inadvertence, accident, or mistake that the certificates of stock above referred to were not delivered to the petitioner, but that they were not delivered for the reason that there was no agreement for their delivery. The answer further sets forth that the right of the petitioner to the possession of the certificates of stock has been denied by the underwriters who subscribed the underwriting agreement, and that they have filed a bill of complaint against the petitioner in a court in the city of Philadelphia, and a copy of the bill of complaint is annexed to the answer. The prayer of that bill is that the Corn Exchange National Bank, its officers and directors, be enjoined from instituting any suit or suits against the subscribers to the

underwriting agreement, and that the bank and its officers and directors be required to surrender and deliver to the underwriters for cancellation the agreement of underwriting.

Upon the facts as thus presented, the petitioner insists that it is entitled to an order directing the receivers of the Eastern Milling & Export Company of New Jersey to deliver to the petitioner the certificates of stock in question. The corporate seal affixed to the assignment of the underwriting agreement is prima facie evidence that the assignment was executed by corporate authority. *Parker v. Washoe Manufacturing Co.*, 49 N. J. Law, 465, 9 Atl. 682. But, of course, such presumption may be overcome by other proof.

The receivers, however, by their answer, have disclosed to the court the fact that the persons signing the underwriting agreement insist that they were entitled to have it surrendered to them and canceled. Whether such surrender and cancellation should be made is now an issue between the Corn Exchange National Bank and the signers of the underwriting agreement. With such a fact presented to me, I ought not to grant the prayer of the petition, in the absence of the signers of the underwriting agreement, and without a hearing afforded to them.

It has been suggested by the counsel for the receivers that this court might stay the proceedings on the petition herein filed until after the determination of the suit now pending in the city of Philadelphia. But this is not a case where such stay ought to be ordered. The rule is that the pendency of a suit between the same parties and for the same cause of action in one state is no bar to a subsequent suit brought in a sister state, and that the remedy of the defendant is to apply to the court in which the subsequent suit is brought to stay proceedings, or to refuse final determination, until the suit first instituted is determined. *Fairchild v. Fairchild*, 53 N. J. Eq. 681, 34 Atl. 10, 51 Am. St. Rep. 650. But the parties in the proceeding now before me are not the same as the parties in the suit pending in Philadelphia, and I cannot, therefore, apply the rule stated in *Fairchild v. Fairchild*. There is nothing for me to do but to dismiss the petition, with costs. The order to dismiss it, however, will be without prejudice to the right of the petitioner to file a new petition, or to institute any other proceedings that it may be advised are proper, at any future time.

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**KIRKPATRICK v. EASTERN MILLING & EXPORT CO. (2.)**

(Circuit Court, D. New Jersey. December 14, 1904.)

No. 57.

**1. CORPORATIONS—RECEIVERS—PETITION FOR OWNERS TO TURN OVER PROPERTY—PRACTICE.**

A petition for an order on the receivers of an insolvent corporation, of which the court has taken charge, to turn over certain property claimed by the petitioners, is simply an application for incidental administrative relief, and is not adapted to the determination of substantive issues. The only question to be considered, therefore, is whether the petitioners have shown such title to the property that the court ought in justice to direct the receivers to surrender it.

**2. SAME—MERITS OF CONTROVERSY WITH OPPOSING CLAIMANTS.**

Where, in such case, the property claimed consisted in certain stock certificates made out to the subscribers to an underwriting agreement to

take bonds, to which the stock was to be a bonus, and the agreement and bonds had been transferred by the corporation to the petitioning bank as collateral security for a loan, but not the stock, except impliedly, the subscribers to the underwriting agreement, although made parties to the proceedings, were not entitled to set up therein, and have determined, the defenses which they had on the merits to the enforcement of the underwriting agreement against them.

**3. CORPORATIONS—ASSIGNMENT OF AGREEMENT UNDERWRITING BONDS—CONSTRUCTION—MATTERS ESSENTIAL TO ENFORCEMENT.**

Certain persons executed an underwriting agreement with a corporation by which they agreed to purchase bonds to be issued by it at a stated price, each to receive as a bonus common stock of the corporation equal to 75 per cent. of the face of the bonds taken by him. The bonds and stock in the several amounts called for by the agreement were executed, but, before the time arrived for their delivery, the bonds were pledged by the corporation to a bank to secure a loan, together with an assignment of the underwriting agreement, authorizing the bank to enforce the same by suit in the company's name in case of default. For some reason the stock was not delivered to the bank. *Held*, that the assignment carried with it, as a necessary incident to make it effective, the right to such stock, and that, the corporation having become insolvent and passed into the hands of receivers, the bank was entitled to an order requiring them to turn over to it the certificates of stock which had come into their possession, that it might tender the same, with the bonds, to the underwriters.

**4. SAME—ASSIGNABILITY OF UNDERWRITING AGREEMENT.**

An underwriting agreement with a corporation by which the subscribers agreed to purchase an issue of its bonds is assignable by the corporation to a pledgee of the bonds.

**5. SAME—AUTHORITY OF OFFICERS—PLEDGE OF ASSETS.**

Where the president and secretary of a corporation pledged certain of its bonds to secure a loan, at the same time giving the pledgee a written assignment of an underwriting agreement for such bonds, executed by them over the seal of the corporation, they were acting within the apparent scope of their authority; and the pledgee, who took the assignment without notice of any limitation on their authority, is not bound by such a limitation, but is entitled to enforce the contract in accordance with its terms.

**In Equity.** Sur petition of Corn Exchange National Bank for order on receivers to deliver certain certificates of stock, and answers of receivers and others thereto.

H. Gordon McCouch, Samuel Dickson, and Henry S. Drinker, for petitioner.

H. Reynolds Brown, for respondents.

ARCHBALD, District Judge.<sup>1</sup> This being a hearing on petition and answer, the facts, in case of a conflict, are, of course, to be taken as stated in the latter, although, in the view which I take of the case, this is not very material.

The character of the proceeding determines, in large measure, the disposition to be made of it. It is simply for the purpose of securing certain incidental administrative relief, growing out of the fact that the corporation which is the defendant in the original bill has been put by the court into the hands of receivers, and it is not, in consequence, adapted or designed for the determination of substantive issues. The

<sup>1</sup> Specially assigned.

court is appealed to, to direct the receivers, by whom it has assumed to take charge of the corporate assets and affairs, to turn over certain property to which the petitioners lay claim, which has come into the receivers' hands. Confining our attention to this question, much that is set up in the answer becomes immaterial; nor is there anything in conflict with this view in the former ruling of this court by which it was held that the parties to the underwriting agreement to be presently referred to were entitled to be heard, and should be brought in as respondents, as they now have been; the character and extent of the hearing to be accorded them not having been passed upon. The only question, therefore, to be considered, is whether the petitioners have shown such title to the property in controversy that the court ought, in justice, to direct the receivers to turn it over to them.

It is the undisputed fact that on January 29, 1903, by agreement in writing with the corporation whose affairs are being administered, the respondents (other than the receivers), all of whom are stockholders and most of whom are directors of the company, subscribed for an issue of \$600,000 5 per cent. income bonds, which it was decided to put out. These bonds were to be taken and paid for by them severally on or before February 1, 1904, in varying sums, at 50 per cent. of their par value, and therewith they were to receive as a bonus common stock of the company to the amount of 75 per cent. of the face value of the bonds allotted to each. This undertaking, however, was never carried out, and, the necessities of the corporate business requiring it, on May 13, 1903, a loan of \$25,000 for two months was obtained from the Corn Exchange Bank, the petitioners; the bonds and the underwriting agreement by which the respondents were obligated to take them being pledged as collateral security. But whether by inadvertence or otherwise, the certificates for the shares of stock to which each would be respectively entitled, although actually made out and executed, were not turned over to the bank, and, being now in the hands of the receivers, by whom they were obtained along with the other papers of the company, the present proceeding has been instituted to secure them.

The right of the bank to the relief asked for depends on whether the written assignment by which the underwriting agreement was transferred to it, a copy of which is given in the margin,<sup>2</sup> was effective to

<sup>2</sup>In consideration of the discount by the Corn Exchange National Bank of the note of this company for twenty-five thousand dollars, payable two months after date, and as security for the repayment thereof the Eastern Milling and Export Company hereby pledges six hundred thousand mortgage bonds, with the right to sell the same upon default, as specified in the terms of the collateral note, and further hereby assigns, transfers and sets over to the Corn Exchange National Bank all its right, claim and demand under the Memorandum of Agreement of January 30, 1903, between the said company and the underwriting subscribers thereto, and authorizes the said bank, in case of default, to bring suit in the name of the Eastern Milling and Export Company against any and all of the said subscribers.

In Witness Whereof, the Eastern Milling and Export Company has caused its corporate seal to be hereunto affixed, duly attested, this thirteenth day of May, 1903.

[Seal]

Attest:

George E. Hellig,  
Secretary.

Eastern Milling and Export Company.

B. K. Freed,  
President.



carry title to the certificates which are now demanded. Of this, as it seems to me, there can be no doubt. By it the milling company, in express terms, assigns, transfers, and sets over to the bank "all its right, claim and demand under the Memorandum of Agreement of January 30, 1903, between the said company and the underwriting subscribers thereto, and authorizes the said bank, in case of default, to bring suit in the name of the \* \* \* company against any and all of the said subscribers." The bank is thus invested in the fullest manner with the rights of the company to and under the agreement, and therewith, by implication, with whatever is essential to the exercise and enforcement of those rights. To this the possession of the stock certificates is unquestionably material. While intrinsically worthless, their production and tender—technically at least—is a prerequisite to any demand upon the respondents for a fulfillment of their part of the agreement, and the manifest purpose in opposing a delivery at this time is to block any such demand. The whole value to the bank of the underwriting agreement, including the right to sue which is expressly given, is thus made to depend on the possession of these certificates, which it must therefore be assumed it was the intention of the company that the bank should have, although not expressly mentioned in the assignment. *Batesville Institute v. Kauffman*, 18 Wall. 151, 21 L. Ed. 775; *New Orleans Co. v. Montgomery*, 95 U. S. 16, 24 L. Ed. 346; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; *City of Wichita v. Old Colony Trust Co.* (C. C. A.) 132 Fed. 641; *Gallagher v. Nichols*, 60 N. Y. 438; *Lemmon v. Strong*, 59 Conn. 448, 22 Atl. 293, 12 L. R. A. 270, 21 Am. St. Rep. 123; *Esty v. Graham*, 46 N. H. 169; *Schlieman v. Bowlin*, 36 Minn. 198, 30 N. W. 879. They have been long since made out in due form by the proper officers of the milling company, according to the number of shares that the several parties would be entitled to, and nothing remains to be done but to turn them over to the bank as is now asked. To this, in my judgment, they are entitled, under the showing that has been made.

It is said, however, that the underwriting agreement was not assignable; having a distinct personal character; being made with the corporation, which alone was competent to say when and how far it should be enforced. But agreements of this kind, representing large values, are being constantly assigned and accepted as the basis for the organization of incorporated companies, and it would seriously disturb prevailing ideas in the business world if any such doctrine were announced as is now contended for. Recognizing this, and not being willing to go that far, the learned counsel for the respondents endeavors to distinguish the present case by the suggestion that the usual underwriting agreement is with individual promoters, in anticipation of the transfer to a corporation to be formed, and not, as here, with the corporation itself. But this only serves to emphasize the unsoundness of the position taken, for with individuals, much more than with a corporation, which has no personality, would the agreement take on a personal form; and, as it is conceded that it would not do to impose any such limitation in the one case, neither would it in the other.

It is further said that the resolution on which the loan from the

bank was predicated \* only authorized a pledge of the bonds, and not an assignment of the subscriptions for them, and that the officers of the company therefore exceeded their powers. But it is not shown that the bank knew anything about the resolution, or the limitation contained in it, if that is the construction it is to bear; and as the making of the loan, and the pledging of any or all of the corporate assets, were within the apparent authority of the directors, acting through the president and secretary, by whom the assignment was executed, backed up by the corporate seal, the bank, having parted with its money on the strength of the assignment, is now entitled to enforce it according to its terms. 10 Cycl. Law & Proc. pp. 765, 903, 917.

The other matters relied upon by the respondents, such as the alleged understanding with the company that they were not to be called upon, except under certain contingencies; the changed conditions since the execution of the agreement, including the insolvency of the company, which make it inequitable that they should have to pay for worthless securities; and the recent resolution by which they claim to have been released from liability—all go to the question whether the agreement can be enforced against them by the bank when it is put in shape to do so, and cannot be considered here. As was well said at the argument, if the court cannot pass upon the merits in favor of the petitioners, as it certainly cannot, involving, as it would, a money decree against the respondents on their subscriptions, neither can it pass upon the merits against the petitioners, denying them the preliminary relief which they ask. The same may be said of the contention that the undertaking of the respondents being for the aggregate sum of \$300,000—50 per cent. of the par value of the bonds—there is no way of adjusting this to the \$25,000 for which it is pledged, and to which extent, therefore, it is alone enforceable. Without intending to prejudge this question, attention may be called to the fact that the agreement of the respondents is not only joint, but several; and, even if this were not so, there would not seem to be any great difficulty in dealing with it either legally or equitably.

Let an order be drawn directing the receivers to turn over to the petitioners the certificates asked for, without prejudice otherwise to the rights of the respondents.

\*“Resolved that the proper officers be authorized to make a short loan of \$25,000 or \$30,000, pledging as collateral security for the same the entire issue of \$600,000 income bonds.”

## KIRKPATRICK V. EASTERN MILLING &amp; EXPORT CO. (3.)

(Circuit Court, D. New Jersey. February 18, 1905.)

No. 57.

**1. RECEIVERS—RIGHT OF APPEAL—ORDERS NOT AFFECTING ESTATE.**

Receivers for an insolvent corporation are not entitled to appeal from an order of the court by which they were appointed directing them to deliver to an intervener certificates of stock of the corporation which have come into their hands, but are admittedly worthless; the receivers not being affected personally and the corporate estate having no rights to protect.

**2. SAME—OTHER PARTIES AFFECTED.**

But other parties joined as respondents in a petition to have certain certificates of stock in the hands of the receivers turned over in order that suit may be brought against them upon an underwriting agreement subscribing for bonds to which the stock was to be a bonus, are entitled to have the action of the court making such order reviewed by appeal.

**3. BAIL ON APPEAL—SUPERSEDEAS—CONSIDERATIONS GOVERNING—RISK OF DELAY.**

To make such appeal a supersedeas, however, substantial bail should be given. Where, therefore, as the result of the appeal, the appellees will be prevented from bringing suit pending it, while double the amount of the indebtedness for which the appellants may be ultimately found liable—some \$25,000 in this case—will not be required so as to call for a bond of \$50,000, held, under all the circumstances, that one of \$8,000 should be given; this being to secure against the risk of delay and the possible loss resulting therefrom.

In Equity. Sur petition of Corn Exchange National Bank, and application of respondents for leave to appeal from the order of the court thereon.

Burr, Brown & Lloyd, for the application.

H. Gordon McCouch and Samuel Dickson, contra.

ARCHBALD, District Judge.<sup>1</sup> Except as it is expressly agreed to submit to me the question whether the receivers have the right, and should be permitted, to appeal from the order of court by which they were directed to turn over to the petitioning bank the certificates of stock in their hands, I should not undertake to pass upon it, allowing the appeal pro forma, and leaving the matter to be disposed of by the higher court, on motion to dismiss. But as it is now put, I cannot refuse to decide the point, and, upon due consideration, I do not see that the appeal will lie. The receivers are not affected personally by the order, and have no ground to appeal upon that score. But conceding that, as was decided in *Bosworth v. Terminal Railroad*, 174 U. S. 182, 19 Sup. Ct. 625, 43 L. Ed. 941, a receiver may defend, both in the court appointing him and by appeal, the estate in his hands against all claims which are antagonistic to the rights of either or both parties to the suit in which he has been appointed, so far as such action does not run counter to conditions imposed by the court in its discretion, nothing

<sup>1</sup> Specially assigned.

of that kind is presented here. Admittedly, the certificates of stock are intrinsically worthless, and the only importance they have is that their possession by the bank is a technical prerequisite to beginning suit on the underwriting agreement. It is over this that the battle is waged, the subscribers seeking to keep the certificates out of the hands of the bank, and the bank making every effort to obtain them, in order to perfect their claim. Outside of these immediate parties, it is of no concern to any one which succeeds, and the receivers are not warranted, therefore, in intervening. They are at the most mere stakeholders, and should remain indifferent. That was the position they took in their answer, and is the one which they should maintain.

With the other respondents, however, it is materially different. Having been admitted to come in and be heard, if they consider that their rights have been prejudiced, they are, *prima facie* at least, entitled to have the action of the court reviewed. And as their interests are distinct from those of the receivers, who have none, no question of nonjoinder can arise in their taking an appeal alone. It is not clear that this question was intended to be submitted to me, with regard to which counsel take opposite positions in their briefs, but, whether it was or not, I am not prepared to deny the right. The place for that is in the court to which the case is to go.

But if the appeal is not only to be allowed, but to be made a supersedeas, the appellees should be adequately secured. There is always danger in delay, and it is to protect against this hazard that bail on appeal is required. The right of the bank to sue on the underwriting agreement being hung up pending the appeal, it is clearly entitled to something more than security for costs meanwhile. The only question is how much. This is somewhat difficult to determine, and, at best, can only be more or less arbitrarily fixed. The delay incident to an appeal in this instance ought not, in view of the coming term, to be many months, and yet contingencies not now in contemplation may extend it very much beyond that. Assuming that it might run into a year, and that the bank may be kept out of bringing suit that long—although in the end sustained—it can hardly be said that the whole indebtedness for which the underwriting agreement is held as collateral is imperiled thereby, so as to call for a bond of \$50,000, double the amount, as is asked. It is not as though the bank now had judgment against the appellants, fixing their obligation to it, on which execution could at once go out. There is still much litigation to ensue before that point will in any event be reached, and, as the appellants claim to have a complete defense when the time comes, it may never be. But the risk of delay is something, and, such as it is, must be borne by those to whom it is accorded. The other side is therefore entitled to a bond of some magnitude to fall back upon in case it results to their loss. All things considered, \$8,000 seems to me none too much to ask, and that is the amount I will fix, this being substantial without being unduly restrictive. The bank is not likely to be damaged beyond it by being put off, and the parties to the underwriting agreement will only be answerable for the actual loss,

within that amount, directly shown to have resulted from the taking of the appeal.

The petition of the receivers for leave to appeal is denied; that by the other respondents is allowed; bond in the sum of \$8,000, with sufficient sureties, to be entered in order to make the same a supersedeas.

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JONES v. MISSOURI-EDISON ELECTRIC CO. et al.

(Circuit Court, E. D. Missouri, E. D. February 21, 1905.)

No. 4,982.

1. CORPORATIONS—CONSOLIDATION—MISSOURI STATUTE.

A consolidation of corporations under and in conformity to Rev. St. Mo. 1899, § 1334, which authorizes the consolidation of "any two corporations \* \* \* whose objects and business are, in general, of the same nature," is not invalidated by the fact that one of the constituent corporations was itself created by a prior consolidation.

2. SAME—EFFECT OF CONSOLIDATION.

Rev. St. Mo. 1899, § 1334, provides that "any two corporations \* \* \* whose objects and business are in general of the same nature may amalgamate, unite, and consolidate said corporations and form one consolidated corporation holding and enjoying all the rights, privileges, power, franchises, and property belonging to each, and under such corporate name as they may adopt or agree upon." *Held*, that a consolidation effected in conformity to such statute operated to extinguish the corporate life of the constituent companies, and that a stockholder in one of such companies could not maintain a bill in equity for relief or to enforce rights, based on the theory that the company was still in existence, and where the relief, if granted as prayed for, must be enforced through such company.

In Equity. On demurrer to bill.

Bomar & Bomar and Dickson, Smith & Dickson, for complainant.  
Boyle, Priest & Lehmann, for defendants.

POLLOCK, District Judge. This case is before the court on separate demurrers of the individual defendants Chas. H. Huttig and his associates and the Union Electric Light & Power Company, of September 9, 1903. The facts stated in the bill, stripped of verbiage, briefly stated, are as follows: The complainant is, and was on the 9th day of September, 1903, the legal owner of 10 shares and the equitable owner of 992 shares, of the par value of \$100 per share, of the preferred stock of defendant the Missouri-Edison Electric Company (hereinafter called the "Edison Company"). That said company was duly incorporated under the laws of this state on the 4th day of October, 1897, for the purpose of manufacturing and selling electricity, with a capital stock of \$4,000,000, one-half of said stock being preferred, and the remainder common, stock. That said corporation was organized in pursuance of a reorganization agreement of the bondholders of a former corporation known as the Edison Illuminating Company. That said reorganization agreement, the articles of association, and the by-laws of the Edison Company as well, among other things, made this provision in regard to the preferred stock of the Edison Company:

"Each share of this preferred stock will entitle the holder to an annual dividend on the par value thereof of five per cent., if earned, and if not earned and paid in any given year, then all arrears on this account must be paid before any dividend is declared or paid on the common stock." That defendants Chas. H. Huttig, August Gehner, Herman Stifel, C. Marquard Forster, Eugene H. Benoist, Phillip Stock, William F. Nolker, Henry Semple Ames, and William D. Orthwein constitute the board of directors of the Edison Company. That defendant the Union Electric Light & Power Company (hereinafter called the "Union Company"), on the 16th day of May, 1902, organized under the laws of this state by a consolidation of two theretofore organized and then existing corporations under the laws of this state known as the Citizens' Electric Light & Power Company and the Imperial Electric Light, Heat & Power Company, with a capital stock of the par value of \$10,000,000. That thereafter, on the 9th day of September, 1903, the defendant the Union Electric Light & Power Company of September 9, 1903 (hereinafter called the Consolidated Union Company) was organized under the laws of this state with a capital stock of \$10,000,000, divided into 100,000 shares of the par value of \$100 per share, by a consolidation of the Edison Company and the Union Company in manner and form as provided by a law of this state enacted for the purpose of permitting the consolidation of incorporated companies: the basis of such consolidation being 1 share of Consolidated Union stock and \$5 in cash in exchange for 2 shares of preferred stock in the Edison Company, and 1 share of Consolidated Union stock and \$5 in exchange for 4 shares of common stock in the Edison Company, and 1 share of Consolidated Union stock in exchange for 1 share preferred stock in the Union Company, and 1 share Consolidated Union stock in exchange for 2 shares of common stock in the Union Company. That said consolidation and the steps leading up thereto were designed and carried out by a certain corporation called the North American Company, its agents and servants (not made parties to this bill), by and through the assistance of the Missouri Valley Trust Company, a corporation (not made party to the bill), for the use, benefit, and advantage of the North American Company. That complainant protested against the consolidation of the Edison Company, in which he was a preferred shareholder, with the Union Company, and files this, his bill of complaint, on behalf of himself and other preferred shareholders in the Edison Company similarly situated, to the use and benefit of the Edison Company. After the consolidation was effected he demanded of the officers of the Edison Company a correction of the wrongs complained of, and a transfer on the books of the company of the shares of stock to which he held the equitable right.

The relief sought by the bill is, primarily, the dissolution of the Consolidated Union Company and the rehabilitation of the Edison Company, and a decree commanding the officers of the Edison Company to recognize him as a shareholder in said company, and a transfer of the shares of stock of which he is the equitable owner on the books of the company, and an accounting of all the property belonging to the Edison Company in the hands of the Consolidated Union Company as a result of the consolidation, and a decree for the recovery of the same

from the Consolidated Union Company on behalf of and for the use and benefit of the Edison Company; secondarily, and in the alternative, that an account may be taken of the value of complainant's stock in the Edison Company, and that the amount so ascertained may be decreed a lien on all the property and assets of the Edison Company and the Consolidated Union Company, and payment thereof ordered to complainant; for the appointment of a receiver, and general relief.

The specific wrongs charged in the bill, briefly stated, are: (1) Want of statutory power authorizing the consolidation and the formation of the Consolidated Union Company. (2) That the Union Company was at the time of the attempted consolidation, and long prior thereto, a profitable, going, business concern, making large profits for its shareholders; that it was possessed of a very large amount of tangible property and valuable franchises; that the Union Company, with which it was consolidated, was largely indebted, and heavily overstocked; that the Consolidated Union Company is capitalized in an amount greatly in excess of the value of the joint property of its constituent companies, has no preferred stock to give in exchange for the preferred stock of complainant in the Edison Company, and for these reasons the attempted consolidation was manifestly unjust and inequitable to the preferred shareholders in the Edison Company. (3) That said consolidation was procured by the North American Company, its agents and servants, aided by the Missouri Valley Trust Company, operating through the individual defendants, the directors and managing officers of the Edison Company, fraudulently, for the use, advantage, and benefit of the North American Company, with the intent of uniting and consolidating all the light, heat, and power companies of the city of St. Louis into one concern in violation of the anti-trust laws of the state. (4) That the directors and officers of the Edison Company, on proper demand made, refused to transfer the shares in said company, to which complainant held the complete equitable title, to him on the books of said company. (5) That the officers of the Edison Company, when appealed to for that purpose, refused to right the wrongs and grievances of complainant; hence his resort to equity. The separate demurrers lodged against this bill challenge its sufficiency on two grounds: multifariousness and want of equity.

The question first arising for consideration upon an examination of this bill is, are the averments therein contained sufficient to authorize a decree avoiding the consolidation of 1903? The requisite and necessary power relied upon to support this consolidation is found in section 1334, Rev. St. 1899 of this state, which provides, as follows:

"Sec. 1334. Consolidation of Companies, How Effected. Any two corporations now existing under general or special laws or which may be hereafter created, whose objects and business are in general of the same nature, may amalgamate, unite and consolidate said corporations and form one consolidated corporation, holding and enjoying all the rights, privileges, power, franchises and property belonging to each, and under such corporate name as they may adopt or agree upon; such consolidation shall be made by agreement in writing, by or under the authority of the board of directors and the assent of the owners of at least three-fifths of the capital stock of each of said corporations, and a certificate of the fact of such consolidation, with the name of the

consolidated company, shall be recorded in the office of the recorder of deeds of the city or county in which such corporation is located, and a certified copy of such recorded instrument shall be filed in the office of the Secretary of State: provided, that no such consolidation shall in any manner affect or impair the rights of any creditors of either of said corporations: and provided further, that corporations so consolidating shall accept the provisions of this article. Such agreement may provide for the number of directors of said corporation, not exceeding thirteen."

The bill concedes the challenged consolidation to have been in form regular, and in compliance with the conditions prescribed in this act, but denies the right of the Union Company to again consolidate with the Edison Company, of which complainant was at the time a preferred shareholder. That is to say, the bill challenges the re-exercise by a corporation of the power of consolidation granted by this act, upon the theory, when once such power has been employed, it becomes exhausted. It is fundamental law that the right to exercise such a vital power of a corporation as contemplates the turning over of all its corporate property, including its right to be a corporation and to hold and use its corporate powers, franchises, and privileges, and which results, when employed in the extinguishment of its corporative life, must be found in some positive plenary legislative grant either in the articles of association of the corporations consolidating or in the general law of the land. Such power cannot be implied. *Nugent v. The Supervisors*, 19 Wall. 241; 22 L. Ed. 83; *Pearce v. Madison, etc., R. R. Co.*, 21 How. 441, 16 L. Ed. 184; *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604. It is also firmly settled by authority, if ample statutory power is found wanting authorizing either of the constituent companies to consolidate with the other, the entire consolidation is unauthorized and void. *St. Louis Railroad v. Terre Haute Railroad*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849. Hence the question here arising for consideration is, did the Union Company, formed by consolidation under the terms of the act quoted, have the power to reconsolidate with the Edison Company under the terms and provisions of the act?

From an examination of the act it will be seen, in express terms, to authorize any two corporations then existing or thereafter brought into existence, without restriction or limitation, to consolidate and form one corporation. Therefore, by necessary construction, when the Citizens' Electric Light & Power Company consolidated with the Imperial Light, Heat & Power Company, forming the Union Company, the constituent companies passed out of existence and all their property, franchises, rights, and powers merged into, were consolidated with, and thereafter exercised by the Union Company. The act does not in terms, neither by necessary implication nor by implication at all, inhibit any corporation, whether formed by consolidation or otherwise, from availing itself of the power of consolidation conferred by the terms of the act. Therefore the question is, may this court, then, by construction of the act, exclude from its operation a corporation, though formed by consolidation, not excluded therefrom by the language therein employed by the lawmaking power? I think not. No case authorizing such a holding has been cited by solicitors for complainant, and



presumptively, therefore, no such case may be found. Aside from this, corporations are purely the creatures of statutory law, created, controlled, and terminated by law. To my mind, the state, in the exercise of its legislative power, untrammelled by constitutional inhibition, may grant, withdraw, or refuse to corporations created by it the power of consolidation upon such terms and conditions and under such restrictions and limitations as it may see fit. In this case, as has been seen, the state has unqualifiedly and without limitation granted the power of consolidation to any two corporations whose objects and business are in general of the same nature, as were the objects and business of the Edison and Union Companies, the consolidation of which is here challenged. This act was in effect at the time the complainant became a stockholder in the Edison Company. He therefore purchased his shares with full knowledge of the fact that the company might lawfully do that of which he now complains, to wit, consolidate with any other corporation of the state whose objects and business were of the same general nature. Such consolidation he could not, in the first instance, have prevented, had he so desired, and he cannot now be heard to challenge the legality of a consolidation perfected in accordance with the terms and conditions imposed by the act. *Nugent v. The Supervisors*, 19 Wall. 241, 22 L. Ed. 83; *Town of East Lincoln v. Davenport*, 94 U. S. 801, 24 L. Ed. 322; *County of Scotland v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. Ed. 330; *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878; *Menasha v. Hazard*, 102 U. S. 81, 26 L. Ed. 83; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411; *County of Tipton v. Locomotive Works*, 103 U. S. 523, 26 L. Ed. 340; *New Buffalo v. Iron Company*, 105 U. S. 73, 26 L. Ed. 1024.

While unnecessary to a decision of the question now presented, it may well be doubted whether, in a case where there is apparent legislative power conferring the right of consolidation, as there is here, and a consolidation in compliance with such legislative power has been effected, and the consolidated company becomes a *de facto*, if not a *de jure*, corporation, the complainant, a stockholder in one of the constituent companies, would have any standing in court to question the validity of the consolidation. The right to so do would seem from the authorities to reside rather in the state through its proper law officers. *Toledo, St. L. & K. C. R. Co. v. Continental Trust Company*, 95 Fed. 497, 36 C. C. A. 155.

The power to consolidate under the act in question being upheld, and the consolidation proceedings being by the bill conceded to be in accordance with the conditions and provisions of the act, it only remains to determine the legal effect of such consolidation upon the constituent companies. The solution of this question, of course, must depend upon the act itself. Was the effect of the consolidation the extinguishment of the consolidating corporations and the formation thereby of a new corporation possessed of all the property, rights, and franchises of the constituent companies, or did the constituent companies remain in existence? The act provides:

"Any two corporations now existing under general or special laws, or which may be hereafter created, whose objects and business are in general of the

same nature, may amalgamate, unite and consolidate said corporations and form one consolidated corporation, holding and enjoying all the rights, privileges, power, franchises and property belonging to each, and under such corporate name as they may adopt or agree upon."

Pardee, Circuit Judge, delivering the opinion in *New Orleans Gas Light Company v. Louisiana Light, etc., Company*, 4 Woods (U. S.) 90, 11 Fed. 277, says:

"Where the consolidation act authorizes two corporations to consolidate and form one consolidated corporation, holding and enjoying all the rights, etc., belonging to the constituent corporations, the old corporations are dissolved and a new corporation is created."

In *Keokuk & Western Railroad v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450, Mr. Justice Brown, delivering the opinion of the court, construing a former act of this state in many respects similar to that under consideration, says:

"Looking at the act in question in this case, we find that by section 1 any Missouri railroad company whose track should connect with the road of an adjoining state was authorized to make and enter into an agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks should be so connected, making one company of the two, whose stock should be so consolidated upon such terms, conditions, and stipulations as might be mutually agreed between them; that by section 2 'such consolidation shall not be made, unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated'; that by section 3 the board of directors were authorized to adopt by resolution a new corporate name for the consolidated company, and call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company; and providing that a copy of the consolidation agreement and the name adopted for the new company 'shall be filed with the Secretary of State, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company.' It is difficult to see how the Legislature could provide more clearly for the extinguishment of the prior companies and the formation of a new one than by providing that the two companies shall become one, that new certificates of stock shall be issued in exchange for the stock of the constituent companies, and that the consolidation agreement shall be recorded with the Secretary of State as the charter of the new company. In our opinion, this was the effect of the act in question."

It was clearly the legislative intent that a consolidation under the terms of the act in question should result in the extinguishment of the old and the creation of a new corporate life. It is not apparent in what manner such consolidation would in any way contravene the provisions of the anti-trust laws of the state.

From what has been said, it must follow as a necessary sequence, in so far as the bill seeks relief in disaffirmance and avoidance of the consolidation made and the rehabilitation of the Edison Company, the bill is without equity. The life of the Edison Company having been extinguished by the consolidation made, no relief can be granted through complainant on behalf of or against that corporation or its former board of directors.

Of what rights in law or equity complainant is possessed against the Consolidated Union Company by reason of its assumption of his contract relations with the extinguished Edison Company it becomes unnecessary and improper to here determine, for that the granting of

such relief would be utterly inconsistent with the entire frame and scope of the bill as now presented. Such relief, when granted, must be based upon and in recognition of the validity of the consolidation here challenged and the extinguishment of the Edison Company, through whom relief is now sought by complainant, whereas the averments of the present bill are diametrically opposed to the conclusion reached as to the validity and effect of the consolidation and formation of the Consolidated Union Company.

It follows the demurrers must be sustained, and the bill dismissed. It is so ordered.

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MANNING v. BERDAN et al.

(Circuit Court, D. New Jersey. February 15, 1905.)

1. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—SUIT FOR CANCELLATION OF NOTE.

A federal court of equity has jurisdiction of a suit for the cancellation of a promissory note alleged to have been obtained from complainant by fraud, the remedy at law not being plain, adequate, and complete.

2. CORPORATIONS—FRAUD OF PROMOTERS—BASIS FOR EQUITABLE RELIEF.

False and fraudulent representations made in a prospectus issued by the promoters of a corporation respecting the value of property which was to be transferred by them to the corporation when organized, afford ground for equitable relief against the corporation in behalf of one who subscribed for its stock in reliance on such representations.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 244-265.]

Acts of corporators and promoters, see note to *Yelser v. United States Board & Paper Co.*, 46 C. C. A. 576.]

In Equity. On application for preliminary injunction.

William P. Chapman, Jr., and Robert H. McCarter, for complainant.

John W. Harding, for defendants.

LANNING, District Judge. A motion has heretofore been made in this cause by the defendant the W. K. Niver Coal Company to dismiss the bill of complaint for want of jurisdiction. The motion was denied. See opinion (C. C.) 132 Fed. 382. The cause now comes before the court on an application by the complainant for an injunction to restrain the further prosecution of an action at law, and has been heard on the bill of complaint, with the affidavits thereto annexed and the answering affidavits. It appears that William N. Berdan instituted an action at law in the Supreme Court of the state of New Jersey against Henry S. Manning to recover the sum of \$51,250 upon a promissory note given by Manning to the order of the W. K. Niver Coal Company. The action was removed to this court. The parties in it are William N. Berdan, plaintiff, and Henry S. Manning, defendant. The parties in this suit are Henry S. Manning, complainant, and William N. Berdan and the W. K. Niver Coal Company, defendants. The objects of the bill are to secure an injunction to stay the action at law, to com-

pel the surrender of the note of the complainant for cancellation, and to secure a discovery in aid of the relief sought. The substance of the complaint is that William K. Niver and John B. McDonald, copartners in the mining business, caused the W. K. Niver Coal Company to be organized as a corporation under the laws of the state of Pennsylvania for the purpose of conveying to the corporation the property and business of the copartnership, and to the end that the corporation might acquire certain other mining properties; that the corporation and Niver and McDonald issued a prospectus concerning the affairs of the corporation, containing fraudulent overvaluations of the copartnership property, and other fraudulent misrepresentations of material facts; that the authorized capital stock of the corporation was \$2,000,000, and that it had provided for an issue of \$1,000,000 of its mortgage bonds; that the most of the stock and a large part of the bonds were issued to Niver and McDonald as a consideration for their copartnership property and business on a basis of enormously inflated values of that property and business; that the facts which would show these inflated values were concealed in the prospectus and by the corporation and its promoters and agents; that, relying on the prospectus and the statements of one R. A. C. Smith, who was authorized to act for the corporation and whose statements the complainant declares to have been false, the complainant was induced to sign a contract for the purchase of \$50,000 of the mortgage bonds and 250 shares of the corporation's capital stock, and to give therefor his promissory notes for \$50,000, which were subsequently renewed by a single note for \$51,250, being the amount of the original notes with interest, and being the note which the complainant now seeks to have surrendered and canceled; that the complainant had no knowledge of the alleged misrepresentations and concealments when he gave the last note; and that on discovery of the facts he promptly rescinded the contract, tendered to the corporation the 250 shares of the capital stock which he had received (no bonds ever having been delivered to him), and demanded the surrender to him of the promissory note.

The first objection made by the defendants to the granting of the injunction is that the complainant has an adequate defense to the action at law. In urging this objection, the attention of the court has been directed to section 723 of the Revised Statutes [U. S. Comp. St. 1901, p. 583]. This section provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." The primary object of the bill, however, is to secure a surrender of the note and its cancellation. Section 723 does not alter the rule that was in force prior to 1789, when it was first enacted, concerning the power of a court of equity to assume jurisdiction in a case triable at law. In *Boyce v. Grundy*, 3 Pet. 215, 7 L. Ed. 655, the court said concerning this section that:

"It is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy

at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

In *Jones v. Bolles*, 9 Wall. 364, 19 L. Ed. 734, it appears that Bolles, on behalf of himself and all other stockholders of the Mineral Point Mining Company, filed his bill of complaint against Jones and the mining company for an injunction to restrain Jones from suing for, claiming, or demanding against the mining company the purchase money of a certain tract of mining land which he had conveyed to the mining company. The matter set forth in the bill as a ground for the relief prayed for was a charge of misrepresentation, concealment, and fraud on the part of Jones, he being an agent of the mining company, whereby he induced Bolles to purchase for himself and others capital stock of the mining company. Jones answered the bill, denying the principal charges in it. The Circuit Court for the District of Wisconsin enjoined Jones from bringing any action at law against the mining company, directed him to execute a release, and declared the agreement entered into between him and the mining company, which he had concealed from Bolles, to be void. On the appeal Mr. Justice Bradley said:

"It is objected that a court of equity has no jurisdiction of the case because the law affords a complete remedy in damages. This objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment; and it does not depend on discovery. But in this case a court of law could not give adequate relief. The agreement complained of is perpetual in its nature, and the only effectual relief against it, where the keeping of it on foot is a fraud against parties, is the annulment of it. This cannot be decreed by a court of law, but can by a court of equity."

In *Metler's Administrators v. Metler*, 18 N. J. Eq. 270, the complainant filed a bill praying for a perpetual injunction to restrain an action at law upon a promissory note which had been given without consideration, and for a surrender and cancellation of the note. The defendants demurred to the bill, and set up as a defense that the complainants had an adequate remedy at law. But the chancellor held that in such a case the remedy at law was not complete, and that the promissory note, which appeared to be valid on its face, might, in case of a discontinuance of or nonsuit in the action at law, be held until the evidence of its being without consideration should be lost, when a suit on it brought against the maker or his representatives might be successful. "In such case," said the chancellor, "the jurisdiction of courts of equity to order the security to be given up to be canceled is now well established. There has been some diversity of opinion and decision on this point, and more in cases when the instrument asked to be canceled is at law void on its face; but even then the weight of authority is in favor of it. In cases where the instrument is on its face valid, and especially if negotiable, the jurisdiction of the court is founded upon principle adopted among other cases in bills quia timet, and is now settled by authority." The decree of the chancellor was affirmed by the New Jersey court of last resort. See 19 N. J. Eq. 457.

The reasonableness of such a rule is well illustrated in this case. By the bill of complaint it is charged that the W. K. Niver Coal Company, the payee mentioned in the note, transferred it to Berdan after maturity, without consideration, and with notice that Manning claimed a good defense thereto; and, further, that Berdan is not the beneficial owner of the note, has no real interest in it, and that he holds it for the use and benefit of the W. K. Niver Coal Company. Berdan does not claim to have any interest in the note. In his affidavit he says that the note was transferred to him by John B. McDonald, to the end that he (Berdan) might bring action thereon "for the benefit of the said John B. McDonald." Berdan may discontinue the action at law commenced by him, and deliver the note back to his transferror, who may again cause another action at law to be commenced against Manning, or, in the event of his death, against his representatives. If the note was in fact obtained from the complainant by the fraud of the W. K. Niver Coal Company or of its agents, and if Berdan is chargeable with notice of that fraud, the complainant should not be denied the relief which a court of equity may give him. In such circumstances he cannot have, in an action at law, "a plain, adequate, and complete remedy," and therefore there is nothing in section 723 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] that prohibits his application to a court of equity for the relief which it may afford.

Another objection by the defendants to the granting of the injunction prayed for is that neither the bill of complaint nor the affidavits annexed thereto show any misrepresentations or concealments of material facts for which the W. K. Niver Coal Company can in any wise be held responsible. This objection I deem to be without merit. Some of the allegations in the bill of complaint have already been set forth. Another important one is that by the law of the state of Pennsylvania, under which the W. K. Niver Coal Company is organized, it is provided that no corporation shall issue stock or bonds except for money, labor done, or property actually received; that all fictitious increase of stock or indebtedness over and above the honest valuation of the property received in consideration therefor shall be void; that the holders of the shares of stock of a corporation which have not been fully paid shall be liable to creditors of the corporation for its debts to the extent of the unpaid portion of the capital stock; and that, if the complainant shall continue to hold the shares of stock delivered to him without objection, and without rescission of the contract under which those shares were delivered to him, he may be held liable for the debts of the corporation. I do not find that the allegation concerning the law of the state of Pennsylvania is verified by any affidavit, but the allegation as to the overvaluations of the property and business of Niver and McDonald, and as to the suppressions of material facts in the prospectus, are verified. The complainant says the prospectus was shown to him at the time his signature to the contract of purchase was obtained, and that he relied wholly upon his confidence in the promoters of the corporation, and without personal

examination of the properties acquired or intended to be acquired by the corporation. If these allegations shall be substantiated by due proof on final hearing, I fail to see why the complainant will not be entitled to the relief he seeks. It seems to me such relief would be in accord with the principles of well-considered precedents.

Another objection is that section 724 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] deprives the complainant of any redress in equity. The provision of that section is that:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."

The objection is groundless. It is only "parties" to an action at law that can be compelled to produce such evidence. The W. K. Niver Coal Company is a party defendant to this suit because the complainant charges that it is the real party in interest, but it is not a party to the record in the action at law, and, of course, cannot be compelled to produce in that action any books or other documents under the provisions of the 724th section.

There is one feature of the case, however, that renders it improper to issue an injunction before the bill of complaint shall have been amended, notwithstanding the defect in the bill now to be referred to has not been objected to by the defendants. In the affidavit of David T. Price, filed by the defendants, it is said that John B. McDonald purchased the note in question from the W. K. Niver Coal Company for the sum of \$50,000 in cash, and that, after Manning had refused to pay the note, he transferred it to Berdan. Berdan, as already stated, swears that the note was transferred to him by McDonald. Manning, in his reply affidavit, swears, on information and belief, that the note was discounted on or about its date by the Mercantile National Bank of the City of New York for the benefit of the W. K. Niver Coal Company. If the allegations of the bill of complaint concerning McDonald's relations to the W. K. Niver Coal Company are true, McDonald can have no better right to recover on the note than the W. K. Niver Coal Company itself. In view of the affidavits of Price and Berdan, the bill should be amended by making McDonald a party thereto. This the complainant has already offered to do.

Upon a suitable amendment to the bill of complaint, an injunction will be allowed restraining the prosecution of the action at law until the further order of the court.

## DEVLIN v. McLEOD.

(Circuit Court, W. D. New York. December 22, 1904.)

## 1. TRADE-MARKS—WORDS INDICATING QUALITY.

The words "Toothache Gum," used to designate a medicinal preparation for the relief of toothache, were suggestive of the ailment and its probable cure, and designated quality, rather than the origin or ownership of the article, and were therefore not subject to appropriation as a technical trade-mark.

[Ed. Note.—Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to *Searle & Hereth Co. v. Warner*, 50 C. C. A. 823.]

## 2. SAME—UNFAIR COMPETITION—FRAUD.

Where, in a suit for unfair competition, it was apparent that confusion was likely to arise because of defendant's imitation of plaintiff's package, an intent to defraud would be presumed.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper*, 30 C. C. A. 376.]

## 3. SAME—EVIDENCE.

In a suit to restrain defendant from alleged unfair competition in the sale of "Toothache Gum" in packages similar to complainant's package, evidence held to show such a similarity as to entitle complainant to an injunction.

## 4. SAME—LACHES.

Where complainant, the original manufacturer of "Dent's Toothache Gum," had no knowledge of defendant's use in the United States or elsewhere of the words "Royal Toothache Gum" to designate his commodity until 1902, and plaintiff brought suit promptly thereafter to enjoin such use, and to restrain defendant from selling his commodity in packages similar to complainant's packages, complainant was not barred from relief by laches.

[Ed. Note.—Laches as a defense in suits for infringement of trade-mark or trade-name, see notes to *Taylor v. Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.]

## 5. SAME—INJUNCTION—DAMAGES.

Where, in a suit for unlawful competition, the gist of the action was defendant's use of a label similar to that used by complainant, the fact that defendant's use thereof at the time suit was brought had been inconsiderable did not warrant the refusal of an injunction, though the use was insufficient to entitle complainant to an accounting.

In Equity.

Forbes & Haviland (Charles T. Haviland, of counsel), for complainant.

Frank Gibbons, for defendant.

HAZEL, District Judge. Complainant seeks to restrain the defendant from using the words "Toothache Gum" in the sale of an article to alleviate or cure pain in a tooth. A technical trade-mark right is claimed by complainant in the words mentioned. The bill also charges unfair competition in trade, by imitating the dress and style of complainant's package. The facts, though in conflict, tend to show that complainant began the manufacture of Dent's Toothache Gum in Toronto, Canada, in 1886, and that the same has been sold in the United States since 1889 or 1890. The article is contained in a two-drachm vial wrapped



in an orange-color label. Upon the label is printed in plain black type the words:

"Dent's Toothache Gum. Stops toothache instantly. Will not run or spread in the mouth. This is not a chewing gum. Directions on inside label. Sole proprietors C. S. Dent & Co., Detroit, U. S. A."

This form and size of package, style and color of label and type, have been continuously used by complainant, without change, except that the words "London, England," were added in 1897. The defendant also manufactures and sells a toothache gum similarly put up, in vials of the size and shape, color of label, style and color of type, and general appearance, of complainant's package; using, however, the words "Royal Toothache Gum" to attract attention to his vendible goods. The label also has printed thereon the words:

"Stops toothache at once. An insoluble gum or wax. Will not burn the mouth. Full directions on label. Made by The J. Bell McLeod Medicine Co., Buffalo, N. Y."

The opaque profile of a man's face has occasionally been printed upon some of the labels used by defendant. It is admitted, however, that a label having printed upon it the silhouette figure mentioned has not been largely used, and accordingly no attention need be given to this form of label. The defendant began the manufacture of his commodity in 1893 or 1894. He claims the term "Toothache Gum" originated with one Gibbons, who began the manufacture of a similar article in 1888, and placed the same on the market in packages similar to those used by complainant, except as to color of label. It sufficiently appears, however, that complainant's adoption of the name and the character of the label used in the United States was prior to that of defendant or any other person. Assuming, therefore, that the complainant was the first to adopt the name and style of dress, the first question is whether he has an exclusive proprietary right to appropriate the term claimed as a trade-mark, in the absence of fraud and deception. The rule is unassailable that the use of words, letters, or symbols as a mere indicia to the quality, class, and character of style of the vendible goods to which they are affixed, cannot be adopted as a valid trade-mark. *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Barrett Chemical Co. v. Stern*, 176 N. Y. 27, 68 N. E. 65. The common words "Toothache Gum" are certainly suggestive of the ailment, and its probable cure by the use of the medicated application to the painful tooth or gums. Their adoption denotes the character of the article sold, and its efficiency as a curative medicinal preparation, rather than origin or ownership, and hence they are not entitled to protection as a technical trade-mark.

As to unfair competition: The law of unfair trade is thus comprehensively stated by Judge Coxe in *Hilson Co. v. Foster et al.* (C. C.) 80 Fed. 896:

"No man has a right to use names, symbols, signs, or marks which are intended or calculated to represent that his business is that of another. No man should in this way be permitted to appropriate the fruits of another's industry, or impose his goods upon the public by inducing it to believe that they are the goods of some one else."

The general rule governing this class of cases is stated by the Supreme Court as follows:

"If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as will be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection."

McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 549, 11 Sup. Ct. 396, 34 L. Ed. 997; Coats v. Merrick Thread Co., *supra*.

The application of this rule, based upon a fair inference drawn from the evidence, would seem to establish that the defendant, by fraud and deception, palmed off his article for that of complainant. True, fraud, in cases of unfair competition, is the essence of the relief sought, and should be clearly proved; but where a similarity of style and color of label and type, size of package, spacing, and marginal lines, when collocated, is present, the existence of a wrongful intention in a case like this is persuasive. Moreover, when it is apparent that confusion is likely to arise because of the imitation and resemblance, an intent to deceive may be presumed. There is no conclusively direct evidence that confusion has resulted from the similarities pointed out, nor is there evidence of actual sales of one product for the other, or even of a mistake of one for the other, or any representation of palming off the toothache gum of the defendant for that of the complainant. Nevertheless, by the adoption of the collocated prominent features found in complainant's label and style of dress, an attempted deception is shown, and no such differentiation in the vendible goods of the defendant exists as to warrant a denial of the protection of a court of equity. The pertinent rule is plainly stated in *Collinsplatt v. Finlayson et al.* (C. C.) 88 Fed. 693, as follows:

"Nor do these courts [i. e., federal] require specific proof of purchases by individuals actually deceived, when the labels themselves show an attempt at deception which appears to be well-calculated to deceive." And again: "Inspection of the labels must carry conviction to any unbiased and intelligent mind that the later label was prepared by some one who had seen the earlier one, and that it was designed, not to differentiate the goods to which it was affixed, but to simulate a resemblance to complainant's goods sufficiently strong to mislead the consumer, although containing variations sufficient to argue about, should the designer be brought into court."

In the recent case of *Enterprise Mfg. Co. v. Landers, Frary & Clark*, 131 Fed. 241, the Circuit Court of Appeals for this circuit states the rule in these words:

"A court of equity will not allow a man to palm off his goods as those of another, whether his misrepresentations are made by word of mouth, or, more subtly, by simulating the collocation of details of appearance by which the consuming public has come to recognize the product of his competitor."

The principal words on the label of the defendant are very much the same as those on complainant's label; the vials are practically the same size—the defendant's but one-half drachm larger; the gum in the vial emits a similar medicinal odor; and the size of the lettering, the color of the ink and labels, are certainly similar. As has been stated, the figure of the man's face upon the defendant's label is only occasionally

used. From its omission upon the labels principally used, or its entire abandonment—a fact which may be inferred from the testimony—an intent to enhance the similarity to complainant's packages may be presumed. Furthermore, it is admitted that in February, 1902, the defendant put up an article called "Bent's Toothache Gum," in form and size of vial, color of label, size and style of type, in imitation of complainant's package. Upon this point defendant testifies that the packages in question (about one gross in amount) were manufactured under his supervision at the request of one Bent. Although the production of the label having the name "Bent" printed upon it, in imitation of the name "Dent" on complainant's label, has been discontinued, the issuance of such label is thought to have some bearing upon defendant's intent to imitate complainant's article, which the evidence shows has been widely advertised.

Defendant contends that the doctrine of laches has application. Complainant had no knowledge of the use in the United States or elsewhere by defendant of the words "Royal Toothache Gum" to designate his commodity until some time in the year 1902, and it is thought, therefore, that laches will not bar complainant's relief, especially as the action was promptly brought. Moreover, the use by defendant of the yellow label, size and style of vial and type complained of, which is the gist of the unfair trade feature of this controversy, has been inconsiderable; and hence the refusal of a decree of injunction is not warranted, though no case for an accounting is presented. *Rahtjen's Am. Composition Co. v. Holzappel's Composition Co.*, 101 Fed. 257, 41 C. C. A. 329; *Menendez v. Holt*, 128 U. S. 524, 9 Sup. Ct. 143, 32 L. Ed. 526.

A decree may be entered, without costs, enjoining the defendant from the use of the words "Toothache Gum" in connection with a style of type similar to that used by complainant on a label of the same or similar color as that of complainant, and also enjoining the use of the word "Bent" in connection with such style of packages as herein described. So ordered.

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DEVLIN v. PEEK et al.

(Circuit Court, S. D. New York. December 23, 1904.)

**1. UNFAIR COMPETITION—IMITATING PACKAGE.**

Though the words "Toothache Gum" are descriptive, and therefore may not be appropriated as a technical trade-mark, defendant may, on the ground of unfair competition, be enjoined from using the words in connection with a style of type used by complainant, and on a label of similar color.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

**2. ACTIONS—PERSONS USING TRADE-NAME.**

*Laws N. Y. 1900*, p. 452, c. 216, § 363b, forbidding the carrying on of business under an assumed name, does not prevent institution of an action by one who has assumed a trade-name.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Names, § 7.]

Action to Restrain Infringement of Trade-Mark or Trade-Name "Toothache Gum," and for Unfair Competition.

Forbes & Haviland and Charles T. Haviland, for complainant.  
Joseph C. Clayton and William G. McCrea, for defendants.

HAZEL, District Judge. The principal questions presented have just been decided by this court in an action brought by this complainant against John Bell McLeod, 135 Fed. 164, in the Western District of New York, for infringement of complainant's trade-mark and unfair competition. Both cases were considered at the same time. The McLeod Case was earlier, and the reasons for my views are set out in the decision filed therein.

As intimated at the hearing, it is thought that the words "Toothache Gum" are descriptive, and accordingly cannot be appropriated as a technical trade-mark. An examination of the evidence warrants the conclusion that the complainant is entitled to relief against the defendant on the ground of unfair competition. The similarities between the packages, namely, in the style and color of label, size and color of type, size of vial, when collocated, are thought to be sufficient to deceive an intending purchaser desiring complainant's article, and induce him to accept that of defendant for the genuine. The resemblance and collocation raises a presumption of wrongful intent. *Collinsplatt v. Finlayson et al.* (C. C.) 88 Fed. 693; *Enterprise Mfg. Co. v. Landers, Frary & Clark* (C. C. A.) 131 Fed. 241.

The point that the complainant carries on business in this state, and has brought this action under an assumed name, is untenable. By section 363b of chapter 216, p. 452, of the Laws of 1900 of the State of New York, it is forbidden to conduct or carry on business in the state of New York under an assumed name, or any designation other than the real name of the individual carrying on the business, unless a certificate is filed in conformity with the statute. This law does not forbid the institution of an action by an individual who has assumed a trade-name.

A decree may be entered, without costs, enjoining the defendants from the use of the words "Toothache Gum" in connection with a style of type similar to that used by complainant on a label of the same or similar color as that of complainant. So ordered.

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IN re EWALD & BRAINARD.

(District Court, N. D. Iowa, Central Division. February 8, 1905.)

No. 474.

**1. BANKRUPTCY—PRIORITY BETWEEN CREDITORS—EFFECT OF WITHHOLDING MORTGAGE FROM RECORD.**

The act of a creditor in withholding from record a chattel mortgage securing his debt, by agreement with the mortgagor, until the latter's bankruptcy, while it may render the mortgage invalid as a lien as against subsequent creditors without notice, does not of itself affect his right to prove his debt in bankruptcy, nor subordinate it to the claims of subsequent creditors.

**2. SAME—PARTICIPATION IN DEBTOR'S FRAUD.**

A creditor holding an unrecorded chattel mortgage securing his debt, at whose instance the debtor obtained a loan from a bank on a written

statement showing his property free from incumbrance, and who received part payment of his debt from the proceeds, will be postponed in bankruptcy, as to the remainder of his claim, to the debt of the bank.

In Bankruptcy. On petitions of the First National Bank of Crystal Lake and the Prussia Hardware Company, of Ft. Dodge, Iowa, for review of the orders of the referee denying them priority of payment from the bankrupts' estate of their respective claims over the claims of Gilbertson & Thompson and the Crystal Lake State Bank.

L. S. Butler and Wright & Nugent, for petitioners.

J. E. Wichman and H. A. Brown, for Gilbertson & Thompson and Crystal Lake State Bank.

REED, District Judge. It appears from the testimony that in March, 1902, the bankrupts made a chattel mortgage upon their entire property, consisting of a stock of merchandise, to Gilbertson & Thompson, doing business as bankers under the name of the Crystal Lake Bank, to secure a debt of \$3,000 represented by two notes of the bankrupts, dated in September preceding, one for \$500 and one for \$2,500, owing by them to that bank. By agreement between Gilbertson & Thompson and the bankrupts this mortgage was not to be recorded, and it was not recorded prior to the institution of the bankruptcy proceedings. November 7, 1902, the bankrupts made a bill of sale of the same stock of merchandise to the Crystal Lake State Bank (which was the successor of the Gilbertson & Thompson bank) to secure a claim of about \$185 to that bank, and also the balance due upon the Gilbertson & Thompson mortgage debt; and by agreement between the parties this bill of sale was not to be recorded, and it was not recorded prior to the bankruptcy proceedings. About June 1, 1902, when the note of \$500 became due, the cashier of Gilbertson & Thompson requested Mr. Brainard, one of the bankrupts, that they make a loan from the First National Bank of Crystal Lake. Brainard in reply said that he thought he could do so, but would have to tell that bank of the mortgage held by Gilbertson & Thompson. The cashier replied that he need not do that, as it was none of the business of that bank that Gilbertson & Thompson held this mortgage. Brainard thereupon applied to the First National Bank of Crystal Lake for a loan to the bankrupts of \$1,000, and upon being questioned by the cashier of that bank as to the financial condition of his firm, made a written statement that their merchandise was worth about \$5,000, and was free and clear of all incumbrance. Upon the strength of this statement the First National Bank loaned the bankrupts \$1,000, took their note therefor unsecured, and about October 1st following bought notes made or indorsed by the bankrupts to the amount of \$371. The cashier of the First National Bank, who concluded these transactions, testified that the bank would not have made the loan nor bought the notes if he had known of the mortgage to Gilbertson & Thompson. Of the \$1,000 so loaned by the First National Bank, the bankrupts on the same day paid \$530 thereof to Gilbertson & Thompson to pay the \$500 note secured by the chattel mortgage above mentioned. Between April and November 1, 1902, the Prussia Hardware Company sold the bankrupts upon open account

goods to the amount of \$163. The creditman of that company testifies that before the goods were sold he learned from the commercial agencies that there were no incumbrances upon the bankrupts' stock, and thereupon extended the credit, which he would not have done had he known of the mortgage to Gilbertson & Thompson. Neither Gilbertson & Thompson nor the Crystal Lake State Bank made any statements or representations of any kind to the Prussia Hardware Company to induce that company to extend credit to the bankrupts; nor did they make any statements to the First National Bank, or do anything other than as above stated, to induce that bank to make the loan, or to purchase the notes against the bankrupts. The First National Bank and the Prussia Hardware Company proved their claims against the bankrupts, and petitioned the referee to give them priority of payment thereof from the bankrupts' estate over the claims of Gilbertson & Thompson and the Crystal Lake State Bank, which were also proved against the bankrupts' estate. The referee denied such petitions, and the First National Bank and the Prussia Hardware Company severally petition for review of such orders.

The contention of both petitioners is that the withholding of the mortgage and bill of sale from record by agreement with the bankrupts was in and of itself such fraud upon them as will preclude Gilbertson & Thompson and the Crystal Lake State Bank from sharing equally with the petitioners in the distribution of the bankrupts' estate; and the First National Bank further contends that the act of the cashier of Gilbertson & Thompson in inducing the bankrupt Brainard to conceal from it at the time it made the loan of \$1,000 the existence of the chattel mortgage, and the actual concealment thereof by the bankrupts in pursuance of the request of the cashier of Gilbertson & Thompson to do so, was such active fraud upon the part of Gilbertson & Thompson and their cashier as will defeat the right of Gilbertson & Thompson to share equally with the First National Bank in the distribution of the bankrupts' estate. The withholding of the bill of sale to the Crystal Lake State Bank from record could have had no influence upon either petitioner in extending credit to the bankrupts, for that instrument was not made until after the petitioners had extended such credit. If Gilbertson & Thompson were claiming to hold the property or its proceeds under the mortgage to them, the failure to record the same would, under the bankruptcy law, be fatal to such claim; and, regardless of that law, it might preclude them from holding the property under such mortgage as against other creditors who had extended credit to the debtors in ignorance of such lien after it was made, and before it was recorded, even though it might have been recorded before such other creditors had acquired any liens upon or right to the property by attachment or otherwise. *Blennerhassett v. Sherman*, 105 U. S., at page 117, 26 L. Ed. 1080; *Goll & Frank v. Miller*, 87 Iowa, 426, 54 N. W. 443; *Bacon v. Harris* (C. C.) 62 Fed. 99. These authorities, however, only hold that the mortgage is invalid under the circumstances therein stated. The failure to record a mortgage does not render the debt secured thereby invalid, nor release the debtor therefrom, but only deprives the creditor of all rights under his mortgage as against

other creditors of the mortgagor. The debt still exists, and may be enforced against the debtor. Ordinarily, no obligation rests upon a creditor to notify the public or other creditors of a debt owing him by his debtor. And if he does nothing to induce others to extend credit to such debtor after he has taken a mortgage to secure his own debt, it would seem that by withholding the mortgage from record he would only forfeit his rights thereunder. Gilbertson & Thompson were not applied to for information as to the financial standing of the bankrupts by either of the petitioners, and they were not required to hunt them up and volunteer such information. As Gilbertson & Thompson have relinquished all rights under their mortgage, and are not now asserting any rights thereunder, it should not be held that, because they have withheld it from record, they may not enforce their debt secured thereby against their debtors. The mortgage to Gilbertson & Thompson was a preference under the bankruptcy act, and section 57g of that act (Bankr. Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) permits them to surrender such preference and prove the debt as an unsecured claim against the bankrupts' estate; and the mere withholding of the mortgage from record does not preclude them from doing this. If Gilbertson & Thompson had done nothing else but withhold the mortgage from record, as they had agreed to do with the bankrupts, the order of the referee would be approved upon both of the petitions for review.

It appears, however, from the testimony, as above stated, that the bankrupts procured from the First National Bank of Crystal Lake a loan of \$1,000 upon a materially false statement in writing made by the bankrupts to that bank at the time, and upon the strength of which the loan was made; and the bank afterwards purchased notes made or indorsed by the bankrupts to the amount of \$371; neither of which would it have done but for such false statement. Such false statement was made at the instance of the cashier or agent of Gilbertson & Thompson, and from the loan so procured from the First National Bank the bankrupts at once paid to Gilbertson & Thompson \$530 to pay the \$500 note and the interest thereon held by them against the bankrupts and secured by their mortgage. Gilbertson & Thompson thereby received that much of the fruits of the fraud so perpetrated upon the First National Bank, whereby it was led to believe that the bankrupts were not indebted to Gilbertson & Thompson. They must, therefore, be held to have participated in and to have profited by the fraud so practiced upon that bank, whereby it was induced to make its loan to, and purchase of the notes against, the bankrupts.

The bankruptcy law is founded and administered upon the principles of equity, and it would be clearly inequitable to permit a creditor who by a false and fraudulent statement, purposely made or caused to be made by him, had induced another to extend credit to his insolvent debtor, and had profited thereby, to share equally with the one whom he had thus defrauded in the distribution of the bankrupts' estate. Equity will not permit this to be done, but will postpone the claim of the creditor who has thus defrauded the other to the claim of the latter in the distribution of the bankrupts' estate. The conclusion is that upon the petition of the First National Bank of Crystal Lake for re-

view of the order of the referee such order must be reversed so far as it permits Gilbertson & Thompson to share equally with that bank in the distribution of the bankrupts' estate, but will be approved so far as it relates to the claim of the Crystal Lake State Bank.

In computing the dividend to be paid upon the claim of the First National Bank the debt of Gilbertson & Thompson will be excluded from the amount of the debts proved against the bankrupts' estate, and that claim is adjudged to be junior and inferior to the claim of the First National Bank of Crystal Lake.

Upon the petition of the Prussia Hardware Company, the order of the referee is approved. It is ordered accordingly.

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**W. H. THOMAS & SON CO. v. BARNETT.**

(Circuit Court, W. D. Kentucky. January 21, 1905.)

**1. CUSTOMS DUTIES—MERCHANDISE ENTITLED TO DEBENTURE.**

The provision in section 3030, Rev. St. [U. S. Comp. St. 1901, p. 1995], for "merchandise entitled to debenture," has reference to merchandise in a customs bonded warehouse, in regard to which its owner or the importer is entitled to a certificate in due form showing the amount of duties paid thereon, and that it has been duly entered for export to a foreign country.

**2. SAME—MERCHANDISE IN UNSAFE PACKAGES—TRANSFER OF MERCHANDISE IN WAREHOUSE.**

Under section 3030, Rev. St. [U. S. Comp. St. 1901, p. 1995], merchandise in customs bonded warehouses may not be transferred from the original packages for safety or preservation while in warehouse, unless it is entered for exportation. The importer's only remedy is to remove the merchandise from the warehouse into his own possession.

**3. PLEADING—STATEMENT OF LEGAL CONCLUSION.**

The expression "merchandise entitled to debenture," in section 3030, Rev. St. [U. S. Comp. St. 1901, p. 1995], is there used as a sort of legal conclusion based upon other provisions, and, in order to be sufficient, a pleading founded on section 3030 should allege that the antecedent provisions have been met. It is not enough merely to state that the merchandise is "entitled to debenture," without averring the facts the existence of which makes it so entitled.

Augustus E. Willson, for plaintiff.

R. D. Hill, U. S. Atty., for defendant.

EVANS, District Judge. This is an action at law, brought in the Jefferson Circuit Court against the defendant, the surveyor of customs at Louisville, Ky., who has removed it into this court under a writ of certiorari issued pursuant to section 643 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 521].

The plaintiff, in its petition, alleges that certain distilled spirits manufactured in Kentucky had long ago been exported to Europe; that within three years before the institution of this action plaintiff imported said distilled spirits into the United States; that they were merchandise "entitled to debenture"; that, as the owner thereof, it desired to transfer the same into packages other than those in which they were imported; that on November 16, 1903, plaintiff made application in writing to the defendant for permission to transfer the said



whisky to bottles; that said whisky is in the customs bonded warehouse in Louisville, Ky.; that for 10 or more years it has been in the barrels in which it was originally put when manufactured; that the barrels are old, worn, and decayed; that by reason of age, much handling, rust of iron hoops, and other causes, the packages have all become unfit for holding their contents, which will waste and evaporate and otherwise be greatly injured or lost if not transferred to new packages; and that the defendant at the time of the application aforesaid knew all these facts to be true. The petition further avers that plaintiff's application to the defendant was denied and refused by that officer, and that instead of granting it he referred it to the Secretary of the Treasury, who advised and instructed the defendant that there was no law to authorize the giving of such permission under the circumstances of the plaintiff's case. The plaintiff sets out in full in its petition section 3030 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1995], and asserts that defendant has refused to accord to plaintiff the rights conferred by that section, and that he has thereby done plaintiff a wrong and injury, for which it asks damages in the sum of \$5,000, and it also prays the judgment of the court ordering the defendant to permit the transfer applied for. There is no averment in the petition, nor any indication from anything stated therein, that it is the purpose of the plaintiff to export the whisky, or any part of it. There is no averment that the whisky, or any part of it, has been entered at the customs office for export to any foreign country. The plaintiff does not aver that it has paid the duties under the laws of the United States upon the whisky, though we may assume that payment of the duties has been secured to the United States, or that such payment cannot be evaded by re-export, because the whisky is still in the bonded warehouse. Doubtless the necessary steps provided by law have been taken in order to permit the whisky to remain in the warehouse. There is no averment in the petition that the defendant willfully refused to permit the transfer, but possibly that omission may not be material, inasmuch as a positive refusal to permit the transfer is alleged by plaintiff, although the petition shows that the refusal was based upon instructions from the Secretary of the Treasury, the superior officer of the defendant, and which instructions the defendant was probably bound to follow. Certain papers are referred to in the petition as being made exhibits therein, but they have not been filed, nor shown to the court; but the view I take of the case probably renders this circumstance immaterial.

The plaintiff's petition being such as I have indicated, the defendant has filed a general demurrer thereto, and thus raises a very interesting question, which depends for its solution upon the proper interpretation of section 3030 of the Revised Statutes, which is as follows:

"When the owner, importer, consignee, or agent, of any merchandise entitled to debenture may wish to transfer the same into packages other than those in which the merchandise was originally imported, the collector of the port where the same may be shall permit the transfer to be made if necessary for the safety or preservation thereof."

The language of the section is plain enough, except in the use of the phrase "entitled to debenture." That phrase, however, is the one we

are most concerned to clearly understand and interpret, for upon it the right of the plaintiff must turn. The word "debenture," as used in the section, is a somewhat antiquated, and possibly abnormal, term; one that nowadays conveys no accurate meaning at first blush to any but the initiated. The petition, as we have seen, alleges that the distilled spirits were "entitled to debenture," and plaintiff's counsel insists that that is the statement of a fact, and not the statement of a mere legal conclusion by the pleader. It is the only statement in the petition in this essential connection, and plaintiff argues that it is equivalent to an assertion of the general right everybody has to export merchandise, and that that is what the phrase means, and that the statute intended to give every owner of property in its nature exportable the right, while in government custody, to transfer it out of bad packages into good ones, if necessary for its preservation. As we have seen, however, no facts (if any others are essential) are set out or stated in the plaintiff's pleading as a basis of the averment that this merchandise was "entitled to debenture." The pleading in this respect follows the language of section 3030, Rev. St., literally. Doubtless there are cases where a pleading is sufficient when it follows the statutory language on which it is based, but to be so it must embrace all the essential parts of such language. Here there are several statutory provisions besides those contained in section 3030, which show that the phrase "entitled to debenture," used in that section, is itself there used as a sort of legal conclusion, based upon other provisions, and, in order to be sufficient, a pleading founded on section 3030 should show that the antecedent provisions have also been met.

Sections 3030 and 3031, as they now appear in the Revised Statutes of the United States, originally made up section 32 of the act of March 1, 1823, c. 21, 3 Stat. 738, what is now section 3031 being there a proviso to what is now section 3030. The act of March 1, 1823, was an amendment to the very elaborate customs act of March 2, 1799, c. 22, 1 Stat. 627-704. What remains of those most important enactments respecting drawbacks is now found in chapter 9, tit. 34, of the Revised Statutes, §§ 3015-3057 [U. S. Comp. St. 1901, pp. 1988-2003]. The two acts referred to, many of the essential features of which are still in force, provide, among other things, for the payment of drawbacks to all persons who may return to a foreign country merchandise which has been imported into this country. They provide for the repayment (less 1 per cent.) of all the duties paid thereon where the duties paid exceeded \$50 in amount, and where the merchandise is returned within a certain time (now three years) after importation. But the duties have to be paid before they can be repaid as drawbacks, and the legislation points out how entries at the custom house for exportation of the merchandise intended to be returned to the foreign country shall be made. At a certain point in the process a certificate is to be given to the owner of the goods showing the amount of duties paid, the entry of the goods for exportation, etc., and the amount of money shown by the certificate to be due to the holder thereof is paid by the United States, a permanent appropriation having been made for that purpose. This certificate, curiously enough, and for some reasons not easily as-

certainable, is called a "debenture," and Bouvier, in his Law Dictionary, thus defines it:

"A certificate given in pursuance of law, by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned, to an importer, for drawback of duties on merchandise imported and exported by him, provided the duties on the said merchandise shall have been discharged prior to the time aforesaid."

This definition seems to be perfectly accurate under sections 3038, 3039, and 3040 of the Revised Statutes, which are parts of the act of 1799. A form for the debentures was prescribed in section 80 of the act of 1799, and it, with only slight change, is in use at the present day. It is now as follows:

Debenture Certificate.

District of \_\_\_\_\_,  
\_\_\_\_\_, 19—.

Debenture for \_\_\_\_\_ dollars \_\_\_\_\_ cents.

In pursuance of law, I hereby certify that the sum of \_\_\_\_\_ dollars will be due from the United States of America, payable at this office, to \_\_\_\_\_, or order, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, for the drawback of duties on merchandise imported by \_\_\_\_\_, in the \_\_\_\_\_, Master, and exported by \_\_\_\_\_ in the \_\_\_\_\_, Master, the duties arising from the importation of the said merchandise having been paid.

Countersigned:

Collector.

\_\_\_\_\_,  
Naval Officer.

This is the "debenture," and it seems clear enough that to this the merchandise must become "entitled" in order to bring it within section 3030.

The court has carefully examined Act March 2, 1799, c. 22, 1 Stat. 627 et seq., and also Act March 1, 1823, 3 Stat. 738, and by referring to sections 75 to 81 of the former and to section 32 of the latter it can plainly be seen what meaning should be ascribed to the phrase "entitled to debenture" in what is now section 3030 of the Revised Statutes. That phrase refers exclusively to merchandise the importer of which is entitled in respect thereto to a certificate that he has paid the duties thereon, and has entered it at the custom house in due form for exportation to some foreign country. No merchandise, except under those circumstances, is "entitled to debenture." When the importer of merchandise becomes entitled to such a certificate respecting them, then, but not till then, is he entitled to make an application under section 3030; and in that contingency, if the provisions of section 3031 are found to be met, he is entitled to have the permission granted—that is to say, if the owner has paid the duties, and has manifested his intention to export the merchandise by an entry thereof to that effect in the custom house, then if the original packages in which the goods are stored are unfit to bear the exportation, it is the duty of the customs officer to permit the owner to transfer the goods into fit packages. This is necessary also from another standpoint, namely, as an exception to the general rule fixed by section 3016 (also a part of the act of 1799), which requires that all exportations of imported articles shall be made in the same packages in which they were imported. In short, the drawbacks allowed under section 3015 of the Revised Statutes are ascertained by the customs officers, and the amount thereof certified in a

paper called a "debenture," it all being a process by which the government determines and certifies the amount which the law requires it to refund of certain duties paid on goods imported to this country, but which, before going into consumption here, are entered for export to be taken out of the country again. We have now reached a point where we are prepared to perfectly understand the meaning of the phrase "entitled to debenture," and we conclude that it signifies and relates to merchandise the importer or owner of which is entitled to a certificate in due form showing the amount of duties paid thereon, and that it has been duly entered for export back to a foreign country. Where it is the intention of the owner to export merchandise to a foreign country after he has paid the duty thereon, and when he has made at the custom house a proper entry for its exportation, then that merchandise is "entitled to debenture," within the meaning of section 3030; and if the owner should discover that the packages which contained it are unsafe, and unfit to stand the voyage, he may apply for permission to transfer it to other packages, and in that contingency it is the duty of the collector of the port, under section 3030, to permit the transfer, provided (under section 3031) he discovers, after inspection, that the original packages are unfit. But the collector of the port is under no obligation whatever—indeed, he has no lawful authority—to permit the transfer unless the merchandise is "entitled to debenture" within the meaning of that phrase as we have stated it. Unless he enters the goods for exportation, apparently his only remedy is to pay the duties, remove the merchandise from the bonded warehouse, and thereafter himself treat it in any lawful way necessary for the preservation of his property. It may be true, as argued by counsel, that justice and common sense obviously demand that facilities should be provided for the transfer of merchandise from bad packages to good ones in all cases where the commodity is in customs bonded warehouses; but that is a matter entirely for the consideration of Congress. The court has only to determine in this case whether the defendant has violated any right given by law to the plaintiff, and that question depends upon whether Congress has imposed upon defendant any duty which can be enforced for the plaintiff's benefit. It does not appear that Congress has done so, nor that it has ever legislated to meet this particular class of cases.

It may not be improper to add that there may be some law or regulation which may authorize the remission of 99 per cent. of the duties chargeable against merchandise in a customs bonded warehouse without the formality of actual payment of the duties in cases where an entry is made of the merchandise for export while it still remains in bond. I have not, however, been able to find any such law or regulation, and it is not very essential that we should examine further into that phase of the case, because in no contingency can the indispensable condition precedent of due entry for export be avoided before any merchandise can become "entitled to debenture." This condition is not met by any averment in the plaintiff's petition.

From what has been said it is entirely clear to the mind of the court that the general averment in the plaintiff's petition that the whisky therein described is "entitled to debenture" when the application for permission to transfer it to new packages was made is a mere statement

by the pleader of a legal conclusion, and is therefore wholly insufficient in point of law. As the petition alleges no facts which sufficiently show that the plaintiff's merchandise was ever entered at the custom house for exportation after its importation into the United States, and as the petition alleges no other state of facts which shows the plaintiff to be entitled to the certification called a "debenture," we must conclude that it does not show any right to any part of the relief sought against the defendant.

The demurrer will therefore be sustained, and the plaintiff may have leave to amend its petition within 20 days, if so advised.

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**J. & P. COATS, Limited, v. JOHN COATES THREAD CO.**

(Circuit Court, D. Minnesota, Third Division. January 28, 1905.)

**1. UNFAIR COMPETITION—ADOPTION OF CORPORATE NAME.**

While a person has the right to use his own name to designate articles which he manufactures and deals in, a corporation has not the right to use the name of one of its incorporators, where it is the name by which an article made and sold by an older dealer is usually called for and described, so as to cause deception of purchasers and injury to the older manufacturer.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 75, 84.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

**2. SAME—FRAUDULENT INTENT.**

Complainant, J. & P. Coats, Limited, a corporation, and its predecessors in business, have made and sold thread in the United States since about 1840, which has usually been called for and sold under the same of "Coats thread," and has by such name acquired a good reputation and a large sale; it being understood generally that thread so called was manufactured by complainant. Defendant corporation, the John Coates Thread Company, later commenced the manufacture and sale of thread; having taken its name from that of one of its incorporators, who had never been in the thread business previous to defendant's organization. It was shown that in many instances purchasers calling for Coats thread were given by dealers thread made by defendant, which it sold at a lower price than complainant charged for its product, but which retailed for the same price. There was little or nothing on the spools to attract the attention of the ordinary purchaser to the difference. *Held*, that defendant's name was apparently adopted for the purpose of unfair competition, and that its use would be enjoined.

In Equity. Suit to enjoin unfair competition.

C. A. Severance and Archibald Cox (Guthrie, Cravath & Henderson, Carl A. De Gersdorff, and Joseph P. Cotton, Jr., on the brief), for complainant.

John E. Stryker (L. J. Dobner, on the brief), for defendant.

LOCHREN, District Judge (orally). This suit was brought by the complainant corporation, which is a manufacturer and dealer in thread, to restrain the defendant corporation, which is also a dealer in thread, from the use of the corporate name which the defendant has adopted; claiming that such use results in what is known as "unfair competition,"

and is liable to deceive the public and purchasers of thread into the belief that the thread which is put upon the market by the defendant is the thread that is manufactured and sold by the complainant, and that it thereby injures the trade of the complainant, not only by causing sales of its thread to be made to purchasers who actually desire and intend to purchase the thread made by the complainant, but also by furnishing an inferior article, supposed by the purchasers to be the thread of the complainant; that the quality of the complainant's thread is thereby discredited and its business injured. The evidence shows that the predecessors of the complainant have been engaged in this business since about 1830, and in the sale of thread in the United States since about 1840—a period of some 60 years—and that the manufacture was commenced by James and Peter Coats originally at Paisley, in Scotland, and that after they had begun dealing in thread in this country they established a manufactory of thread in the United States at Pawtucket, R. I.

It is claimed upon the part of the defendant that the complainant is not entitled to the relief asked, for the reason that it has, in putting its thread upon the market, made misrepresentations which would debar it from equitable relief of the kind asked; that it has caused general belief that this is a foreign thread, whereas, being manufactured in Rhode Island, it is a domestic thread; and that it has not set forth on its label the claim that it is the assignee and entitled to the trade-marks of the original partnership, or of the first corporation which was formed to carry on the business, following that partnership.

It does not appear from the evidence that there is anything in the dressing of the goods or the labels upon them, or that there ever has been, which has represented the goods to be made in a foreign country. The labels, both on the spools and on the packages, are silent in respect to where the thread was made. It does not represent on those packages that it is the successor of J. & P. Coats or the first corporation, the J. & P. Coats Company. There does not seem to be any misrepresentation, and it does not strike me that the matter is material at all, unless there is some misrepresentation which might mislead the public or purchasers. The fact that these statements are not on the label would not affect purchasers, in my judgment, and is entirely immaterial. In some of the cases cited there were misrepresentations—for instance, as to the place of manufacture—but there is no such misrepresentation on these packages. I think there is nothing in that contention.

It is claimed also upon the part of the defendant that its corporation had a right to adopt the name "Coates," being the name of one of the incorporators, and to transact business under the name of the John Coates Thread Company, and that, if the complainant is injured thereby, it is *damnum absque injuria*, because the defendant did no more than it had a right to do. It seems to be well settled that every person has a right to use his own name in the conduct of his business—any business that he is engaged in personally—and upon the labels that he places upon his goods. But even in respect to that, it is pretty well settled that it must be done in a way that will not injure a person who has the same name, and has under that name acquired a reputation for an article manufactured that is valuable; that is, while a person has a right

to use his own name, he must do it in a way which will not injure another. Therefore, in cases of that kind, it is quite often required by the courts that he shall differentiate his labels, or the method that he takes to represent his articles, from those of the older manufacturer, so that it shall not result in placing his goods so they will be likely to be sold to purchasers who believe that they are the product of the earlier manufacturer. There is nothing about these labels of defendant, I think, that anybody could complain of as simulating the labels of the complainant. The packages are entirely different in their appearance, and, if these articles were ordinarily sold in packages, the purchaser, being in the habit of purchasing one kind, would be very unlikely to be misled by receiving a package of the other kind. But in respect to these goods, the ultimate purchaser does not purchase the packages, ordinarily, but single spools of thread, and in reference to those there is little to attract the attention of any ordinary purchaser—especially one who had no knowledge of but one kind of goods as being sold under the same name. It appears from the evidence that these goods of complainant are ordinarily called for by the name of "Coats thread." The purchaser, going into a retail store and desiring to purchase a spool or a few spools of such thread, simply calls for "Coats thread"; and I think the evidence shows that at the time the defendant went into business it was the general (perhaps the universal) understanding of those who had occasion to make such purchases that by calling for "Coats thread" they would be supplied with thread manufactured by the complainant, there being no other so known on the market. It being on the market so long, it had an established reputation, and was favorably regarded; and the article was ordinarily called for by that name, and no other. While the name is precisely as appropriate to the thread which is furnished by the defendant as to the article that is put on the market by the complainant, the evidence shows that in many instances persons calling for "Coats thread," desiring and expecting to receive the thread manufactured by the complainant, have been furnished by retailers with the other article. So that the liability to mistake is plainly shown. The fact that mistakes have occurred very often, and that they are liable to occur constantly, is shown not only by the evidence, but appears as a necessary result from the fact of the two kinds of thread passing generally under the same name of "Coat[e]s thread." It appears from the evidence that the defendant furnished the retailers this thread at a lower price than is required by the complainant—considerably lower—and that the retailer would have an interest, as the articles retailed for the same price, in putting off the defendant's article instead of the complainant's; that the means of deceiving purchasers in that respect exists necessarily in the way these articles are put up; and it must be held that such result was contemplated by the defendant.

Now, while any person has the right to use his own name in the conduct of his business, in describing the articles of his manufacture and which he is dealing in, he has not the right to use the name of any other dealer; and it is well settled by the authorities that a corporation has not the right to use the name of one of its incorporators for the purpose of unfair competition with an older dealer, where it is likely

to do him injury, and that it will not be permitted to use that name if it is the name by which the older article is usually called for and described. As the use by the defendant of the name "Coates," having the same sound as the name by which the complainant's thread has been so long and favorably known, will certainly injure the business of the complainant, such use would be restrained, even though such consequence was not foreseen nor intended by defendant. But there is in this case evidence that goes farther than that, and shows that this was done intentionally for the very purpose of making use of the reputation which had been acquired by the complainant in the selling of the thread of the defendant. If we credit the testimony of Mr. Boynton at all, the name of the defendant was chosen deliberately for that purpose. His testimony has been criticised by the counsel for the defendant, and it certainly shows that he himself purposed to adopt this fraudulent practice in his own interest. There may be considerable ground for censuring him, and perhaps discrediting him to some extent, but I do not know that there is sufficient to warrant me in throwing out his testimony altogether, so long as it seems to correspond with the admitted facts in the case—the facts that the corporation was actually formed at that time, that Mr. Coates had never been engaged in the business at all up to that time, and that his name was taken, instead of any other name or the name of any other incorporators, to describe this corporation. I am inclined to think that the allegations in the bill are sustained and that the complainant is entitled to an injunction as prayed, and to an accounting.

The decree may be prepared accordingly.

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**GIRARD TRUST CO. et al. v. MCKINLEY-LANNING LOAN & TRUST CO. et al.**

(Circuit Court, E. D. Pennsylvania. February 15, 1905.)

Nos. 10, 13.

**1. CORPORATIONS—INSOLVENCY PROCEEDINGS—INTERVENTION.**

Where a trust company holding securities of a loan company in trust to secure its debentures petitioned the court in insolvency proceedings against the loan company asking an order permitting it to collect or sell the securities in its hands, and that its costs and expenses be made a charge against the fund realized, debenture holders, who deny its right, under the trust agreement, to so charge the costs and expenses, are entitled to intervene and contest such application.

**2. SAME—TRUSTEE HOLDING PLEDGED SECURITIES—POWERS AND DUTIES UNDER CONTRACT.**

A trust agreement under which a loan company deposited securities with the trustee to secure its debentures provided that in case of default in the payment of any debenture bond or the interest thereon the trustee should proceed to collect or sell the securities pledged, and to apply the proceeds in payment of the debentures, and that any claim of the trustee for the costs of such collection or sale should not be a lien upon the securities, but should be against the loan company only. *Held*, that such agreement did not contemplate the general insolvency of the loan company, and that while, therefore, the trustee could not be compelled in such contingency to collect the securities at its own cost, neither was it au-



thorized thereby to make such collection where a receiver had been appointed to administer the estate of the insolvent.

### 3. COSTS—INTERLOCUTORY ALLOWANCE.

Fees and expenses incurred on a hearing before a master of interlocutory issues arising in insolvency proceedings against a corporation cannot be allowed in advance of the general distribution of assets to be made a charge against a particular class of creditors, many of whom are not before the court, nor properly represented, on that question.

In Equity. Hearing on master's interlocutory reports.

A. H. Wintersteen, for Girard Trust Co.

George L. Crawford, for Receiver Edmund G. Hamersly.

Charles C. Townsend and Cornwell, Gheen & Cornwell, for exceptions.

J. B. McPHERSON, District Judge. The McKinley-Lanning Loan & Trust Company (hereinafter called the "Mortgage Company") is a Pennsylvania corporation, and was engaged in the western farm mortgage business upon the well-known plan of issuing debentures, these being secured by mortgages deposited with the Girard Trust Company as trustee. The mortgage company fell into financial difficulties several years ago, made repeated and continued defaults in meeting its obligations, and was finally brought into this court by a creditors' bill in which Lucius B. Goodyear, a debenture holder, was the complainant. The mortgage company's insolvency was averred, and a receiver was asked for. No defense was made, and on April 13, 1903, Edmund G. Hamersly was appointed receiver, with the usual powers, and an injunction was issued enjoining the officers, agents, etc., of the mortgage company, the bondholders, and all other persons except the receiver, "from selling, disposing of, or in any way interfering with the property or effects of the defendant, or any part thereof, or from enforcing, or undertaking to enforce, any lien on said property or effects, or any part thereof, or from bringing, instituting, or prosecuting any act, suit, or proceeding at law or in equity against said corporation, or its assets, or against taking any steps towards the liquidation of said corporation." Little, if any, property of the mortgage company was found in this jurisdiction, except the securities that were deposited in the hands of the trust company, and to the possession of these the trust company had a superior right. On October 14, 1903, the trust company filed a second bill in equity against the mortgage company, joining the receiver as the other defendant, setting forth its contract with the mortgage company in behalf of the debenture holders, the default of the mortgage company, the desirability of proceeding to realize upon the securities in the hands of the trustee, and the impossibility of taking the proper steps so long as the court's injunction remained in force, and praying for an account, and for permission to sell the assets in its hands. In December following, the two suits were consolidated by the consent of all parties, and a master was appointed to "consider the matters and things to be exhibited before him in this consolidated cause and in the causes consolidated into this consolidated cause, to report the facts and the law, and to recommend a decree

to be entered by the court in the premises." On March 1, 1904, the trust company presented a petition to the master asking to have its powers enlarged over the securities in its hands, and to this petition the mortgage company and certain debenture holders, who were not parties to the action, filed an answer, objecting to the proposed grant. The right of these holders to appear before the master was attacked, whereupon petitions were presented to the court in April and May, asking for leave to intervene, and these, with the trust company's answer thereto, were referred to the master for inquiry and report thereon. The trust company's petition for additional powers was objected to before the master on the ground that it should have been presented first to the court, whereupon the trust company withdrew the petition and did not renew it. The receiver, however, on May 5 presented his own petition to the court, asking for the same order that had been prayed for by the trust company; and this petition also, with the answers thereto, was referred to the master for appropriate action. On May 23 the trust company petitioned the court for leave to pay an allowance of \$1,000 to the master on account of expenses already incurred and in part payment of his compensation, and this subject also was referred to the master for consideration and report. He has now reported fully upon all the subjects thus specially committed to him by the court, and argument has been had upon the exceptions that were filed to some of his conclusions by the debenture holders. In brief, he reports that the powers asked for by the trust company should be granted, that the petitions for intervention should be allowed, and that the trust company should be directed to pay to the master certain moneys already laid out by him for stenographer's fees and other expenses, and a further sum, to be fixed by the court, as compensation for the services that he has already rendered.

No objection was made before me to the allowance of the petitions to intervene, and I agree with the master that they should be granted. As will presently appear, the trust company's position on the subject of costs and expenses for administering the assets in its hands is antagonistic to the position of the intervening debenture holders, and under such circumstances they should be permitted to come into the suit, and defend what they believe to be their right and their interest in their own way and by their own counsel. A proper order to this effect may be prepared.

The principal subject of dispute is involved in the other two reports of the master, and needs a further statement of facts before it can be properly understood:

The agreement between the trust company and the mortgage company provides, *inter alia*, as follows:

"In case of default of the said McKinley-Lanning Loan & Trust Company in the payment of any debenture bond, or the interest upon the same, and such default shall continue for sixty days, then the said trustee shall proceed at once to collect or sell the securities in their hands pledged for the payment of same, and apply the proceeds for their redemption, and all costs of such collection or sale shall be charged against the McKinley-Lanning Loan & Trust Company.

"The said the Girard Life Insurance, Annuity & Trust Company of Philadelphia, as aforesaid, trustee, hereby accepts the said trust and covenants with the said the McKinley-Lanning Loan & Trust Company and with all parties who shall become in anywise interested on account of the purchase of the said debenture bonds, that they will faithfully discharge all duties herein required of them, and agrees that no claim for compensation for its services shall be a lien upon said securities pledged for the redemption of the said debentures herein provided for, but any such claim shall be against the McKinley-Lanning Loan & Trust Company only."

The construction of these paragraphs is in dispute. The intervening debenture holders insist that the trust company is bound to proceed at once to collect or sell the securities in its hands, advancing whatever sums of money may be necessary to accomplish this purpose, and looking solely to the mortgage company for reimbursement; while the trust company's position is that these provisions have no application to a case of insolvency and general default by the mortgage company, but were intended to apply only to occasional defaults during the currency of the term for which the debentures were issued. The master sustained the trust company's contention, saying:

"There is no suggestion anywhere in the trust agreement that the parties contemplated the possible insolvency of the pledgor, or that they meant to provide for such a contingency. This construction of the clause quoted is borne out by the subsequent clause where the trustee agrees to look to the McKinley-Lanning Loan & Trust Company only for compensation and reimbursement in case of such default. It is unreasonable to suppose that the trustee would agree to perform the innumerable and onerous duties attendant upon the liquidation or foreclosure of the entire trust assets without compensation or indemnity for expenses. A careful examination of the whole trust agreement leads the master to the conclusion that no such intent was in the minds of the parties when the agreement was executed. He therefore holds that the provisions in the agreement relating to the duties of the trustee upon a default, and prescribing the method by which, in such an event, the trustee shall be paid, do not contemplate the present situation nor in any manner provide for it."

I agree with this conclusion, but I am not convinced that, as a necessary result, the trust company has authority, without more, to go on and administer the assets under the direction of the court. Some one must do so, of course, but, unless the trust company is specially appointed for that purpose, I do not see where it derives the power to act in the premises. Since the agreement does not contemplate the present situation, it gives the trust company no power whatever to administer the assets in case of general insolvency; and, since the trust company has not been appointed by the court to undertake the administration, it follows, I think, as a necessary consequence, that from no source as yet has the power been obtained. I am unable, therefore, to assent to the suggested order, because it is framed upon the theory that the trust company has authority now to a limited degree, but needs to have such authority enlarged. I may suggest, however, that further disputes concerning the relative power of the trust company and the receiver over the assets may perhaps be avoided by joining the trust company with Mr. Hamersly as an additional receiver, so that it may act in administering the

assets, not only by virtue of whatever powers it may possess under the agreement, but also by virtue of the authority to be hereafter conferred by the court. A petition asking for such an appointment, and for an order giving to both receivers suitable powers to deal with the assets in the manner most likely to produce the best results, will be entertained after due notice, and, unless good reason be shown to the contrary, will be granted.

With regard to the reimbursement of the master for certain expenses and to the payment of his fee, I regret to say that I do not feel at liberty to make such an order at the present time. This is an interlocutory proceeding, from which it is probable that no appeal will lie. The trustee cannot fairly be said to represent the debenture holders in the dispute, for its interest is adverse to theirs, and only some of such holders have intervened. The rest are entitled to be heard upon a question that may, and almost certainly will, affect their interest; and a similar remark may be made concerning general creditors, if such there be, in the contingency that the securities produce more than enough to pay off the debentures in full. The proper time to determine the question of expenses and allowances is upon distribution, when all parties will be in court, with an opportunity to be heard, and under obligation to present their own claims and such objections as they may have to the claims of others. Clearly, I think, no payments should be authorized now which might be adjudged erroneous on appeal. Of course, if the trust company is willing to make advances at its own risk, on account of these expenses and the master's compensation, it is at liberty to do so.

For the reasons thus given, the orders recommended by the master upon his two reports concerning the proposed enlargement of the trustee's powers and concerning fees and expenses cannot now be made.

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### MEYSENBURG v. LITTLEFIELD.

(Circuit Court, E. D. Missouri, E. D. January 10, 1905.)

#### 1. PARTNERSHIP—TERMINATION.

Complainant and defendant entered into a partnership terminable at will, and became selling agents for the J. Company, manufacturers of railway supplies. Thereafter the J. Company sold its physical properties to the F. Steel Company, which operated the plant through a new corporation known as the L. Steel Company. Thereafter complainant and defendant, as a firm, wrote the president of the L. Steel Company, asking confirmation in writing of their employment as selling agents, and for an agreement that such employment should not be terminated except on 12 months' notice, which agreement was confirmed by a reply to such letter. *Held* that, though such correspondence amounted to a contract that the firm's agency should not be terminated except on 12 months' notice, such contract did not prevent defendant from dissolving the partnership by notice to complainant at will.

#### 2. SAME—GOOD FAITH.

Where a partnership was terminable at will, it may be dissolved by one of the partners without regard to the question of good faith or reasonableness of time or circumstance.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 600.]

**3. SAME—EFFECT.**

Where a manufacturing corporation employed a firm to act as its selling agents, the dissolution of the firm operated to terminate the contract of employment.

Boyle, Priest & Lehman, for complainant.  
Adiel Sherwood, for defendant.

ADAMS, District Judge. This is a bill to secure the dissolution of a copartnership and an accounting. The case shows that in May, 1891, H. S. Littlefield and E. A. Meysenburg entered into articles of copartnership to carry on the business of selling railway supplies on commission. No fixed term for the duration of the partnership is found in the articles, and none is shown to have been ever thereafter, in terms, agreed upon. They continued together in business until the fall of 1899, when, on November 27th of that year, Littlefield notified Meysenburg that he would terminate the partnership on December 31st of that year. On January 1, 1900, Littlefield formally announced the dissolution, and declined to do further partnership business. For some years prior to 1898 the firm had been, without any written contract, acting as selling agents of the Johnson Company, manufacturers of railway supplies. The last-named company, on or about November 1, 1898, sold its physical properties to the Federal Steel Company. In the year 1898 the Lorain Steel Company, a corporation, was organized, the Federal Steel Company owning two-thirds of its capital stock, and the Johnson Company the balance thereof. On November 1, 1898, the Federal Steel Company began operating the old Johnson plant, acting through the Lorain Steel Company, two-thirds of the stock of the last-named company being then owned by it. The firm of Littlefield & Meysenburg never had any contract with the Lorain Steel Company nor with the Federal Steel Company, but the evidence shows that the firm went on quite as before until the fall of 1899, when, as already stated, Littlefield notified Meysenburg of his purpose to dissolve the partnership.

Complainant contends that this attempted dissolution was fraudulent and void, because defendant had no just ground for dissolving the firm, and because at that time—December 31, 1899—there was a subsisting contract between the firm and the Lorain Steel Company, entitling the firm to at least one year's notice before the selling arrangement, evidenced by the contract, could be terminated. It appears that on October 19, 1898 (before the Federal Steel Company had begun operating the manufacturing plant through the agency of the Lorain Steel Company), Littlefield & Meysenburg wrote a letter to the president of the Lorain Steel Company, as follows:

"Chicago, October 19th, 1898.

A. J. Moxham, Esq., President The Lorain Steel Company, Lorain, Ohio—  
Dear Sir: As the sale of your company to the Federal Steel Company seems assured, we wish to call your attention to the conversation writer had (with) Mr. Coolidge last April and afterwards confirmed by you, it being that, although we had no written contract with the Johnson Company, the arrangement then existing between us as your selling agents would be continued by the new company (Lorain Steel Company), and we should have twelve months' notice before the arrangement was terminated. Under the present condition

of affairs, we think we should have the agreement as per that conversation in writing and would thank you to write us accordingly.

"Awaiting your early reply, we are,

"Very respectfully, [Signed] Littlefield & Meysenburg."

To this letter the president responded as follows:

"Lorain, Ohio, October 20th, 1898.

"Littlefield & Meysenburg, Monadnock Bldg., Chicago, Ill.—Gentlemen: Answering your favor of the 19th, I hereby confirm our agreement that you should have twelve months' notice before termination of present selling arrangement. This should have been put into writing at the time.

"Yours truly, [Signed] A. S. Moxham, President,  
"The Lorain Steel Company."

It is contended that these letters amount to a contract by which the firm of Littlefield & Meysenburg was to be continued as sales agents of the Lorain Steel Company for an indefinite time, subject to 12 months' notice before the Lorain Steel Company could terminate the relation, and that this contract, by necessary implication, created a partnership between Littlefield and Meysenburg, terminable only after giving 12 months' notice.

I do not find it necessary to pass upon the debatable question whether the two letters quoted, in the light of all the evidence, amount to a contract between Littlefield & Meysenburg on the one hand and the steel company on the other, as claimed. It is contended, and there is evidence tending to show, that these two letters were not written for the purpose of expressing the intention of the writers; but rather for the purpose of affording the firm a favorable equity for the consideration of the Federal Steel Company, which all, at the time, expected would soon become the owners of the manufacturing plant. But, as already stated, it does not appear necessary to determine the issue of fact thus presented. I am of opinion that, even if the letters do amount to such a contract, its existence does not have the effect, by implication of law, to create a partnership which should endure as long as the term of the contract. Neither do the letters impress upon the situation, as it was prior to their being written, a condition that the partnership as it then existed between Littlefield and Meysenburg, should not be terminated without 12 months' notice. Lord Eldon said in *Crawshay v. Maule*, 1 Swanston, Chan. Rep. 495, 508:

"Without doubt, in the absence of express, there may be an implied, contract as to the duration of a partnership; but I must contradict all authority if I say that wherever there is a partnership a purchase of the leasehold interest of longer or shorter duration is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument, the court holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if a partner purchases the fee simple there shall be a partnership forever."

The reasoning in the case *State ex rel. The City of St. Louis v. The Laclede Gaslight Company*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789, is substantially to the same effect. If an executory contract in favor of a partnership is in existence at the time of the dissolution of the partnership, it is an asset of the partnership, to be disposed of, in liquidation, like any other asset. In reaching a

conclusion, therefore, on the merits of this case, the partnership between Littlefield and Meysenburg must be treated as a partnership at will, with all the legal incidents appertaining thereto.

In partnerships of this kind it is the right of either partner to determine the relation at any time. The dissolution is no breach of any contract, because the contract itself contains a stipulation, implied by law, that either party may determine the relation at his pleasure. Accordingly, instead of a dissolution being a breach of the contract of a partnership at will, it is, in its proper sense, executing one of the implied stipulations of such a contract. *Karrick v. Hannaman*, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. Ed. 484. It is said in the last-cited case:

"Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership relation and to the authority of each partner to act for all, but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract."

If, therefore, it be true that the letters passed between the Lorain Steel Company and Littlefield & Meysenburg should be so construed as to create a term of at least one year for the partnership's endurance, even then it was dissolved by the notice given by Littlefield to Meysenburg, and Meysenburg's only redress was an action at law for damages for breach of the contract. But inasmuch as the partnership is one at will, and was dissolved by Littlefield's notice, effective December 31, 1899, there was no breach of any stipulation of the contract, expressed or implied. The dissolution took effect about one year after the Federal Steel Company had assumed the control of manufacturing supplies in the name of the Lorain Steel Company, and it must be assumed that during the year the firm of Littlefield & Meysenburg had been prosecuting their business in selling the product of the factory; whether in the exercise of any right under the contract made by the two letters in question or otherwise does not appear. These letters have been carefully considered, and if, when truly interpreted, they conferred any enforceable right upon Littlefield and Meysenburg (which, for want of mutuality, may be doubted), it seems clear that a dissolution of the firm of Littlefield & Meysenburg would necessarily absolve the Lorain Steel Company, or any successor, from any obligation imposed by the contract. It was the skill and diligence of Littlefield and Meysenburg which the Lorain Steel Company contracted for, and the skill and diligence of Littlefield and Meysenburg working harmoniously with the ambition of promoting their joint interests. In other words, it was the skill and diligence of Littlefield and Meysenburg, as partners, with all that term implies, which the Lorain Steel Company contracted for, and when Littlefield and Meysenburg dissolved that relation the consideration so far failed that the contract ceased to be enforceable; and the firm's action in dissolving the copartnership would be such a breach of the contract in question as to justify the steel company in subsequently ignoring it. The proof shows that the defendant offered to account to complainant for all fruits of the firm's work up to the time of dissolution, December 31, 1899. In fact, I do not understand that any claim

is made that an accounting is necessary, except on the basis that complainant is entitled to his share in the proceeds of Littlefield's agency for the Lorain Steel Company, arising from the fact that Littlefield became the selling agent for that company soon after the dissolution of the firm. In my opinion, complainant has no interest in such proceeds, and accordingly is entitled to no accounting with relation thereto.

The evidence shows that in the fall of the year 1899 Meysenburg was a member of the city council, a branch of the municipal assembly of the city of St. Louis, and that a certain bill was pending before a committee of which Meysenburg was chairman; that Littlefield urged Meysenburg to report the bill (without recommendation, however) for action by the council, claiming that by so doing the interests of the firm might be enhanced. Meysenburg refused to do this. Littlefield regarded such refusal as disloyalty to the firm, and now claims that such conduct of Meysenburg, among other things, justified him in dissolving the firm. Meysenburg claims that because defendant was actuated by selfish motives (possibly by a revengeful spirit) in dissolving the partnership, and because he chose an unreasonable time, while the firm was enjoying a privilege or option entitling it to 12 months' notice before cessation, and because defendant soon after made a contract with the Lorain Steel Company to sell the product of its factory, or, having such a contract in contemplation at the time, gave notice of the dissolution of the partnership, therefore the notice of dissolution was fraudulent, and did not effect the severance of the partnership relation. This theory is that, to dissolve a partnership at will, good faith and reasonableness in time and circumstance must be observed. Counsel have called the court's attention to the case of *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376, in support of their theory. The last-cited case shows that the doctrine contended for is the doctrine of the civil law, and in many cases it doubtless subserves the cause of equity and justice; but I am persuaded, from the authorities which have been called to my attention, and especially the decision of the Supreme Court of the United States in *Karrick v. Hannaman*, *supra*, and cases therein cited, that the doctrine of the civil law on this subject has never been adopted by courts administering the principles of the common law.

The partnership between Littlefield and Meysenburg was dissolved by the notice of November 27, 1899; such dissolution becoming, according to the notice, effective December 31, 1899. This dissolution, in my opinion, left no enforceable right in the firm of Littlefield & Meysenburg against the Lorain Steel Company. The dissolution itself absolved the steel company from any continuing liability under the contract, even if any such existed.

The result is that the bill in this case must be dismissed.



## UNITED STATES ex rel. MAXWELL v. BARRETT et al.

(Circuit Court, N. D. California. January 30, 1905.)

No. 18,565.

**1. FEDERAL COURTS—JURISDICTION.**

The national courts inferior to the Supreme Court can exercise such jurisdiction and powers only as are expressly conferred on them by Congress.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Courts, §§ 792-805.]

**2. SAME—ACTION ON BOND OF GOVERNMENT CONTRACTOR—UNITED STATES AS USE PLAINTIFF.**

An action on the bond of a contractor for government work brought under Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], in the name of the United States for the use of a person who furnished labor or materials in the prosecution of the work, is not one in which the United States is plaintiff or petitioner, within the meaning and intent of section 1 of the judiciary act of August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], but one in which it is merely a nominal party, and, in the absence of express provisions therefor in the statute giving the right of action, a federal court is without jurisdiction thereof unless the requisite diversity of citizenship and amount in controversy are affirmatively shown.

At Law. On separate demurrers of defendants to complaint.

Wickliffe Matthews, for plaintiff.

Jesse W. Lilienthal, for defendant American Bonding & Trust Co.

Edwin L. Forster, for defendant Barrett.

HUNT, District Judge. In May, 1901, the defendant Barrett, then and now a citizen of California, contracted with the United States for the construction by him of a post office building at Oakland, Cal. To secure fulfillment of the covenants and conditions on his part, Barrett as principal, with the defendant company, a corporation of Maryland, as surety, executed a bond in the penal sum of \$80,000, payable to the United States, the condition being:

"That whereas, the said Augustus E. Barrett has entered into a certain contract, hereunto attached, with L. J. Gage, Secretary of the Treasury, acting for and in behalf of the United States, bearing date the 9th day of May, A. D. 1901: Now, if the said defendant, Augustus E. Barrett, shall well and truly fulfill all the covenants and conditions of the said contract, and shall perform all the undertakings therein stipulated by him to be performed, and shall well and truly comply with and fulfill the conditions of, and perform all the work and furnish all the labor and materials required by any and all changes in or additions to, or omissions from said contract which may hereafter be made, and shall perform all the undertakings stipulated by him to be performed in any and all such changes in or additional thereto, notice thereof to the said surety being hereby waived, and shall promptly make payment to all persons supplying him labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise to remain in full force and virtue."

Maxwell supplied Barrett with certain hardware at the price of \$1,190, and with other hardware to the value of \$586.23, in the prosecution of the work, and which was used in the building. The debt being due and unpaid, Maxwell brought this suit demanding judgment against the defendants for the sum of \$1,776.23.

The action is brought under the provisions of "An act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], and declaring that:

"Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor and furnishing affidavit to the department under the direction of which the work is being or has been prosecuted, that labor or material for the prosecution of such work has been supplied by him or them and payment for which has not been made, shall be furnished with a certified copy of said contract and bond upon which said person or persons supplying such labor and materials shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit, against said contractor and sureties, and to prosecute the same to final judgment and execution: provided, that such action and its prosecution shall involve the United States in no expense.

"Sec. 2. Provided, that in such case the court in which the action is brought is authorized to require proper security for costs in case the judgment is for the defendant."

The defendants interposed separate demurrers. One of the grounds relied upon by the defendant American Bonding & Trust Company is that the court has no jurisdiction over the subject-matter of the action. Defendant Barrett's demurrer omits this ground.

1. The professed purpose of the act pursuant to which the bond involved in this suit was given, and by virtue of which this action was instituted, is to protect "persons furnishing materials and labor for the construction of public works." Inasmuch as persons supplying material or labor in the erection of public buildings or works cannot assert any lien or charge thereon for such materials or labor, Congress desired to afford them protection, and to that end provided in the body of the act that the usual penal bond for the protection of the government should contain the additional obligation that the contractor should promptly make payments to any and all persons supplying him with labor and materials in the prosecution of the work provided for in the contract the performance of which the bond secures, and that such person or persons shall have a right of action on the bond, and be authorized to bring suit in the name of the United States for his or their use and benefit against the contractor and sureties, and to prosecute the same to final judgment and execution. Express provision is made that such action and its prosecution shall involve the government in no expense, and the court in which such action is brought is authorized to require proper security for the costs in case judgment is rendered for the defendant. Manifestly there was no occasion for legislation on the subject so far as the United States is concerned. The only reason for enacting the law was to protect those who might furnish materials or labor to persons having contracts with the government. As was well stated by Judge

Thayer in *United States, to Use of Anniston Pipe & Foundry Co., v. National Surety Co.*, 92 Fed. 549, 34 C. C. A. 526:

"There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. The bond which is provided for by the act was intended to perform a double function—in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience."

It is to be noted that the act does not limit or prescribe the forum to which persons furnishing labor or material must resort to obtain the remedy provided.

2. Let us see who are the real plaintiffs in suits brought under this act. The United States has no control or direction of the actions. The United States cannot be charged with any costs or expense. The actions are brought and maintained for the sole use and benefit of the persons who have supplied materials and labor, and they, and they alone, are liable for costs if judgment passes for the defendant. The controversy is altogether between them and the defendants. Of whom could the court require security for costs? Not from the government of the United States, but from the persons bringing the suits. So, in this case, in the event of a judgment for Maxwell and the suing out of a writ of error by defendants, would the citation be served upon the United States? Would it not be required to be served on Maxwell only? And if judgment should be entered in favor of the defendants, would it be requisite or possible for the United States to be plaintiff in error? Let it be supposed that Maxwell in his own name had brought an action in a court of the state of California against Barrett to recover the price of materials furnished, and that judgment was rendered in favor of Barrett, and that thereafter Maxwell instituted a suit in the name of the United States for his use against Barrett and the surety to recover upon the bond for the price of the materials; would not the former judgment operate as an estoppel by way of *res judicata*? And does it not appear plain that the former judgment would not in any way affect the United States? Had Maxwell sued in his own name upon the bond in a state court, and no objection been made prior to judgment, would not a judgment in his favor be good? Is it not reasonable to assume that the court would in such a case decide that the omission to use the name of the United States was, at the worst, a mere formal irregularity, and should not affect either the jurisdiction of the court or the merits of the controversy?

If the act were silent in respect to the right of the person supplying materials or labor to bring suit upon the bond, it is likely that such

suit might be maintained, for the bond contains a covenant in such a person's favor. The objection that such plaintiff is not a party to the instrument on which the action is brought is not tenable when the bond is a deed poll containing a covenant in his favor. The generally accepted common-law rule is that only covenantees named in and sealing a specialty may maintain an action of covenant thereon, and the reason for inserting in the act the requirement that suit shall be brought by the person supplying labor and material, in the government's name, for his use and benefit, was probably to conform the practice to the rule generally supposed to be applicable to such cases. But the rule is not of universal application. The exceptions are quite as well established as the rule itself. Only those who have sealed a deed inter partes can maintain an action of covenant upon the deed. This is the rule except when abrogated or modified by statute. In respect to a deed poll, however, the opposite rule prevails. The bond referred to in the act, and here sued upon, is a deed poll; and a stranger to a deed poll may prosecute an action upon a broken covenant therein which was made for his benefit, provided he be in some manner designated. His name need not be used. He may be one of a class, as in *Fellows v. Gilman*, 4 Wend. 414, where plaintiff was held to be entitled to sue a constable and sureties upon his official bond for breach of a covenant therein, "to pay to each and every person such sum or sums of money as the said constable shall become liable for on account of any execution which shall be delivered to such constable for collection." Another familiar example of the rule as to the right of a stranger—that is, one who has not signed the specialty—to sue upon covenants in a deed poll appears in a case where there has been a breach of a covenant running to the grantee, "his heirs and assigns"; they may sue because they are sufficiently pointed out to disclose that the covenant was made for their benefit. It would not be difficult to give other illustrations. See *Jones v. Thomas*, 21 Grat. 96.

By the act the United States has consented to the use of its name by the real actor and plaintiff. It is reasonably clear to me that the United States is not a substantial party, but merely a modal, formal, and nominal party to a suit brought under the act by one who has supplied labor or materials to the contractor. Much might be said in favor of the contention that the provision touching the use of the name of the United States is permissive or directory, and not mandatory. Upon this question, however, I give no opinion, but assume the provision to be mandatory.

3. By adopting the Constitution the states and the people surrendered to the United States certain of their powers. The Constitution is a delegation of powers to the nation. Powers not so delegated nor prohibited to the states by the Constitution are reserved. All the federal judicial power is by the Constitution vested in one Supreme Court and such inferior courts as Congress may from time to time establish. Whatever is not expressly conceded to the United States is expressly reserved by the states. The opinion in *United States v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259, contains the following succinct statement of the principle:

"The powers of the general government are made up of concessions from the several states; whatever is not expressly given to the former the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions. That power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer."

The judicial power of the federal courts, as Alexander Hamilton accurately observed in the *Federalist*, No. 83, is declared by the organic law to comprehend "certain cases particularly specified. The expression of these cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because, the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority."

Section 2 of article 3 of the Constitution enumerates the cases and controversies to which the national judicial power extends. It ordains that such power shall extend to certain matters, among which are "controversies to which the United States shall be a party." It is probably within the competency of Congress to confer upon the Circuit Court jurisdiction of controversies to which the United States is a mere formal and nominal party. Perhaps the language quoted is sufficiently comprehensive in that regard, though it would seem that the main (if not the sole) purpose was to concede and surrender judicial power where the government is a real or interested party—namely, where the United States is in fact a party to controversies—and not to those cases involving controversies in which the United States has no concern. *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159.

4. But if it be granted that the language quoted must be construed as being sufficiently comprehensive in that regard, so that the national judicial power includes all controversies to which the United States is a party, the next inquiry is whether Congress has conferred upon the Circuit Courts the power to take cognizance of controversies to which the United States is but a nominal party. Has Congress partitioned out or allotted to Circuit Courts power to entertain controversies in which the United States has no interest and over which it exercises no control? Is the United States plaintiff in the controversy before the court, within the meaning and intent of the act of August 13, 1888, c. 866, 25 Stat. 433, 1 Rev. St. Supp. 1878, p. 611 [U. S. Comp. St. 1901, p. 508], the first section of which provides that the Circuit Courts shall have original cognizance of any controversy in which the United States is plaintiff or petitioner, regardless of the amount in dispute? *U. S. v. Sayward*, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508.

National courts inferior to the Supreme Court are clothed with such powers as Congress has conferred upon them. The doctrine, negatively expressed, is that such courts have no other or greater jurisdiction than that which Congress apportions to them. The potential power ceded to the United States by section 2 of article 3 of

the Constitution may be called into exercise by Congress, which possesses the right to establish inferior courts, and to partition among them all or any part of the judicial powers not vested in the Supreme Court. Courts created by Congress can exercise such powers only as are expressly conferred upon them. They cannot take jurisdiction by mere implication. They have no jurisdiction by intendment. *Harrison v. Hadley*, 2 Dill. 229, Fed. Cas. No. 6,137; *Ex parte Cabrera*, 1 Wash. C. C. 232, Fed. Cas. No. 2,278; *Bank v. Roberts*, 4 Conn. 323, Fed. Cas. No. 934; *U. S. v. Alberty, Hempst.* 444, Fed. Cas. No. 14,426. In *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718, the court said:

"A Circuit Court, however, is of limited jurisdiction, and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace. And the fair presumption is not, as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather that a cause is without its jurisdiction till the contrary appears."

Congress may withhold from the courts of its creation jurisdiction of controversies to which the United States is a nominal party. Unless such power is conferred it is withheld, for statutory courts can have no jurisdiction but such as the statute confers. *Sheldon v. Hill*, 8 How. 441, 12 L. Ed. 1147.

Circuit Courts have cognizance of any controversy in which the United States is plaintiff. In the case at bar the United States is not, in the proper sense or within the intent of Congress, plaintiff in the controversy presented, for it is without concern or interest therein. Maxwell himself recognized this fact when in the title of the case he designated himself as the plaintiff, when he described himself in the body of the complaint as plaintiff, and when, in the verification, he swore that he was plaintiff. I think Congress intended to confer a jurisdiction over suits and actions in which are controversies affecting the United States as plaintiff, and in which the government of the United States is more than a mere figurehead. It is firmly established that "for purposes of jurisdiction in the federal courts regard is had to the real rather than the nominal party." *Stewart v. Ry. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. Section 2 of article 3 of the Constitution and the judiciary acts of Congress "look to things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law"—is the declaration of the Supreme Court in *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159, cited *supra*, which was approved and applied in Maryland, for Use of Markley, *v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822. The United States is "a mere conduit" through which the law affords a remedy. *Id.* It is a modal party to this action, but is not a real or substantial plaintiff in the controversy out of which the action arises.

I am aware that the learned judge who delivered the opinion in *United States v. Churchyard* (C. C.) 132 Fed. 83, is of opinion that in actions of this kind Circuit Courts have jurisdiction; but I think he failed to give effect to the principle that no case is within the

jurisdiction of federal courts (inferior to the Supreme Court) unless Congress has unmistakably conferred it. Support for the conclusion that this court is without jurisdiction is found in the able opinions of Judges Baker and Evans, delivered in United States, to Use of Lumber Co., v. Henderlong (C. C.) 102 Fed. 2, and United States, to Use of Stone Co., v. Sheridan (C. C.) 119 Fed. 236.

Barrett's omission to challenge the jurisdiction of this court over the subject-matter is not of moment, for the court must of its own motion notice such want of power.

The demurrer of the American Bonding & Trust Company of Baltimore is sustained, and an order will be made dismissing the action for want of jurisdiction of the subject-matter.

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McCLAUGHREY et al. v. KING, Sheriff.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. February 9, 1905.)

REWARDS—PERFORMANCE OF SERVICE—REWARD FOR ARREST.

A reward offered "for the arrest of each of the parties convicted" of a stated crime is not earned by merely giving information to an officer which leads to the arrest of a person subsequently convicted.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rewards, §§ 7-13.]

At Law. On demurrer to complaint.

Cravens & Cravens and Arthur M. Jackson, for plaintiffs.

Jorden E. Cravens, for defendant.

ROGERS, District Judge. The plaintiffs allege for their cause of action that they are citizens of the state of Illinois, and the defendant is the duly qualified and acting sheriff of the county of Johnson and state of Arkansas, and a citizen of that state; that on February 5, 1902, the Bank of Clarksville, in Johnson county, Ark., was robbed by a man known, among other names, by that of Fred Underwood, and other parties acting in concert, and in robbing the bank they killed the sheriff of Johnson county, John A. Powers; that shortly thereafter the defendant, who was the successor in office of John A. Powers, offered a reward of \$2,750 "for the arrest of each of the parties convicted of said bank robbery and said murder"; that plaintiffs, having ascertained about August 1, 1902, that said Underwood had been arrested on the 26th of July, 1902, by the police officers in the city of Evansville, Ind., on the charge of vagrancy, and having known that said Underwood was suspected of being one of the robbers of the said Bank of Clarksville and one of the murderers of said Powers, and knowing that said reward had been offered for the arrest of said Underwood, immediately notified the defendant, through Ralph W. Cochran, chief of police of Oklahoma City, that said Underwood was under arrest in the city of Evansville, in the state of Indiana, and that, acting upon said information so furnished, the said Joseph B. King immediately went to said city of Evansville, in the state of Indiana, and, acting in his official capacity of sheriff, arrested said Underwood, took him into his custody, and brought him back to the city of Clarksville, Johnson

county, Ark., where he was subsequently tried, convicted, and executed. Plaintiffs further allege that they have made demands for the \$2,750 reward, and that the said defendant refuses to pay it, and pray judgment for the same. The defendant demurs.

The court is of opinion that the demurrer is well taken, and sustains the same on the following authorities: *Shuey v. U. S.*, 92 U. S. 73, 23 L. Ed. 697; *Amis v. Conner*, 43 Ark. 337; *Everman v. Hyman* (Ind. Sup.) 28 N. E. 1022, 84 Am. St. Rep. 284; *Williams v. Railroad Co.* (Ill.) 61 N. E. 456, 85 Am. St. Rep. 278; *Juniata County v. McDonald* (Pa.) 15 Atl. 696; *Lovejoy v. Atc., Topeka & Santa Fé R. Co.*, 53 Mo. App. 386. Cases have been cited more or less at variance with the principles announced in these cases. Most of them are easily distinguished from the case at bar by reason of the difference in the facts. There is, however, some conflict. This court, however, of course, is bound by the decision of the Supreme Court of the United States, and is of opinion that the line of authorities in support of that doctrine are best supported by reason and justice.

The demurrer is sustained, with leave to amend.

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In re COOPER.

(District Court, E. D. Pennsylvania. February 21, 1905.)

No. 2,143.

**BANKRUPTCY—TRUSTEES—ELECTION—RIGHT TO VOTE—ATTORNEYS.**

Where an attorney's retainer for a bankrupt was limited to the filing of the bankrupt's petition, and the latter paid him no fee, the attorney was not disqualified to accept claims from creditors sent to him thereafter without his solicitation or the procurement of the bankrupt, and to vote on such claims for the election of a trustee.

Charles W. Eaby, for trustee.

Alfred Aarons, for objecting creditor.

J. B. McPHERSON, District Judge. The testimony taken before the referee satisfies me that Mr. Eaby was only employed by the bankrupt to file his petition, and that his obligation as attorney ceased at that point. The bankrupt paid him no fee, and he seems to have been engaged for the special purpose just referred to. This being so, I see no impropriety in his accepting claims from creditors that were sent to him afterwards without his own solicitation or the procurement of the bankrupt, and voting upon them for trustee. There is no evidence of any collusion between the bankrupt and the attorney or the trustee, nor that the trustee was chosen in the bankrupt's interest, nor that the election was in any degree influenced by the bankrupt or the trustee. I have no disposition to relax the wholesome rule that the courts are disposed to enforce regarding this subject; on the contrary, I fully agree that neither the bankrupt nor his attorney should be permitted to have any influence in the election of the trustee. But where the relation of attorney and client was originally so limited, and had in effect come to an end, and where there is no ground even for suspicion of concealment or collusion, I think it would be unduly harsh to prohibit the attorney



from accepting the claims of creditors, since he would not be permitted to represent the bankrupt in any further stage of the proceeding, even if he should desire to do so. The whole transaction was in thorough good faith, and the peculiar circumstance of the case, including the bankrupt's disappearance, leave no doubt in my mind about the personal and professional rectitude of all concerned.

The referee's approval of the trustee's election is affirmed.

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LONG et al. v. LOCKMAN.

(District Court, D. Colorado. January 25, 1905.)

No. 836.

**INVOLUNTARY BANKRUPTCY—JURISDICTION—RESIDENCE—ESTOPPEL.**

An involuntary bankruptcy proceeding having been commenced against decedent in Arkansas, he filed a sworn plea to the jurisdiction, denying his residence in that state, and asserting that he was a resident of Colorado, whereupon the proceeding was dismissed, and the creditors, at considerable expense, commenced a new proceeding in Colorado, pending which the bankrupt died. *Held*, that the bankrupt's administrator was estopped to deny in such proceeding that the bankrupt was a resident of Colorado.

H. W. Currey and W. L. Dayton, for creditors.

Bicksler, McLean & Bennett and A. M. Berry, for administrator.

McPHERSON, District Judge. This is a proceeding in involuntary bankruptcy instituted against R. H. Williams, since which time he has died. That he was, at the time the proceedings were brought, insolvent, in my judgment, is not open to debate, and I am content in stating the fact. And it is equally clear to my mind that he had within the statutory period transferred and concealed his assets, and for the fraudulent purpose of defeating his creditors, who became such by being swindled, cheated, and defrauded by Williams. There is no one fact of which the court is apprised, connected with the so-called business transactions of Williams, but that merits condemnation, and the fact that he is dead in no sense mitigates the conclusion reached. Judge Trieber, when the case was before him, as reported in 120 Fed. 34, 35, tempered his language when he said:

"The debtor [Williams] is a gambler, traveling from place to place plying his vocation. He arrived at Hot Springs, Arkansas, in this district, and had carried on his business there for two months prior to the filing of the petition to have him adjudicated a bankrupt, which was for a longer period than he has carried on his business or resided in any other district."

The District Court for the Western District of Arkansas (Judge Trieber presiding) dismissed the proceedings because of a want of jurisdiction, for that the said Williams was not a resident of that district. Within a few days the petition was filed herein (January 8, 1903). March 2, 1903, the subpoena having been served by publication, the alleged bankrupt appeared in this court by counsel and attacked the petition, and on the following day moved to dismiss.

the proceeding. A few days thereafter (March 23, 1903) the motion was denied, and an amendment to the petition was required the following day, which order the petitioning creditors complied with. The alleged bankrupt asked for time in which to answer, which was refused. For this error the judgment of adjudication was reversed by the Circuit Court of Appeals. 132 Fed. 1. An answer having been filed, and evidence having been taken and offered, the contention, in addition to denying insolvency and acts of bankruptcy, now is that this court, like the District Court of Arkansas, is without jurisdiction, because his residence or domicile when the case was brought was elsewhere than Colorado, to wit, Missouri.

The evidence shows that there is a son (a lad) of Williams, by a wife some years deceased. Williams had no home at any place. Wherever the evidence shows him to have been—whether in Colorado, Arkansas, or Missouri—he stopped at hotels, boarding houses, and restaurants. For a year or more prior to his death, it is claimed, he had what some of the witnesses call a “common-law wife.” But she has not testified in this case, although residing now at Wichita, Kan., as claimed. A few days before this proceeding was brought, Williams registered at a hotel in Arkansas as from “Colorado.” As every person must, for jurisdictional purposes, have a domicile somewhere, and cannot be treated as a vagabond, although he may in fact be one, if this were an original question I would find that he was a resident of southwestern Missouri when the petition was filed. He had been there more than elsewhere, and covering a longer period of time. It was there that the conspiracies were formed, and most of them consummated, connected with which so many were swindled in such large sums in his fraudulent “foot-racing schemes.” The evidence is very slight as to any residence in Colorado, and there is reliable evidence that he did not reside in Colorado. But for jurisdictional purposes he resided somewhere, and that residence was in one of the three states named. It has been judicially determined on his motion that it was not in Arkansas. Therefore it must have been either in Missouri or Colorado. But as against the greater weight of the evidence, that, as an original question, his residence was in Missouri, is the one fact that he registered as from Colorado; and, in my opinion, the controlling fact is that when his case was before Judge Trieber, in Arkansas, Williams, in person, in order to defeat the jurisdiction of that court, presented his own affidavit that he was a resident of Colorado; and, the case being dismissed in Arkansas, the petitioning creditors, acting upon that affidavit, lodged the case in this court, and at much expense. The petitioning creditors acted upon that affidavit. They brought the case here. They by so doing have given time and incurred expense. If Williams were living, the lapse of time would defeat a proceeding in bankruptcy in Missouri or elsewhere. But when the answer herein was filed, and the Missouri residence asserted, Williams was dead, and, of course, proceedings in bankruptcy could not be instituted. Therefore how can it be said that this court is without jurisdiction? To so hold is to place a premium upon perjury. The administrator cannot do

that which Williams could not do if he were alive and here defending. In my opinion, Williams in his lifetime was, and the administrator now is, estopped from denying that his residence was in Colorado when the petition herein was filed. There is no claim that, between the time he filed his affidavit before Judge Trieber and the time the petition herein was filed, Williams had changed his residence. It was at one and the same place on both dates. Every element of estoppel is in the evidence, and the evidence on that question is not in conflict. Williams, under oath, said his residence was in Colorado. He received the advantage from that oath. The petitioning creditors acted on it. They filed their petition here. They have incurred much expense by reason of that oath. It cannot now be controverted. It could not be of interest to any one if I were to follow counsel on both sides, in their elaborate and able arguments upon the meaning of the words "residence" and "domicile." Williams, in his plea to the jurisdiction of the Arkansas court, supported by his affidavit, meant to say, and did say, and Judge Trieber so understood it, that the "residence" was in Colorado, so that this court only had jurisdiction over him in a bankruptcy proceeding, and that for that reason the court in Arkansas was without jurisdiction. Neither could it be of interest to any one if I were to review the many cases cited for and against the proposition that it is competent to show what Williams said in his peripatetic visits, sometimes in one state and sometimes in another. I pass those questions by, and hold that this court has jurisdiction upon the grounds of estoppel. And that filing pleadings, offering evidence, making objections, obtaining rulings, and so forth, in one case, may be an estoppel in another case, see the following: *Davis v. Wakelee*, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578; *Sullivan v. Colby*, 71 Fed. 460, 18 C. C. A. 193; *R. R. v. Howard*, 13 How. 307, 336, 14 L. Ed. 157; *Michels v. Olmstead*, 157 U. S. 198, 15 Sup. Ct. 580, 39 L. Ed. 671; *Busch v. Wilcox* (Mich.) 64 N. W. 485.

There will be an adjudication of bankruptcy, and a reference of the case to a referee.

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IN RE WHITE.

(District Court, E. D. Pennsylvania. February 1, 1905.)

No. 2,073.

**1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PETITION.**

A petition in involuntary bankruptcy should state the nature of the petitioners' claims, but an omission in that respect may be cured by amendment.

**2. SAME.**

A petition in involuntary bankruptcy must show that the defendant is not within one of the classes excepted from the operation of the act, either by a negative averment to that effect, or by a direct averment of his principal business; but a petition defective in that respect may be amended.

**3. SAME—ACTS OF BANKRUPTCY—SUFFICIENCY OF ALLEGATION.**

An averment in an involuntary petition that defendant, who was a merchant, committed an act of bankruptcy by conveying a part of his

property, consisting of real estate described, to a person named, with intent to hinder, delay, and defraud his creditors, is sufficient.

**4. SAME.**

An averment of an act of bankruptcy by the transfer or removal of property with intent to hinder, delay, or defraud creditors should state facts and circumstances from which such intent may be inferred; and an allegation merely that defendant, who was a retail merchant, transferred and removed goods from his store with intent to hinder, delay, and defraud creditors, is insufficient, no facts being alleged to show that such goods were not sold and removed in the ordinary course of his business.

In Bankruptcy. On demurrer to petition.

Reber & Downs, for petitioners.

Henry N. Wessel, for alleged bankrupt.

HOLLAND, District Judge. Upon a reargument on the demurrer in this case, I have concluded the opinion and order filed at the first hearing should be modified in accordance with this decision and order following. The demurrer to the involuntary petition filed by creditors in this case alleges that it is defective, for the reasons:

"(1) It does not set forth when the goods were sold and delivered by the said alleged creditors, nor the amount of the securities held by the petitioners, nor the manner in which the value of the securities is fixed. (2) It does not aver that deponent is not one of the class excepted by the act of Congress relative to bankruptcy. (3) The averments relative to the transfer of property are insufficient, in that it does not aver any facts showing an act of bankruptcy, but merely states legal conclusions, and uses the phraseology set forth in the act of Congress."

The petition sets forth that the three creditors therein named "have provable claims amounting in the aggregate, in excess of securities held by them, to the sum of five hundred dollars." They further state that the "nature" and "amount" of these claims follow. Thus far the petitioners have followed the form prescribed by general order 37 of the Supreme Court prescribing the forms in bankruptcy; but in stating their claims, while the amount is given, the nature of the claim is not set forth, and in that it is defective, which, however, can be amended so as to meet the requirements of the act.

The petition also fails to state the business in which the bankrupt was engaged, and in this it is defective. It is true, as contended for by counsel for the petitioners, that from the face of the petition it can be gathered inferentially that he was engaged in the mercantile business in Philadelphia, and was not a farmer or wage-earner; but this depends upon averments in other portions of the petition as to acts of bankruptcy committed by the alleged bankrupt. It is necessary that the petition should show either by a negative averment that the alleged bankrupt is not one of the excepted class, or it must so clearly appear from a specific statement as to the business in which he was engaged as to exclude the inference that his principal business could be one of the excepted class under the act; but this omission is not fatal to the petition, and can be amended. In re Bellah, 8 Am. Bankr. Rep. 310, 116 Fed. 69; Beach v. Macon

Grocery Co., 120 Fed. 736, 57 C. C. A. 150; Loveland, Bankruptcy, p. 142, note 9; In re Brett, 12 Am. Bankr. Rep. 495, 130 Fed. 981.

The petition alleges that the bankrupt—

"On or before the 24th day of October, 1904, while insolvent, conveyed a part of his property, namely, premises 615-17 South Sixth St., and 610 Rodman St., in the city of Philadelphia, to one Weinstein, with intent to hinder, delay, and defraud his creditors; and, further, said Solomon White almost daily between October 1, 1904, and October 29th, and at other times while insolvent, transferred and removed a part of his property, consisting of dry goods and an assortment of notions and gents' furnishings, from his place of business, 8 North Third St., Philadelphia, with intent to hinder, delay, and defraud creditors. The value of said property transferred is at least \$5,000. Said dry goods and notions and gents' furnishings were transferred to numerous parties, whose names are unknown to your petitioners."

This specification states in the first part the real estate transferred and to whom, together with its location and the date of the transfer, with an intent, it is alleged, to hinder, delay, and defraud his creditors. The facts here stated are very few, and this specification is barely over the line which divides it from those held to be insufficient, and probably could not in all cases be regarded as a precedent; but what follows simply specifies the property which is alleged to have been "transferred and removed" and the place from which the transfer and removal was made. The difference between this specification and that contained in *Re Milgraum & Ost* (D. C.) 129 Fed. 827, is that in the latter case it is charged that the property was not only transferred and removed, but that it was concealed in a certain place, which is named. White, the alleged bankrupt, was in the business of selling dry goods and an assortment of notions and gents' furnishings, and a "transfer and removal" of his property could have been lawfully made in the usual course of trade. So that the statement, as it stands, charges an act which he had a lawful right to perform. Of course, it is alleged to have been done with intent to hinder, delay, and defraud creditors; but there is no statement in the specification from which this inference could be drawn, as was found in the *Milgraum & Ost* Case, wherein it is charged that he concealed his property, naming it.

This might be said of the first part of this specification, except for the fact that Solomon White was not in the business of selling real estate, and, under all the circumstances, it might be said—although the inference does not necessarily arise—that a conveyance of his real estate was done with intent to hinder, delay, and defraud his creditors. However, we have concluded that the first part of the specification may be permitted to stand, but that the second part should be amended. The cases are reviewed in *Re Bellah*, 8 Am. Bankr. Rep. 310, 116 Fed. 69. It is held that it is sufficient, in specifications against a discharge, to aver a failure to keep books in the words of the act alone, because those words set forth all the elements necessary to establish the evil intent, and no further details can be given. In *re Ginsburg*, 12 Am. Bankr. Rep. 459, 130 Fed. 627; *Godshalk v. Sterling*, 12 Am. Bankr. Rep. 302, 129 Fed. 580. Yet these same cases hold, following numerous others, that both in petitions and specifications of a discharge, allegations of a disposition of property to hinder, delay, and defraud creditors are insufficient, if stated merely in the language of the act. It is

necessary to state facts and circumstances from which the inference can be drawn that the disposition of the property was done with the evil intent. Solomon White was engaged in the sale of the kind of merchandise mentioned in the specifications, and, when sold, it was removed from his premises, as he had a right to do. This averment is, therefore, insufficient, as there are no facts whatever to indicate that the transfer or removal was done with the intent charged, and not in the due course of trade.

In *Re Bellah*, supra, the source, identity, amount, and receipt by the defendant of the fund which he was charged with concealing were distinctly stated, although the place of concealment and manner of concealment were not given. It was held sufficient in *Re Milgraum & Ost*, supra, to allege a concealment of property specified, together with the amount and the place from which it was taken and the place in which it was concealed. In *re Hark*, 135 Fed. 603, the date, amount, and kind of property alleged to have been concealed, together with the place from which it was taken, although the place of concealment was alleged to have been unknown to the petitioners, was held sufficient. In all these cases the averments are sufficiently specific to give the alleged bankrupt notice of what he will be expected to meet, and, at the same time, taken together, the inference can fairly be drawn that the disposition of the property as alleged was done with the evil intent prohibited in the act, to wit, the intent to hinder, delay, and defraud creditors.

The petitioners will be permitted to amend their petition, in accordance with this opinion, on or before March 20, 1905; otherwise, the objection to the second part of this specification will be sustained.

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**KELLER v. KANSAS CITY, ST. L. & C. R. CO. et al.**

**HARMON v. LOUISIANA & M. R. R. CO. et al.**

(Circuit Court, E. D. Missouri, E. D. April 15, 1903.)

**1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—JOINDER OF DOMESTIC CORPORATION.**

The Circuit Court has no jurisdiction over an action by a citizen of this state for injuries, brought against both a domestic and a foreign corporation, where there is any right of action, or any reasonable ground to claim a right of action, against the domestic corporation, and where no separable controversy is claimed to exist.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

**2. RAILROADS—LEASES—CONTINUING LIABILITY OF LESSOR.**

Under Rev. St. Mo. 1890, § 1060, authorizing foreign railroad corporations to lease or purchase lines of railroad within the state, and declaring a domestic corporation which so leases its lines to a foreign corporation, "liable as if it operated the road itself," a domestic corporation which has leased its road to a foreign corporation is liable for injuries inflicted by the lessee in the operation of the road.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 802-816.]

**3. SAME—DEBATABLE LIABILITY—DECISION BY STATE COURT.**

Where a domestic corporation is joined as defendant with a foreign corporation, plaintiff has the right to a trial in the state court if the liability of the domestic corporation is fairly debatable, unless his conduct in joining the domestic corporation amounts to a fraudulent interference with the jurisdiction of the federal courts.

**4. SAME—PETITIONS FOR REMOVAL—GROUNDS.**

A contention that a suit against a domestic and against a foreign corporation presents a separable controversy, and is removable to the Circuit Court, under the judiciary act of March 3, 1887, c. 373, 24 Stat. 552, as amended by the act of August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 506], cannot be considered on the hearing of a petition for removal where the petition is not grounded on any such proposition.

[Ed. Note.—Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

George Robertson, for plaintiff Keller.

Frank P. Walsh and George Robertson, for plaintiff Harmon.

Franklin Houston, for defendants.

ADAMS, District Judge. These two cases are now before the court on motions to remand them to the circuit court of Audrain county, whence they came by removal. The petitions for removal in both cases were made by the Chicago & Alton Railway Company alone. It alleged in the first-mentioned case that the Kansas City, St. Louis & Chicago Railroad Company was made a defendant for the sole purpose of fraudulently defeating the jurisdiction of the courts of the United States, and that the joining of that company with the Chicago & Alton Railway Company as defendant was a mere pretense and device to oust the jurisdiction of the federal courts, and that in the last-mentioned case the joining of the Louisiana & Missouri River Railroad Company was done fraudulently and for the purpose of defeating the jurisdiction of the federal courts. It is further alleged that the real cause of action in both cases was against the Chicago & Alton Railway Company alone, because it was solely in possession of and operating the railroad at the time of the injury to plaintiffs' intestates. There is no averment in the petitions for removal to this court that the causes of action were separable, within the meaning of the judiciary act of March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], and that for that reason the Chicago & Alton Railway Company might remove the causes to this court. The last-mentioned company places its sole reliance for the right of removal upon the alleged ground that the joining of the other railroad company with it in each of the two cases in question was not done in good faith, but only for the purpose of preventing the real defendant from availing itself of the right accorded to it by law to remove its cause to this court for a trial.

The plaintiffs' petitions, as well as the petitions for removal in both cases, disclose the fact that the Chicago & Alton Railway Company was at the time of the injury in question operating the road of the Kansas City, St. Louis & Chicago Railroad Company by virtue of a lease and running arrangement made pursuant to an act of the Assem-

bly of the state of Missouri in the year 1870, which is now section 1060, Rev. St. 1899, and that the Chicago & Alton Railway Company was also at the time of the injury in question operating the Louisiana & Missouri River Railroad Company under a lease and running arrangement made pursuant to the same law. The facts disclosed by the pleadings also show that the Chicago & Alton Railway Company is a corporation of the state of Illinois, and therefore a citizen of that state for jurisdictional purposes; that the Kansas City, St. Louis & Chicago Railroad Company and the Louisiana & Missouri River Railroad Company were both corporations of the state of Missouri, and therefore citizens of the state of Missouri for jurisdictional purposes; that the plaintiff in each of the foregoing cases was also a citizen of the state of Missouri. To sustain the jurisdiction of this court, it must be held that there was no right of action, or any reasonable ground to claim such right of action, against the Kansas City, St. Louis & Chicago Railroad Company in one case, and the Louisiana & Missouri River Railroad Company in the other case. If there was such a cause of action, it would be between citizens of the same state, and therefore not within the jurisdiction of this court.

The charge in the petition for removal, as already seen, is based exclusively on the proposition that the joining of the two corporations in each case was in bad faith, and done solely for the purpose of preventing the Chicago & Alton Railway Company from availing itself of its right, as a citizen of another state, to remove its causes into the federal court.

By reference to section 1060, Rev. St. Mo. 1899, it is found that power is thereby conferred upon any railroad organized in any other state to lease or purchase any railroad or any part of a railroad lying within this state. It is also provided by that statute that any corporation within this state leasing its road to a corporation of another state, or making any running arrangement with such corporation, "shall remain liable as if it operated the road itself." This last provision was obviously inserted in the statute for the purpose of subjecting any foreign corporation that might be engaged in operating a railroad under a lease or other running arrangement in this state to liability in all suits instituted in this state, by continuing the liability of the leased road itself, which is being operated by it. The act of the Legislature of 1870, above referred to, received a construction in the case of *Smith v. Pacific Railroad Company*, 61 Mo. 17. That suit was brought against the Pacific Railroad Company for damages occasioned by a servant of the Atlantic & Pacific Railroad Company while operating a train upon a branch line from Tipton to Booneville after such branch line had been leased by the Pacific Railroad Company to the Atlantic & Pacific Railroad Company. The court there remarks:

"The lease was made under this act and by its authority, and, however singular the above provision [referring to the provision making the lessor company liable as if it operated the road itself] may seem, it was accepted by the companies, who bought and sold under it. This construction seems plain. \* \* \* Both corporations are expressly declared liable—the leasing corporation the same as though no lease had been made."



The same court, in the case of *State ex rel. Crumpacker v. Chicago, Burlington & Kansas City Railway Company*, 89 Mo. 523, 14 S. W. 522, holds that the Legislature, in giving a corporation of another state power to purchase a railroad in this state, with the privileges and franchises belonging to it, had the right to prescribe the terms upon which the purchase should be made. The principle thus announced fully covers the facts involved in this case. Accordingly it may be safely stated that the plaintiffs in the two cases now under consideration have the authority of the Supreme Court of the state of Missouri in support of their contention that the lessor roads are still liable for the negligent operation of the railroads in question by the lessee company. But it is argued that, even if there be a liability against the lessor companies as well as the lessee company, such liability is not joint, but several, and therefore that the two companies are improperly made codefendants in these cases. This argument, in itself, is unwarranted by the facts relied upon in the petition for removal, and can only be considered as bearing on the issue whether the suits were instituted against both companies for the sole purpose of preventing removal to this court. Two persons, whether natural or artificial, may undoubtedly be joint tort-feasors in the commission of an act of negligence; and the language of section 1060, *supra*, may contemplate that the lessor company shall, for all purposes of liability, be treated as operating the road together with the lessee, to whom its actual operation is committed.

The plaintiffs, unless their conduct amounts to a fraudulent interference with federal jurisdiction, and this I am not able to find from the facts before me, have a perfect right to have these debatable questions determined in the court of their own selection. These questions will necessarily arise in the defense of these actions, and may then be heard and passed upon. It is sufficient for the present purposes that the averments made in the petitions for removal of these cases, to the effect that they were instituted against the two companies fraudulently for the mere purpose of preventing the jurisdiction of this court over the cases, are not sustained.

Another feature of the argument of these cases is that they present a separable controversy, and that the right of removal arose under Judiciary Act March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]. This contention, however meritorious it seems to be in itself, cannot now receive consideration by the court, because the petitions for removal are not grounded on any such proposition.

The motions to remand these cases must be sustained.

## In re NAYLOR MFG. CO.

(District Court, E. D. Pennsylvania. February 13, 1905.)

No. 1,665.

**1. BAILMENT—CONTRACT—CONVERSION OF EXECUTORY SALE.**

A contract for a sale of property may, while still executory, be changed to a bailment with an alternative of future conversion into a sale, and an agreement therefor is valid, although verbal, and reduced to writing after delivery has been made.

**2. FOREIGN CORPORATIONS—VALIDITY OF CONTRACTS—FAILURE TO COMPLY WITH STATE STATUTE.**

The failure of a foreign corporation doing business in Pennsylvania to register as required by Act April 22, 1874 (P. L. 108), cannot be taken advantage of by the corporation or by its trustee in bankruptcy to avoid its contracts made in the state.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2561.]

In Bankruptcy. On certificate from referee.

George J. Edwards, Jr., and Franklin L. Lyle, for trustee.

Samuel W. Cooper and William Potter Davis, Jr., for claimant.

HOLLAND, District Judge. The Naylor Manufacturing Company, a corporation doing business in this district, was adjudicated a bankrupt on July 22, 1903. The Fairbanks Company, a New Jersey corporation, filed a petition claiming certain personal property, which it alleges it leased to the bankrupt, and asked for an order awarding this property, which consisted of machinery, to it. The referee found that the bankrupt was the bailee of this property, and, it having been sold by the trustee, awarded to the defendant the sum of \$297.65, the proceeds of the sale. The trustee objected to the finding of the referee, and upon his petition the referee certified to this court the two following questions: (1) Is the contract in question a bailment or conditional sale, and is the petitioner entitled to the proceeds of the sale of the machinery, or have such proceeds become the property of the bankrupt estate? (2) Was the contract, if a bailment, between the Naylor Manufacturing Company and Fairbanks Company, void by reason of the noncompliance by the Naylor Manufacturing Company with the provisions of the Pennsylvania act of April 22d, 1874 (P. L. 108), it being a corporation organized under the laws of the District of Columbia, and not having filed a statement of its affairs with the Secretary of State and Auditor General as required by this act?

It is conceded that the agreement between the Fairbanks Company and the bankrupt, dated March 11, 1903, is a bailment of the property in question, but as this property had been in the possession of S. Elmer Naylor, the predecessor of the Naylor Manufacturing Company, bankrupt, from August, 1902, to February, 1903, when he transferred it to the Naylor Manufacturing Company, and held by it until the execution of the bailment, that under the evidence adduced before the referee the original transfer was a sale, and that the subsequent change made by the execution of the contract of bailment was not binding upon the trustee in bankruptcy.

The facts are these: In August, 1902, Naylor negotiated for the purchase of some machinery from the Fairbanks Company through Richards, its salesman. Before the delivery of these goods, Tattman, the Fairbanks manager, ascertained that Naylor's financial standing was not such as to warrant them in giving him credit for the machinery, and, as a result, a conference was had between Naylor and Tattman, and it was agreed between them that the machinery should be leased to Naylor by the Fairbanks Company. The sale slips had the word "Leased" marked upon them, and the word "Lease" was set opposite this machinery in the original entries in the Fairbanks Company's books. Tattman, upon examination, insisted the property had been leased, and that the object was to retain possession of it until the price was paid. After all the machinery had been delivered to Naylor, a writing was executed by Naylor, which the parties called a lease. The terms of it, however, are not set forth, nor is the date of its execution stated, but the evidence shows that both the Fairbanks Company and Naylor regarded it as what is commonly known as a lease. It was destroyed either before or after the execution of the lease dated March 11, 1903, which is conceded to be a bailment. This latter, however, was executed on May 8, 1903, and dated March 11, 1903; but before the property in question was transferred by Naylor to the Naylor Manufacturing Company a conference was had by Naylor with the Fairbanks Company, and the latter objected to a transfer of the bailed property until a new agreement was entered into between it and the bankrupt company. The bankrupt assented to this, and the property was transferred by Naylor to the Naylor Manufacturing Company, and, subsequent to the transfer, to wit, May 8, 1903, the contract of bailment was executed, and the first writing, which was called a lease, was destroyed. It appears, therefore, that the original agreement between Naylor and Richards, the Fairbanks' salesman, was a contract of sale, but before the delivery of the property it was ascertained that Naylor's credit was not such as to warrant them in selling this property to him outright, and it was agreed that he should take it upon an agreement of bailment. This the parties to the contract had a right to do before the delivery of the goods. The fact that the original intention of the parties is to make a sale, and such is the legal effect of their first agreement, does not prevent a change, while it is still executory, into a bailment, with an alternative of future conversion into a sale on the compliance with the stipulated conditions. *Stiles v. Seaton*, 200 Pa. 114, 49 Atl. 774. And this subsequent change to that of a bailment may be verbal, and later reduced to writing. *Rose v. Story*, 1 Pa. 190, 44 Am. Dec. 121; *Henry & Co. v. Patterson*, 57 Pa. 346; *Stiles v. Seaton*, *supra*.

While it is true the evidence does not show the exact terms of the original contract, yet the evidence, both oral and documentary, is uncontradicted that the property was held by Naylor as bailee, and the circumstances were such as to confirm this conclusion. Before this machinery was transferred to the bankrupt corporation, the consent of the Fairbanks Company was necessary, and obtained through a conference with them. All this shows that the actions of both parties from the beginning were such as to indicate they regarded the original

agreement as a bailment, and the fact that they subsequently executed the contract in evidence, which is conceded to be a bailment, confirms the contention that the transfer of the property was a bailment from the beginning, and belonged to the Fairbanks Company until the terms of the agreement had been complied with. They are, therefore, entitled to the proceeds of the sale of this property, unless, as is contended by the trustee, that the contract of this foreign corporation is null and void because of their failure to register in this state in compliance with the act of 1874. This contention, we think, cannot be permitted to prevail. The proposition that this corporation can take advantage of its own omission to comply with the requirements of the Pennsylvania law is against public policy, and in direct conflict with a long line of decisions to the contrary. *Banks v. Columbus*, 170 Pa. 1, 32 Atl. 539; *Swan v. Insurance Company*, 96 Pa. 37; *Watertown v. Simons*, 96 Pa. 520; *Hagerman v. Empire Slate Co.*, 97 Pa. 534.

Great reliance is placed upon the case of *Swing v. Munson*, 191 Pa. 582, 43 Atl. 342, 58 L. R. A. 223, 71 Am. St. Rep. 772, but an examination of this case shows that it was an effort on the part of the trustee of an insolvent corporation organized and doing business in the state of Ohio to collect assessments against a policy holder in the state of Pennsylvania, it not having previously complied with the laws of the state of Pennsylvania requiring foreign insurance companies to register before effecting insurance within the state, and it was held that *Swing*, the trustee, could not recover. But this is an entirely different proposition from the question involved in this case. Here the foreign corporation came into the state of Pennsylvania, and began business, entered into the contract with the Fairbanks Company for this property without having previously registered; and the decisions of the courts of Pennsylvania are uniform in holding that a corporation under such circumstances, while it will not be permitted to enforce its contracts in a state without complying with the registration laws, will not be permitted to take advantage of its own wrong in failing in such compliance when found here doing business, and it is endeavored by residents of the commonwealth to enforce contracts against them.

The findings of the referee are sustained.

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### THE CITY OF BELFAST.

(District Court, E. D. Pennsylvania. February 18, 1905.)

No. 49.

#### 1. SHIPPING—INJURIES TO STEVEDORE—DEATH—ACTIONS—SURVIVAL.

Act Pa. 1851, § 18 (P. L. 674), declares that no action to recover damages for injury to the person by negligence shall abate by reason of plaintiff's death, but the personal representative of the deceased may be substituted as plaintiff. Section 19 provides that whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or, if there be no widow, the personal representatives, may maintain an action and recover damages for the death thus occasioned,

and Act 1855 (P. L. 809) designates the persons who may exercise the right conferred by section 19. *Held* that, while section 19 created a new right to sue, section 18 merely continued a common-law right of action for personal injury after plaintiff's death, and hence, under such section, where a stevedore in his lifetime filed a libel in admiralty against a ship for injuries sustained in unloading by the ship's alleged negligence, the libel did not abate on libellant's death, but might be properly continued in the name of his personal representative.

## 2. SAME—BONDS—DISCHARGE.

A bond, having been executed to relieve the ship from liability under a libel for injuries to a stevedore, was continued in force after libellant's death to secure any judgment which libellant's personal representative might subsequently recover.

### Motions to Substitute Administrator and to Cancel Bond.

John F. Lewis, Francis C. Adler, and Francis S. Laws, for libellant.  
Convers & Kirlin and Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. This action in rem was brought by George Basel against the steamship City of Belfast to recover damages for personal injury sustained by the neglect of the vessel's servants. The injury was done while the libellant was at work as a stevedore in discharging cargo, the ship being moored in the Schuylkill river below Gray's Ferry. The case is still pending, but the libellant has recently died, and in consequence of his death two motions have been made and are now before the court—one to substitute the decedent's administrator as libellant, and the other on behalf of the steamship to cancel the claimant's bond on the ground that the action has abated by reason of the death. The case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, decided that a suit in admiralty could not be maintained for negligence causing the death of a human being upon the high seas or upon waters navigable from the sea in the absence of an act of Congress or a statute of a state giving a right of action therefor. And in *The Corsair*, 145 U. S. 347, 12 Sup. Ct. 949, 36 L. Ed. 727, it was further held that, although the statute of a state had given a right of action to the minor children or widow of the deceased, an action in rem could not be maintained, because such an action was founded upon a maritime lien, and no lien had been given by the statute of Louisiana that was then under consideration. In the present case, however, the action was not brought to recover damages for a death, but by the injured man himself to recover the damages properly due to him, and no statute was needed to permit the bringing of such a suit. But at common law, and in the admiralty as well, the suit would abate by the libellant's death, and therefore the motion to substitute the administrator and proceed with the cause requires the production of statutory support. This is found in the Pennsylvania act of 1851, § 18 (P. L. 674), which reads as follows:

"That no action, hereafter brought to recover damages for injury to the person by negligence or default, shall abate by reason of the death of the plaintiff, but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction."

Section 19 provides for the contingency that the injured person may have died as a consequence of the wrongdoer's negligent act before he has brought a suit, and enacts:

"That, whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his, or her, life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for, and recover damages for, the death thus occasioned."

The act of 1855 (P. L. 309) designates the persons who may exercise the right conferred by section 19, but, as has been decided by the Supreme Court of Pennsylvania in *McCafferty v. Railroad Co.*, 193 Pa. 345, 44 Atl. 436, 74 Am. St. Rep. 690:

"Under these acts two actions cannot be sustained for the same injury. If the party injured has brought an action and died, it may be continued by his executor or administrator for the benefit of his estate, but in such a case no new action can be brought under section 19. If he has not brought an action, the parties designated by the act of 1855 may do so, and the recovery is in their right. If the action is continued for the benefit of the estate, the measure of damages is the loss sustained by the injured party. In the opinion in *Maher v. The Traction Co.*, 181 Pa. 617, 37 Atl. 571, it was said by the present chief justice: 'As the action had been brought in the lifetime of the injured party, and had survived by virtue of section 18 of the act of 1851, it logically follows that the damages recovered by her personal representatives should be the same as she could have recovered had death not ensued. Included therein are damages for her pain and suffering up to the time of her death, and diminution of earning power during a period of life which she would have probably lived had the accident not happened. It is a mistake to suppose that the recovery in this case is for the death. It is still for the personal injury.'"

This ruling was repeated in *Edwards v. Gimbel*, 202 Pa. 30, 51 Atl. 357, and it is settled, therefore, by these decisions that the decedent's right in the present case to recover for the injury done to himself was not extinguished by his death.

It remains to inquire whether the remedy against the ship has been interfered with by the death, or whether the administrator may go on with the suit as he finds it. It is no doubt true that, if the deceased had not sued in his lifetime, and an action had been brought to recover damages for his death, the proceeding in rem could not have been resorted to, because the Pennsylvania statute does not give a lien in such a case. *The Corsair*, supra; *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715; and note to *Brown v. Electric Rwy. Co.*, 70 Am. St. Rep. 681. But the two sections of the act of 1851 deal with separate and independent rights. Section 19 creates a new right to sue, and, taken in connection with the act of 1855, designated the persons who may be parties plaintiff; while section 18 is concerned with the common-law right to sue for personal injury inflicted by the negligence of another, and merely provides that such right shall continue to exist in spite of the plaintiff's death. It seems to me that this right and the remedy that has been chosen to enforce it are inseparable, and that the administrator does no more than take the place of the decedent in order to carry on the suit as the latter would have carried it on if he had not died. The seizure of the ship and the claimant's bond are intended to provide

security that the right shall be satisfied; and, since the right is preserved by the statute, I do not know upon what ground the security is to be taken away. The measure of damages is precisely the same as if the death had not occurred, and the money goes to his near relatives in the same proportion as if he had recovered it himself, and had died intestate. In no respect save the substitution of the personal representative does the action suffer any change, and I do not see upon what reasonable ground a court can decide that a form of action which was properly at the decedent's command in his lifetime is no longer available merely because he has died, and his personal representative must therefore carry on the suit to the end.

The motion to substitute the administrator as libellant is granted, and the motion to cancel the claimant's bond is refused.

R. J. WADDELL & CO. V. UNITED STATES.

(Circuit Court, S. D. New York. November 11, 1904.)

No. 3,512.

1. CUSTOMS DUTIES—CLASSIFICATION—HONES—WHETSTONES.

The provision for "hones and whetstones," in paragraph 574, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], includes only articles used in sharpening edged instruments.

2. SAME—HONE—STONE POLISHERS—UNENUMERATED ARTICLES.

*Held*, that certain articles of hone stone, which are used in polishing marble and lithographic stones, and which are not shown to be known commercially as "hones," are not free of duty as "hones" under paragraph 574, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], but are dutiable as unenumerated manufactured articles under section 6 of said act, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

On Application for Review of a Decision of the Board of United States General Appraisers.

The subject of these proceedings is a decision affirming the assessment of duty by the collector of customs at the port of New York on merchandise imported by R. J. Waddell & Co. This merchandise consisted of a variety of stones, classified as dutiable under section 6, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], as unenumerated manufactured articles. The importers' contention was that it should have been admitted free of duty, under the provision for "hones and whetstones" in paragraph 574 of said act, c. 11, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684]. A description of the merchandise, and the conclusions and reasoning of the Board of General Appraisers, appear from the following excerpt from the Board's opinion:

"De Vries, General Appraiser: At the hearing six samples were introduced as original representative samples of the different kinds of the merchandise in question. \* \* \* Exhibits 3 and 4 are rough pieces of stone in the condition taken from the quarry, with one side smooth. The merchandise represented by these exhibits was of various sizes, being about a handy size to be conveniently held in and grasped by the hand while in use. \* \* \* Exhibit 6 is a rough-cut stone about 8 inches in length, 3 inches in width, and 2 inches thick. The invoices the subject of these protests all contain the following caption: 'Invoice of certain goods, viz., hone stone, sold in Dalmore, Scotland,' etc. Following this designation are the enumerations of the varieties of merchandise by the following specific names, which, described by

reference to the exhibits enumerated, we find are as follows: \* \* \* (4) Marble polishers, 'fine grain,' and marble polishers, 'sharp grain,' represented by Exhibits 3 and 4. \* \* \* (6) Square-cut hones, represented by Exhibit 6. (7) Mikado hone-stone blocks, some of irregular shapes, like Exhibits 3 and 4, and others of regular shapes, like Exhibit 6, all rough cut, and weighing from 70 to 80 pounds each. \* \* \* (10) Hone stone, 'fine grain,' and hone stone, 'sharp grain,' which are the same as Exhibits 3 and 4, being the identical articles. On all invoices but one these goods are designated as 'marble polishers.' On the latest invoice they are designated as 'hone stone,' etc. (11) Mikado hone-stone blocks, 'fine blue,' which are the same as the mikado hone-stone blocks before described, differing in size and color. \* \* \* It further appears and we find that the square-cut hones represented by Exhibit 6 are principally used by lithographers in taking off the hard knots in their lithographic stones, and sometimes for sharpening tools. It further appears that the mikado hone-stone blocks and the mikado hone-stone blocks, 'fine blue,' etc., are used by the calico print trade for the sharpening of tools, and that those imported, the subject of these protests, were sold to that trade for that purpose. We further find that the goods represented by Exhibits 3 and 4, by whatever designation known upon these invoices, are used to rub down marble in the course of polishing the same. In G. A. 5,204, T. D. 23,986, this board, in passing upon merchandise identical with Exhibits 3 and 4, held that such articles did not come within the meaning of the word 'hones,' as used in the free list of the present tariff act, and that only such goods were within the terms thereof as were used for the sharpening of razors, tools, and other edged instruments. It is sought in this case by the importers to impeach that decision by establishing that the word 'hones' in that paragraph is used in a commercial sense, and, as so known, all the merchandise the subject of these protests is entitled to free entry, whatever its use. Much testimony was adduced at the trial. Upon a re-examination of the question of law presented, we are satisfied that the conclusion reached in G. A. 5,204, T. D. 23,986, is correct. The word used in the statute is 'hones,' a plain and unambiguous term. In *Newman v. Arthur*, 109 U. S. 137, 3 Sup. Ct. 91, 27 L. Ed. 883, the Supreme Court said: 'Where words used in an act imposing duties upon merchandise have acquired by commercial use a meaning different from their ordinary meaning, the latter may be controlled by the former, if such be the apparent intent of the statute; but the application falls in the present instance, because the language used is unequivocal. There is no reference in the statute, either expressed or by implication, to any commercial usage, and there is no language in it which requires for its interpretation the aid of extrinsic circumstances.' In G. A. 5,204, T. D. 23,986, this board quoted at length the definitions of the leading lexicographers of both 'hones' and 'whetstones,' and an advertence to that decision shows that lexicographic authorities uniformly agree that the word 'hones' and the word 'whetstones' in their descriptive force each implies a stone used for sharpening edged tools, instruments, etc., by friction. The one unit of similarity between the two is that the stones must be articles used for sharpening edged tools. That being the only sense in which the word is used, we are unable to discover anything in the statute which indicates that it was used in other than its ordinary sense. On the contrary, we find in the statute that which indicates that the word 'hones,' which is the word here in question, was used in its plain, ordinary sense, and not in any commercial sense. It is used in conjunction with the word 'whetstones.' The rule of construction applicable is found quoted by the authorities as follows: 'One of the best-settled rules of the interpretation of laws imposing duties is that the articles grouped together are to be deemed of a kindred nature and of kindred materials, unless there is something in the context which repels that inference. *Adams v. Bancroft*, 3 Sumn. 384, Fed. Cas. No. 44; *United States v. Sixty-Five Terra-Cotta Vases* (C. C.) 18 Fed. 508; *In re Sixty-Five Terra-Cotta Vases* (D. C.) 10 Fed. 880.' If there is doubt, therefore, as to the meaning of the word 'hones,' reference may be had to the word 'whetstones,' its associate word in the statute, as giving evidence of and measuring the scope of the meaning and use of its associate word 'hones.' The one common unit of similarity between them, and which limits the meaning of both of them under the rule quoted, is that each is used



for sharpening edged tools. The meaning of the one is limitation upon the other, and an index of the meaning of the other. It will hardly be contended for a moment that the word 'whetstones,' which is a word known in every household in the land, is used in a commercial sense, or in any other sense than as an instrument used for sharpening edged tools. Under the decision quoted, therefore, we think there can be no escape from the conclusion that the word 'hones,' as used in the statute, is used in its plain, ordinary sense, which is uniformly described by the lexicographic authorities as an instrument used for sharpening tools, and that sense limits its use and scope in its application to the merchandise which Congress intended to give free entry under that designation. It will be noted that all the merchandise covered by these protests, save and except that represented by Exhibits 3, 4, and 6, comes within the definitions laid down in G. A. 5,204; and as to those articles the protests are well taken. As to the articles represented by Exhibits 3, 4, and 6, we find that their use is for other purposes than that of sharpening edged tools, and think the protests are not well taken. As stated, it was sought to establish, particularly with reference to the articles represented by Exhibits 3 and 4, and which are the subject of decision in G. A. 5,204, that they were commercially known as 'hones.' We think this record does not sustain that contention. \* \* \*

"It thus appears, we think, fairly, from this record, that this merchandise is not generally and uniformly through the United States known as 'hones'; that there is not a general and uniform trade designation which includes this merchandise within that designation. On the contrary, it appears that it is invoiced not as 'hones,' but as 'hone stone,' a term descriptive of the quality of merchandise suitable for making hones, rather than an *eo nomine* designation of an article; that it is further known as 'grit,' as 'marble polishers,' as 'Scotch goods,' as 'hone stone,' etc. We find that there is no general and uniform trade designation in this country, which includes such merchandise as represented by Exhibits 3, 4, and 6 within that trade designation as 'hones,' and that, on the contrary, they are not so known. The protests \* \* \* are overruled as to the merchandise represented by Exhibits 3, 4, and 6. \* \* \*

Comstock & Washburn, for appellants.  
Charles Duane Baker, for the United States.

HAZEL, District Judge. The merchandise, consisting of a variety of stones, was assessed for duty at 20 per centum ad valorem, as nonenumerated articles, manufactured in whole or in part, under section 6 of Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], and are claimed by the importers to be entitled to free entry as hones, under a provision of paragraph 574, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], which reads "Hones and Whetstones." The Board of General Appraisers decided that the merchandise represented by Exhibits 3, 4, and 6 herein was properly dutiable as assessed. In view of the comprehensive opinion of the Board of General Appraisers, it is deemed entirely sufficient to say that, in my judgment, the board has correctly interpreted paragraph 574. The stones are not hones or whetstones. The plausible reasons assigned by the board for reaching its conclusion are thought to be sound and persuasive. The importers, however, contend that such decision is clearly against the weight of evidence; that the proofs show that the articles were known as hones according to commercial designation. On this point a great deal of testimony was taken on the part of the government and also of the importers. Upon the conflicting

evidence a decision has been reached that the articles had no uniform trade designation in this country, and that they were not known as hones.

The decision of the Board of General Appraisers is affirmed.

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ALBERT LORSCH & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. November 11, 1904.)

No. 3,539.

CUSTOMS DUTIES—CLASSIFICATION—MEASUREMENT OF IMITATION PRECIOUS STONES—"DIMENSIONS."

In the provision in paragraph 435, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "imitations \* \* \* of precious stones \* \* \* not exceeding an inch in dimensions," the measurement contemplated is that of any single dimension.

On Application for Review of a Decision of the Board of General Appraisers.

The decision subject to review (G. A. 5,661, T. D. 25,251) affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Albert Lorsch & Co. The opinion filed by the board reads as follows:

Sharretts, General Appraiser: The merchandise in question consists of imitations of precious stones exceeding 1 inch in length, but containing less than 1 square inch of superficial surface. It was assessed for duty by the collector at the rate of 45 per cent. ad valorem, under the provision of paragraph 112, Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 158, U. S. Comp. St. 1901, p. 1635, for manufactures of glass or paste, and is claimed by the protestants to be dutiable at 20 per cent. ad valorem, as imitations of precious stones, under paragraph 435, Schedule N, 30 Stat. 192, U. S. Comp. St. 1901, p. 1676. It is conceded that the merchandise is composed of glass or paste made to imitate jade, a semiprecious stone, and that, while it averages less than 1 square inch in size, it exceeds 1 inch in length. The exhibit in the case, taken from the importation, is described on the invoice as item "No. 7115/18, 30x14 millimeters, jade," and represents a cameo, oval in form. Twenty-five millimeters are approximately an inch; hence it will be seen that the articles in question are about  $1\frac{1}{4}$  inches in length, and three-fifths of an inch in width.

The importers' contention is that, Congress having used the word "dimensions" instead of "dimension" in paragraph 435, at least the average dimension, if not both dimensions, must exceed 1 inch, in order to exclude imitations of precious stones from classification thereunder. Had Congress been legislating with regard to a single substance, there would be much force in this contention. Congress, however, disposed of all kinds of precious stones collectively. The plural word, "imitations," was employed in paragraph 435; and, as a corollary, the plural word "dimensions" was used to make the sentence grammatical. "The plural includes the singular." Endlich on Interpretation of Statutes, par. 388. A fair interpretation of the paragraph in question would seem to be that any imitation of a precious stone that exceeded 1 inch in dimensions, or all imitations of precious stones exceeding 1 inch in dimensions, were excluded from entry under that paragraph. We can see nothing in the choice of language employed by Congress to indicate an intent to include length, breadth, and thickness in the word "dimensions." Had such been its intent, the paragraph would probably have read "not exceeding one cubic inch in dimensions." See paragraph 258, Schedule G, 30 Stat. 171, U. S. Comp. St. 1901, p. 1650. If length and breadth only had been contemplated, paragraphs 101 to 105, inclusive, Schedule B, 30 Stat. 157, 158, U. S. Comp. St. 1901, p. 1634, are persuasive that Congress would have based its limitation

of the size of imitations of precious stones upon the square inch. In the proviso to paragraph 565, § 2, Free List, 30 Stat. 198, U. S. Comp. St. 1901, p. 1684, certain plates or disks are provided for according to diameter. It is not unreasonable to suppose that Congress, having made use of the terms "square inches," "cubic contents," and "diameter," intended the word "dimensions" to refer to linear measurement. The Standard Dictionary defines "dimension" to be any measurable extent or magnitude, as of a line, surface, or solid; especially one of the three measurements—length, breadth, and thickness—by means of which the contents of a cubic body are determined; generally used in the plural. The definition of "dimension" as given in the Century Dictionary is: "Magnitude measured along a diameter; the measure through a body or closed figure along one of its principal axes; length, breadth, or thickness."

Bearing upon the intent of Congress, it is well to quote the provisions of the later tariff acts relating to imitations of precious stones: Act March 3, 1883, c. 121, Schedule N, Sundries, par. 420, 22 Stat. 511. "Compositions of glass or paste, when not set, ten per centum ad valorem." Act Oct. 1, 1890, c. 1244, § 1, Schedule N, par. 454, 26 Stat. 601: "Imitations of precious stones, composed of glass or paste, not exceeding one inch in dimensions, not set, ten per centum ad valorem." Act Aug. 27, 1894, c. 349, § 1, Schedule N, par. 338, 28 Stat. 534: "Imitations of precious stones, not exceeding an inch in dimensions, not set, ten per centum ad valorem." Act July 24, 1897, par. 435, supra: "Imitations of diamonds or other precious stones, composed of glass or paste, not exceeding an inch in dimensions, not engraved, painted, or otherwise ornamented or decorated, and not mounted or set, twenty per centum ad valorem."

During the life of the tariff act of 1883, there is but one case recorded of a controversy between the government and importers relative to the classification of so-called imitations of precious stones. *T. D. 7,240*. In that case Mr. Fairchild, then Assistant Secretary of the Treasury, quoting from the appraiser's report, said: "The articles consist of pieces of colored glass of oval shape, and from 1 to 6 inches in length, evidently intended for use in ornamenting stained-glass windows." It will be observed that only one dimension, namely, the length of the article, was specified; and it is not unreasonable to suppose that Congress had in mind this case when framing the tariff act of 1890, and imposed a comparatively low rate of duty on imitations of precious stones not exceeding 1 inch, linear measure, in their greatest axis. Such was the meaning given to the term "dimensions" by the customs authorities, and it has been adhered to by them and accepted by importers without protest up to the present time. "In all cases of ambiguity the contemporaneous construction, not only of the courts, but of the department, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling." *Schell v. Fauche*, 133 U. S. 562, 572, 11 Sup. Ct. 376, 380, 34 L. Ed. 1040, and cases there cited. "The importance of adherence to a long-continued and reasonable construction of a statute by the officers of the department whose duty it has been to execute it, when the statute is of an ambiguous character, has been frequently commented upon by the Supreme Court ever since the case of *Edwards v. Darby*, 12 Wheat. 206, 6 L. Ed. 603." *United States v. Dean Linseed Oil Co.*, 87 Fed. 458, 31 C. C. A. 51.

In our opinion, the collector committed no error in classifying the merchandise as manufactures of paste or glass, and assessing it for duty at 45 per cent. ad valorem, under paragraph 112.

No evidence having been offered regarding the other items on the invoice, the collector's classification relative thereto is presumptively correct.

The protest is overruled, and the collector's decision in all respects is affirmed.

Comstock & Washburn (Albert Comstock, of counsel), for appellants.

Charles Duane Baker, for the United States.

HAZEL, District Judge. I concur in the decision of the Board of General Appraisers. It is thought to be reasonably clear that by the use of the word "dimensions" in paragraph 435 of the tariff

act of July 24, 1897, c. 11, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], as applied to "imitations of diamonds or other precious stones, composed of glass or paste," Congress intended the word to apply to any single dimension. True, the literal meaning of the word "dimensions" includes length, breadth, and thickness, but there is excellent authority for holding that "the plural includes the singular." Other reasons, unnecessary to here repeat, appear in the opinion of the Board of General Appraisers to show the intention of Congress to regard the word "dimensions" as covering any single dimension.

The decision of the Board of General Appraisers sustaining the collector, who assessed a duty at the rate of 45 per centum ad valorem under section 112 of the tariff act (July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635]), for manufactures of glass or paste, is affirmed.

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**JOHNSON v. BRIDGEPORT DEOXIDIZED BRONZE & METAL CO.**

(Circuit Court, D. Connecticut. February 17, 1905.)

No. 512.

**MASTER AND SERVANT—INJURY TO SERVANT—VOLUNTARILY UNDERTAKING DANGEROUS WORK.**

Plaintiff, a foreigner of fair intelligence and with considerable knowledge of the English language, was employed as a laborer in defendant's foundry and grinding room. A belt having been thrown off the pulleys in the grinding room, he undertook to put it on while the shafting was in motion, and, in so doing, his arm was caught in a loop in the belt and torn off. The operation was a dangerous one, and required skill which he did not possess. He was not directed to put on the belt by any one in authority over him, but was twice warned against it by a fellow workman after he had commenced. *Held*, that the injury was not due to any negligence of defendant, but solely to that of plaintiff, for which he could not recover.

At Law.

Donald G. Perkins, for plaintiff.

Seymour C. Loomis, for defendant.

PLATT, District Judge. This is a hearing in damages after default, following the state practice, in an action by John Johnson to recover \$10,000 damages for injuries which he claims to have suffered from the negligence of the defendant. The case was brought in the state court, and was properly transferred here because of diversity of citizenship. When the matter was brought forward, the plaintiff urged his right to have the damages assessed by a jury, which was refused on October 20, 1903. On November 1 and 2, 1904, at New Haven, I heard the evidence and arguments of counsel, and have since those dates received and examined a copy of the testimony and written briefs. The substance of the complaint is as follows:

Defendant had a machine to which motive power was transmitted by a belt running over pulleys. Plaintiff is a foreigner, with slight knowledge of English, and below the average of intelligence. The belting came off, and defendant ordered plaintiff to put it on again while the shafting was in motion, a thing which the plaintiff had seen done frequently by the engineer and by others. This action required skill, and was attended with great danger, all of which defendant knew and plaintiff did not. Plaintiff obeyed the order, and was seriously injured in so doing. The defendant negligently failed to instruct the plaintiff how to put on said belt and of the danger of said work, and negligently ordered the plaintiff to do the same, and exposed the plaintiff to the damages therein, and, by its negligent acts and omissions aforesaid, caused the plaintiff's said injuries.

I find the following facts: On the 23d day of May, 1900, at about 4 o'clock in the afternoon, the plaintiff's arm was torn from his body in the grinding room of the defendant's factory in Bridgeport, Conn. These are the circumstances in which it happened: The plaintiff was a laborer or helper in and about the foundry and the grinding room, which opened into the foundry. His duties were, in a general way, to carry, clean, and chip castings and shovel sand for the molders, and to help the molders whenever his strength could be of assistance to them. Just prior to the accident he was trying to cut off a gate from one of the castings at a power press which stood in the foundry. The gate was so large that it overtaxed the capacity of the press, and the belt through which power was transmitted to the press was thrown off the upper wheel, which was connected with the main shafting, and also off the fly wheel on the press. The speed of the upper wheel was very great, reaching about 184 revolutions per minute. George W. Mackey was the engineer, and had charge of the engine, boiler, belting, and shafting. He had been so employed for about five years, and was a competent man for the position. Mackey was working on the band saw in the grinding room at the time the belt came off the wheels. He came over and worked the fly wheel by hand, so that plaintiff could cut off the gate, and, while this was being done, told the plaintiff that he ought not to use the press in that way. After the gate had been cut off, Mackey went out into the foundry to get a drink of water. He gave the plaintiff no orders to put the belt back upon the wheels. He remonstrated with him for treating the press as he had done, and said nothing more. The plaintiff did not understand exactly what Mackey said to him, but he took it to be that he should put the belt on. Mackey went away as soon as he had spoken. Plaintiff waited 10 or 15 minutes, hoping that Mackey would come back, because he was not sure of what he said; he had no other work to do, and did not wish to loaf, and so he mounted a ladder which was right at hand, and undertook to put the belt back upon the rapidly revolving wheel. In so doing his arm was caught in the loop of the belt, and before he could remove it he was whirled around the shafting and his arm was torn off. Before he had begun to put the belt back upon the wheel he was twice warned by George Ryan, who was holding a casting at

an emery wheel just across the grinding room, to come down off the ladder.

Plaintiff was a fairly intelligent man, with considerable knowledge of the English language. It is not possible that he could have misunderstood what Mackey said to him. Neither is it possible that he could have failed to hear Ryan's warning. He decided to undertake the dangerous work, and stubbornly proceeded to carry out his design until disaster overtook him. He climbed into danger of his own volition. My view of the case eliminates all discussion as to whether an order from Mackey to put the belt on while the wheel was so swiftly revolving would have made the defendant responsible. I think that such an order would have been within the apparent scope of his authority so far as the plaintiff is concerned, and that secret instructions to him by the master touching the stoppage of the machinery would not have availed. The situation was such that plaintiff had a right to assume that he ought to obey, if the order had been given, but I find as a fact that it was not given, and that ends the matter.

The law is well settled under our state practice that the defendant by suffering a default admits nominal damages, and, after larger damages have been shown by the plaintiff, assumes the burden of disproving his own negligence or of proving the plaintiff's contributory negligence. If he succeeds on either point, the damages are kept down to the nominal point. In the case at bar, I think that the defendant has succeeded in each respect, and the logical outcome is that the plaintiff is entitled to only nominal damages.

Let judgment be entered for plaintiff for \$25.

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In re PETTINGILL & CO.

(District Court, D. Massachusetts. February 3, 1905.)

No. 8,742.

1. **BANKRUPTCY—PREFERENCES—REASONABLE CAUSE TO BELIEVE DEBTOR INSOLVENT.**

Grounds for reasonable belief in the present inability of a debtor to pay his debts in the course of business are not necessarily grounds for believing that he is insolvent within the definition of insolvency contained in Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], so as to require the creditor to surrender payments received as preferences.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 256.]

2. **SAME.**

Something less than a year before his bankruptcy a debtor owed a creditor about \$30,000, and on being pressed for payment made a payment of \$8,000, and obtained an extension on the remainder. There had been large business transactions between the parties for years, which were continued, and during the time prior to his bankruptcy large credits were extended to the bankrupt, but large payments were also made. At the time agreed the old indebtedness was not paid, but shortly thereafter a payment of \$10,000 was made. At that time the creditor applied to Dun's Commercial Agency and to another, from both of whom favorable reports were received as to the debtor's condition. *Held*, that the creditor did not have reasonable cause to believe the debtor insolvent

within the meaning of the bankruptcy act, so as to require it to surrender payments received within four months prior to the bankruptcy as preferences under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], before proving its claim, although the bankrupt was in fact insolvent.

In Bankruptcy. On review of decision of referee disallowing the claim of the Press Company.

Walter M. Lindsay, for trustee.

Jeremiah Smith, Jr., for creditor.

LOWELL, District Judge. The creditor seeks to prove. The referee has found that the proof cannot be allowed until preferences received have first been returned. When the payments were made March 21 and 24, 1904, the debtor was insolvent, and knew that he was insolvent. The sole question presented is this: Had the creditor reasonable cause to believe the bankrupt insolvent at the time of the payments? That the creditor had no actual knowledge of insolvency was admitted. The referee has found that he had reasonable cause to believe it. The bankrupt, an advertising agency, for years had done a very large business with the creditor, the New York World, as well as with other papers. This business was largely, but not wholly, on account of Greene's Nervura, a patent medicine. In May, 1903, the former owed the latter \$30,273.41, and was pressed for payment. He offered in payment notes of the Nervura, indorsed by himself. When this arrangement was refused, he paid \$8,000, asked an extension until October 15th for the balance, and this was given him. The referee finds that in May, if the creditor had investigated, he would have found both the bankrupt and the Nervura insolvent; but a request for time, accompanied by a large payment on account, does not indicate insolvency in the definition of the present bankrupt act, even when accompanied by an attempt to fund indebtedness. Moreover, we have to determine reasonable cause as of March, 1904, not as of May, 1903. Much happened between these dates. Business continued between the parties. On June 1, 1903, the indebtedness was \$24,069.01; on October 1, \$26,937.55, though over \$5,500 had been paid in the meantime. In October, 1903, the bankrupt did not make the payment he had promised. The creditor pressed him, and at the last of the month obtained \$10,000. Disturbed by the delay in payment, the creditor asked for a report on the bankrupt from Dun's Commercial Agency. The report was favorable. The creditor inquired also of Taylor, manager of the Boston Globe, and was reassured by the reply. On November 1st the indebtedness was \$19,500.32; on January 1, 1904, it was \$22,382.83, although in two months the bankrupt had paid over \$5,000 on account. In December, 1903, the creditor again pressed for money, apparently on the old account, and the bankrupt agreed to pay \$500 weekly. In January and February, 1904, about \$13,000 credit was given, and only about \$3,500 received on account. The agreement to pay \$500 was not kept, though the shortage was small. About February 1st, instead of the weekly payment, the bankrupt agreed to pay \$10,000 in March,

when the sales of Nervura were to be large. In March there was difficulty in getting the money. On March 12th the creditor wrote, "We shall have to have a definite date and a definite sum named, or be compelled to take steps to protect our account." \$10,000 was promised definitely on March 15th. On March 21st \$3,000 was paid, and on March 24th \$2,000, the payments here alleged to be preferential. On March 26th the bankrupt openly failed. Before March 21st his financial embarrassment had been known to others, but there is no evidence of this creditor's reason to believe him insolvent, except substantially as above stated.

Obviously the creditor had some reasons for suspicion. To decide the case the court must determine how much reason to suspect insolvency is needed to constitute reasonable cause to believe that insolvency exists. Under Act March 2, 1867, c. 176, 14 Stat. 517, the term "insolvency" was defined as an inability to pay debts in course of business, yet in *Grant v. The National Bank of Monmouth*, 97 U. S. 80, 24 L. Ed. 971, the Supreme Court held that the renewal of a note, the overdrawing of a bank account, incorrect habits, a reckless manner of business, and seeming to be pressed for money was enough to make a creditor cautious and distrustful, but gave no reasonable cause to believe the debtor insolvent. The circumstances of suspicion in *Grant v. The National Bank of Monmouth* seem to me stronger than in the case at bar; but, even if they be weaker, yet the changed definition of insolvency in the present Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], makes a material difference in favor of the creditor alleged to be preferred. Insolvency is no longer inability to pay debts in the regular course of business, but exists only "whenever the aggregate of [the bankrupt's] property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts." Grounds for reasonable belief in a present inability to pay debts in the course of business are not necessarily grounds for believing that a man's property at a fair valuation is not sufficient to pay his debts.

In view of the decision and of the language of the Supreme Court in the case just mentioned, I am constrained to reverse the decision of the referee. See, also, *King v. Storer*, 75 Me. 63; *Peterson v. Schroeder*, 75 Wis. 577, 44 N. W. 652.

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In re A. L. ROBERTSHAW MFG. CO.

(District Court, E. D. Pennsylvania. February 24, 1905.)

No. 1,444.

**1. APPEAL—DESIGNATION OF RECORD.**

The court of bankruptcy from which an appeal is taken has no jurisdiction to designate what records shall be certified on which the appellate court shall determine the appeal.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 O. C. A. 9.]



**2. SAME—STATUTES.**

Under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], providing that appeals, as in equity cases, may be taken in bankruptcy to the Circuit Court of Appeals, and Act March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], providing that all provisions in force regulating the methods and systems of review through appeals or writs of error shall regulate appeals and writs of error to the Circuit Court of Appeals, on an appeal to that court in a bankruptcy proceeding, in the absence of stipulation, the whole of the record, in the strict sense of the word, must be transmitted to the appellate court, as required by Rev. St. §§ 698, 750 [U. S. Comp. St. 1901, pp. 568, 591].

**3. SAME—DESIGNATION OF RECORD—CERTIORARI.**

Where the parties to an appeal to the Circuit Court of Appeals in bankruptcy were unable to agree as to the contents of the appeal record, it was the duty of the appellant to file a *præcipe* with the clerk, pointing out specifically what records, in his judgment, should be certified, leaving appellee, if in his opinion the records certified are insufficient, to suggest a diminution of the record and ask for certiorari.

In Bankruptcy. Rule to Designate the Record on Appeal. See 133 Fed. 556.

Simpson & Brown and Ira Jewell Williams, for petitioner.  
John Dickey, Jr., for trustee.

HOLLAND, District Judge. On May 25, 1903, a rule was granted on the trustee in this case to show cause why a certain sum of money should not be paid out of the funds in his hands as trustee of this bankrupt estate. The matter was referred to a referee, who took testimony, and reported the evidence and his findings of fact; and this court, upon final hearing, dismissed the petition, from which an appeal has been taken to the Circuit Court of Appeals in this district. Counsel for the appellant and appellee having failed to agree as to what the record should contain a petition was presented, and a rule granted to show cause why the record on appeal should not consist of certain matters.

The petition of the Imperial Woolen Company, upon which this rule was granted, sets forth such parts of the record as they regard sufficient for a full and complete understanding of the case in the appellate court, and we are of opinion that their judgment is right in this respect; but we know of no law which authorizes the court from which an appeal is taken to designate what records in the court below shall be certified upon which the appellate court shall determine the appeal. In fact the judge of the court from which the appeal is taken ought not in the least to interfere in the discretion allowed by the general terms used in the acts of Congress and rules of court in designating the record to be certified in cases of appeal, as his judgment is to be reviewed, and his opinion of the importance and relevancy of matters contained in the record might, in the estimation of counsel for one side or the other, be as faulty as it is claimed his judgment is from which an appeal is taken; and if an order of the court from which the appeal is taken could have the effect of restricting the record in all cases where such a decree had been made, there would be the possibility of a feeling upon the one side or the other that they had not secured a fair hearing on a full record.

There is no local rule in this district as to what the record should

contain in bankruptcy cases, but the bankruptcy law of July 1, 1898, §. 25a, 30 Stat. 553, c. 541 [U. S. Comp. St. 1901, p. 3432], provides "that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States," etc. The eleventh section of the act of March 3, 1891, establishing the Circuit Court of Appeals (26 Stat. 829, c. 517 [U. S. Comp. St. 1901, p. 552]), provides that "all provisions of law now in force regulating the methods and systems of review, through appeals or writs of error, shall regulate the methods and systems of appeals and writs of error provided for in this act." So that sections 698, 750, Rev. St. [U. S. Comp. St. 1901, pp. 568, 591], as to what the transcript shall contain on appeal "in causes in equity," are in full force and apply in this case; the latter of which, in the absence of stipulation, provides for the transmission of the whole of the record, in the strict sense of the word (*Nashua, etc., Co. v. Boston, etc., Co.*, 61 Fed. 237, 9 C. C. A. 468), and the former for sending up the proofs, entries, and papers on file "necessary to a hearing of the appeal" (*Nashua, etc., Co. v. Boston, etc., Co.*, supra).

In addition to this, the latter part of second section of the act of March 3, 1891 (26 Stat. 826, c. 517 [U. S. Comp. St. 1901, p. 547]), authorizes the Circuit Court of Appeals "to establish all rules and regulations for the conduct of the business of the court within its jurisdiction"; and, in pursuance of that authority, the Circuit Court of Appeals for this circuit, on June 16, 1891, adopted certain rules in open court, the fourteenth of which provides, among other things:

"In all cases brought to this court by \* \* \* appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed."

The language used in the law and rules of court in regard to the record on appeal is so general that in every case it is necessary for some one to specify what part of the record in the particular case comes within these general designations above set forth. The practice here has long prevailed of counsel agreeing, by stipulation filed, as to what the record shall contain, and in seven years there has only been found one case where there was a disagreement; but when that occurs, and it is necessary to specify the record, the best practice, which has prevailed in the local courts and in other districts, is to require the appellant to file a præcipe with the clerk, pointing out specifically what records, in his judgment, are necessary to be certified on the appeal. *Nashua, etc., Co. v. Boston, etc., Co.*, supra; *Burnham v. North Chicago Street Railway Company*, 87 Fed. 168-170, 30 C. C. A. 594. If the appellee is of the opinion that these are not sufficient, he can suggest a diminution of the record, and ask for a certiorari (*Nashua, etc., Co. v. Boston, etc., Co.*, supra, and cases there cited), and the question as to the necessity of additional matter will properly be determined by the appellate court. In our judgment it would not be a satisfactory practice in appeal cases if the court from which the appeal is taken

could in any way restrict or limit the record, and we think this view is supported by reason and authority. *Railway Company v. Stewart*, 95 U. S. 279, 24 L. Ed. 431; *Smith v. McIntyre et al.* (C. C.) 84 Fed. 721; *Burnham v. North Chicago Street Railway Co.*, *supra*.

Holding this view as to the authority of this court and the practice to be adopted, we conclude that the counsel for the appellant must assume the responsibility of designating what records shall be certified by the clerk, and present to him a *præcipe* stating specifically which of the papers on file in the case he desires him to certify to the appellate court.

Rule dismissed.

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IN RE WILLIAM F. FISHER & CO.

(District Court, D. New Jersey. February 27, 1905.)

**1. BANKRUPTCY—SALE OF ASSETS—COMPOSITION.**

Where the money necessary to pay taxes and other debts having priority, required to be deposited by Bankr. Act July 1, 1898, c. 541, § 12b, 30 Stat. 549 [U. S. Comp. St. 1901, p. 8427], as a condition to the enforcement of a composition, had not been deposited, though several months had intervened since the court declared that such deposit must be made before any composition could be confirmed, the pendency of the petition for such composition was no defense to a petition for the sale of the bankrupt's assets.

**2. SAME—PETITION—FILING—REFEREE.**

A petition by a bankrupt's trustee for authority to sell property of the bankrupt was properly filed with the referee, instead of the clerk of the court, though Bankr. Act, § 70b (30 Stat. 566 [U. S. Comp. St. 1901, p. 8451]), declares that real and personal property, when practicable, shall be sold subject to the approval of the court.

**3. SAME—TRUSTEES—APPOINTMENT.**

Bankrupt Act July 1, 1898, c. 541, § 44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 8438], provides that the creditors of a bankrupt shall at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, etc., appoint one trustee or three trustees of the estate, and, if the creditors do not appoint a trustee or trustees, the court shall do so. *Held*, that where the creditors of a bankrupt appointed two trustees at their first meeting, who applied for a sale of the bankrupt's assets, pending which a third trustee was elected, who qualified, and joined in the petition for sale, the fact that the petition was presented by two trustees only in the first instance was no objection thereto, since, if title to the bankrupt's estate was not vested in the two trustees on their appointment and qualification it became vested in the three on the appointment and qualification of the third, as provided by Bankr. Act, § 70 (30 Stat. 565 [U. S. Comp. St. 1901, p. 8451]).

**4. SAME—VACANCY—POWER OF REFEREE.**

Where creditors of a bankrupt elected two trustees at the first meeting, instead of three, as required by Bankr. Act, § 44 (30 Stat. 557 [U. S. Comp. St. 1901, p. 8438]), the referee had no power to fill the vacancy in the office of the third trustee, unless the creditors, after the calling of another meeting by the referee, had themselves failed to fill the same.

In Bankruptcy. On petition for review of referee's order.

Charles J. Peshall, for petitioner.

Robert Adrain, for bankrupt.

LANNING, District Judge. At the first meeting of the creditors of William F. Fisher & Co., held on December 15, 1902, Frederick Weigel and Samuel F. Wylie were appointed trustees of the bankrupt's estate. The trustees immediately qualified and entered upon the duties of their respective offices. On October 31, 1904, they presented their petition to the referee to whom the cause had been referred, praying that they might be authorized to make sale of the property of the bankrupt. After the filing of this petition due notice was given to the creditors of the bankrupt of a hearing thereon, and also of the election of a third trustee, at a meeting of the creditors to be held on December 5, 1904. On December 5th, at the creditors' meeting, they appointed Nathan W. Clayton as the third trustee of the bankrupt's estate. He accepted the appointment, filed his bond, and, by a writing annexed to the petition of the two trustees previously appointed, joined in the prayer for the sale of the bankrupt's property. By an order dated December 24, 1904, the referee directed that the property be sold at not less than \$65,000, by private sale within 30 days from the date of the order, or, if such private sale could not be effected within that time, then by public vendue, and that, if the highest bid should be less than the appraised value of the property, no deed or bill of sale should be executed until the sale should have first been approved by the court. This order is now before me on the petition of Charles J. Peshall for review in accordance with the provisions of general order 27 (89 Fed. xi, 32 C. C. A. xxvii).

In the petition for review it is objected (1) that the order of sale is erroneous in that a petition for composition is now pending in the cause; (2) that the petition of Samuel F. Wylie and Frederick Weigel for authority to sell the property was not filed in the office of the clerk of this court, or presented to the judge of the court, as required by the bankruptcy act; and (3) that the order to sell is fatally defective, because but two trustees were appointed at the first meeting of the creditors of the bankrupt.

The first objection, namely, that a petition for composition is now pending, is not valid. It is true that an effort to effect a composition with the creditors of the bankrupt has been made, but the money necessary to pay taxes and other debts having priority, required to be deposited by section 12b of Bankr. Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3427, has not been deposited, though several months have intervened since the court declared that such deposit must be made before any composition could be confirmed.

The second objection, namely, that the petition praying for authority to sell the property was not filed with the clerk of this court or presented to the judge of the court, is also invalid. It is true that section 70b of the Bankruptcy Act (30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]) provides that real and personal property shall, when practicable, be sold subject to the approval of the court, but it is the general practice, after a case has been referred to a referee, to present the petition for an order of sale to the referee, and for him to grant or deny the order. In *Loveland's Bankruptcy*, p. 702, it is said:

"Whenever it is necessary or advisable in the opinion of the trustee to make a sale, it would seem, from the language of the statute, that it must

be done 'under the direction of the court.' He should apply to the judge or referee (usually the referee) for permission to sell property, specifying particularly what property is to be sold."

Forms 42, 43, 44, 45, and 46 of orders for the sale of the property of bankrupts' estates, prepared by the Supreme Court, all show that the orders are to be made by referees.

The third objection is that the order of sale is invalid, and should be set aside, for the reason that the creditors of the bankrupt at their first meeting elected but two trustees. Section 44 of the Bankruptcy Act (30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]) provides that:

"The creditors of a bankrupt estate shall, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been re-opened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so."

The point made by the objecting creditor is that, as the creditors at their first meeting elected two trustees, and not one trustee or three trustees, the appointment was absolutely void. I am not willing so to hold, especially in view of what was done in this case. It is true that the petition praying for an order to sell the property was originally signed by the two trustees Weigel and Wylie only, but, anticipating the objection to the power of the referee to make an order of sale upon that petition, notice was given to the creditors that at the time of the hearing upon the petition an election of a third trustee would be had. Such election was had, and the trustee, Clayton, accepted his appointment, duly qualified by filing his bond, and also joined in the petition of the other two trustees for the sale of the property. I think this action cured whatever defect existed in the previous action of the creditors. The objection that the appointment of the three trustees is so irregular that they cannot convey a good title to the real estate is not sound. This court has the power to direct the real and personal property of a bankrupt's estate to be sold. If the title to the bankrupt's estate was not vested in the two trustees upon their appointment and qualification, it became vested in the three trustees after the appointment and qualification of Mr. Clayton. See section 70 of the Bankruptcy Act (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]). As this court has general jurisdiction of the subject-matter of the sales of the properties of bankrupts' estates, a title conveyed by the three trustees in this case under an order of this court could not be successfully assailed in any collateral proceeding. The record of the case shows that three trustees have been elected. It is true that they were not all elected at the first meeting of the creditors; but the requirement that they shall be elected at such first meeting must be regarded as directory, and not mandatory. And, since it is clear that the creditors intended to elect more than one trustee, and in fact did elect but two, a fair construction of section 44 of the Bankruptcy Act (30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]) will lead to the conclusion that a vacancy existed in the office of the third trustee. That vacancy was subsequently supplied at a meeting of the creditors duly called. The referee had no power to fill that vacancy unless the creditors, after the calling

of another meeting by the referee, had themselves failed to elect. See *In re MacKellar* (D. C.) 116 Fed. 547; *In re Hare* (D. C.) 119 Fed. 246.

I am of the opinion that the objections to the order of sale are not valid. The petition for review will therefore be dismissed.

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### HEBERTON v. McCLAIN.

(Circuit Court, E. D. Pennsylvania. March 4, 1905.)

No. 100.

1. **INTERNAL REVENUE—LEGACY TAX—VESTED OR CONTINGENT INTERESTS.**

A legacy left by a testatrix to a daughter "when she is eighteen years old" is contingent, and not vested, and not subject to a legacy tax, under section 29 of the war revenue act of June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307].

2. **WILLS—CONSTRUCTION—VESTED REMAINDER.**

Under the will of a testatrix, bequeathing her residuary estate to her husband for life, with remainder to her two daughters equally, with a provision that "should either of them die leaving issue such issue to take and receive the share of its parent," the estate in remainder vested in the daughters by the rule in Pennsylvania.

Action to recover legacy taxes paid. On demurrer to plaintiff's statement.

William Drayton, for plaintiff.

Jasper Y. Brinton and J. Whitaker Thompson, for defendant.

J. B. McPHERSON, District Judge. This action is brought to recover taxes upon certain legacies given by the will of Harriet S. Heberton, of which the following are the relevant paragraphs:

"Item.—I hereby give and bequeath unto my daughter Ethel Crothers Heberton ten thousand dollars, also the portraits of John Stephen Benezet and his wife Judith Benezet, also the statue of Canova's Dancing Girl and the hall clock.

"Item.—I hereby give and bequeath unto my daughter Harriet Stevenson Heberton ten thousand dollars when she is eighteen years old, also the portraits of Thomas Barton and his wife Sarah Benezet Barton, also the Napoleon gilt pier table.

"Item.—I hereby give and bequeath unto my daughters Ethel Crothers Heberton and Harriet Stevenson Heberton my jewelry, laces, bureau, silver, and clothes, to be divided equally between them.

"Item.—I hereby appoint my husband Craig Heberton the executor of this will and the guardian of our children. Upon his death I appoint my brother Stevenson Crothers to act in his place.

"All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath unto my husband Craig Heberton for and during his natural life, and upon his death, equally to and between my daughters Ethel C. Heberton and Harriet Stevenson Heberton, share and share alike. Should either of them die leaving issue, such issue to take and receive the share of its parent."

The tax upon the specific legacy to Ethel Heberton is not involved. The questions for decision are these:

(1) Is the specific legacy to Harriet Heberton vested or contingent?

(2) Is the interest of the two daughters in the residuary estate vested or contingent?

A third question—whether the tax upon Harriet's specific legacy, and upon the estate in remainder of both daughters, was collectible in December, 1901, when it was assessed, the legacies not being then payable to the beneficiaries—need not be decided, as will shortly appear.

1. It is true that the decisions are not harmonious upon the character of a legacy given to a beneficiary "when he shall be twenty-one." The question is seldom presented so nakedly as in the will now before the court. In many of the cases other language of the testator has led to the conclusion that similar words were sufficient to vest the legatee's interest; but in the case of Mrs. Heberton's will I think the authorities require the ruling that the legacy is contingent. In *Roper on Legacies* (4th Ed.) c. 10, § 3, p. 566, it is said:

"The words paid or payable are considered so material that if they be omitted, and the bequests made to the legatees, as, if, provided, in case of, or when, they attain twenty-one, these expressions will, without being controlled by the context of the will, constitute the time of payment as of the essence of the bequest, and consequently the legatees can take no vested interest until they attain twenty-one."

*Jarman on Wills* (4th Ed.) 764, is to the same effect:

"So, where a legacy is given to a person if, or provided, or in case, or when (for it matters not which of these words is used) he attains the age of twenty-one years, or marries, though such legacy, standing alone and unexplained, would clearly be contingent," etc.

The same rule is stated in *Hawkins on Wills* (2d Ed.) 226:

"A bequest to A. at twenty-one, and a bequest to A. payable at twenty-one, do not much differ in expression, yet one is a vested the other a contingent gift."

See, also, *Engles' Estate*, 167 Pa. 463, 31 Atl. 681; *Hanson v. Graham*, 6 Vesey, 243, in which the following language is used:

"No case has determined that the word 'when,' as referred to a period of life, standing by itself and unqualified by any words or circumstances, has ever been held to denote merely the time at which it is to take effect in possession; but standing so unqualified and uncontrolled it is a word of condition, denoting the time when the gift is to take effect in substance. That this is so is evident upon mere general principles; for it is just the same, speaking of an uncertain event, whether you say when, or if, it shall happen. Until it happens, that which is grounded upon it cannot take place."

And *Lane v. Goudge*, 9 Vesey, 230, which contains these words:

"If a legacy is given when a person attains twenty-one, and he never attains that age, he never will be entitled. But if it is coupled with other circumstances, showing that he was not meant conditionally, but only to mark the time when the interest vests in possession, the sense is put upon the words which the will requires."

*Alexander v. Alexander*, 16 Com. Ben. 59, and *Locke v. Lamb*, L. R. 4 Equity Cases, 372. In the vice chancellor's opinion, delivered in the latter case, he quotes from Sir William Grant's opinion in *Leake v. Robinson*, 2 Merivale, 386, as follows:

"If there were an antecedent gift, a direction to pay on the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description when they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five, is it not precisely

the same thing as if I give to such of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five can claim anything under such a gift."

These citations, I think, support the conclusion that the specific legacy under consideration is contingent.

2. Under the authority of *McCormick v. McElligott*, 127 Pa. 230, 17 Atl. 896, 14 Am. St. Rep. 837, and *Carstensen's Estate*, 196 Pa. 325, 46 Atl. 495, I think that the interest taken by the two daughters in the residuary estate was vested.

3. It is not necessary to consider the third question. The case of *Land Title, etc., Co. v. McCoach* (C. C. A.) 129 Fed. 901, declares that a contingent remainder is not taxable; and, as the assessed value of the vested remainder is less than \$10,000, it follows that no tax at all should have been levied upon Harriet's legacies, or upon Ethel's interest in remainder. *Knowlton v. Moore*, 178 U. S. 78, 20 Sup. Ct. 747, 44 L. Ed. 969.

Judgment may be entered for the plaintiff on the demurrer.

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In re SCHULZ et al.

(District Court, D. Oregon. February 21, 1905.)

No. 791.

**BANKRUPTCY—HOMESTEAD—ABANDONMENT.**

A bankrupt, having a homestead and a large family in Washington, removed, with certain of his children, to Oregon to obtain work. He was a tinner, and desired to start a shop where his homestead was located, his purpose being to earn sufficient money in Oregon to do so. He had accumulated some money and a part of the necessary tools, and had paid the interest on the purchase-money mortgage on the homestead, when, being unable to keep up two separate establishments, his wife, who had remained on the homestead, joined him in Oregon. His bankruptcy petition, however, merely alleged that he had "resided and was employed" in Oregon for six months preceding a filing of the petition, but did not allege that he had a domicile in such state. *Held*, that such facts did not show an abandonment of the bankrupt's homestead in Washington.

T. J. Geisler, for petitioners.  
Bronaugh & Bronaugh, for trustee.

BELLINGER, District Judge. The question to be decided is one of homestead exemption under the bankruptcy act. Daniel Schulz, now deceased, and his son Adolph Schulz, were adjudged bankrupts in this court upon their petition filed on January 20, 1904. The two Schulzes were domiciled at North Yakima, in the state of Washington, where Daniel had a homestead, upon which he resided with his wife and a large family of children, 13 in number, 8 of whom were dependent upon him for support. On September 11, 1903, they came to Portland, leaving the wife of Daniel on the homestead at North Yakima, where she was to remain. Thereafter, on November 21, 1903, finding the burden of keeping two separate establishments greater than they could afford, the wife, on her own motion, rented the homestead for a period ending on June 15th next ensuing for \$10 a month, and



joined her husband in Portland. In their petition in bankruptcy it is alleged that Adolph "has resided and been domiciled within the district of Oregon for the greater portion of six months immediately preceding," and "that Daniel Schulz has resided and been employed in the city of Portland and district of Oregon about the same time." The uncontradicted testimony of Daniel Schulz and his wife is to the effect that the former had no work in North Yakima, and had to leave the premises in order to obtain work to support his wife and children; that he was a tinner by trade; that he wanted to start a little shop in North Yakima, and came to Portland to earn enough to do this, and that at the time his testimony was taken, May 20th, he had accumulated a little money and acquired a part of the necessary tools, and had paid the interest on a purchase-money mortgage on the homestead; that at the time of leaving his home in North Yakima he intended to return "as soon as he had earned a little something," and his expectation when testifying was that he would do so at the expiration of the lease of the homestead; that immediately prior to leaving North Yakima he planted some trees and crops on the homestead, built a chicken house and a barn. The barn cost \$200, and was completed a day or two before Daniel Schulz left Yakima.

I am of the opinion that the removal of Daniel Schulz to Portland, under the circumstances testified to, does not constitute an abandonment of the homestead, without reference to the law of the state of Washington providing that a homestead can be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged, etc. "A homestead is not abandoned by the removal of the husband with his family and living elsewhere, when there is an intention to return later and make it their home." *Porter v. Chapman*, 65 Cal. 365, 4 Pac. 237. Such an intention appears from the testimony in this case. The removal to Portland is consistent with such an intention. It was a means to the end of establishing a business in the place of his homestead that would enable him to maintain himself and family permanently there.

All that is offered to support the contention of the creditors is the averment of residence in the petition in bankruptcy, and the testimony of an officer who served some papers in a civil suit upon the bankrupt, and who was told by him and his wife that they lived in Portland and that Portland was their home. This witness says that when he asked Daniel Schulz if he intended to make this place his home the latter answered that he did. The witness had been requested by the attorney to make this particular inquiry. Statements having the effect of admissions are to be received with caution, and this is especially true in a case like this, where it was the office of the witness to procure the particular admission. Furthermore, Schulz spoke English imperfectly, so much so that he testified through an interpreter, and he may have misunderstood the question asked him, or the witness may have misunderstood the answer. Schulz denied that any such conversation took place as the officer testifies to. In the petition to be adjudged bankrupts it is noticeable that as to Adolph, the son, it is stated that Portland has been his place of residence and domicile for the greater part of six months, while the statement as to the father is that he has

resided and been employed in the city of Portland about the same time. Whoever prepared the petition clearly intended to distinguish as to the residence of the two. The term "residence" is used as to the one in the sense of domicile, while as to the other it not only is not so used, but has reference to the fact of an employment merely. A man may have more than one residence, but he can have but one domicile. There is testimony to the effect that Daniel Schulz, upon the advice of his attorney that he had a right to trade his Yakima homestead for one in Oregon, made inquiries to that end, but did not find any opportunity to do so. But this cannot be construed as an abandonment of the homestead. An offer to sell a homestead might tend to prove an intention not to return to it, depending upon the circumstances under which the offer was made; but the only inference to be drawn from an attempt to trade one homestead for another is that of an intention not to abandon the homestead. It tends to show that there was no intention to acquire a domicile in Oregon, unless such a domicile could be substituted for that held in the state of Washington.

The petition of the widow of Daniel Schulz is allowed, and the finding and decision of the referee in respect to the homestead exemption in question is reversed.

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#### KIRKPATRICK v. AMERICAN ALKALI CO.

(Circuit Court, D. New Jersey. February 21, 1905.)

##### 1. CORPORATIONS—INSOLVENCY—UNPAID SUBSCRIPTIONS—ASSESSMENT.

On an application by the receiver of an insolvent corporation to make an assessment on unpaid stock subscriptions necessary to pay debts, the court is required to determine judicially what proportion of the unpaid subscriptions will probably be needed to meet the liabilities, the assessment ordered being confined to such amount.

##### 2. SAME—DISPOSITION OF ASSETS.

Where, on an application by the receiver of an insolvent corporation for permission to levy an assessment on unpaid subscriptions necessary to pay debts, it appeared that no effort had been made to dispose of certain patents belonging to the corporation, for which it had paid \$950,000, or of a claim of \$50,000 against another, and also that the real owners of certain stock, held in the name of dummies, might be ascertained, and an assessment made on them, which might obviate the necessity of, or materially reduce the assessment required on other stock, the receiver's application was premature.

In Equity. On petition of receiver for authority to assess preferred stockholders.

Burr, Brown & Lloyd, for receiver.

Clement B. Wood and Charles E. Morgan, for respondents Robert E. Glendinning & Co. and others.

F. B. Bracken, H. E. Kohn, and James Buchanan, for respondent Charles Evans.

LANNING, District Judge. In this matter the receiver has filed his petition praying for an order authorizing him to make an assessment of \$2.50 per share upon the holders of the preferred stock of the Ameri-

can Alkali Company for the purpose of supplementing the moneys in hand for the payment of the debts of the company and the expenses of the receivership. Upon the filing of the petition a rule was allowed requiring the holders of the preferred stock to show cause why the order prayed for should not be allowed. On the return of the rule, answers were filed by a number of the holders of preferred stock, wherein they raise various objections to the allowance of the order. One of the objections is that the application is premature, for the reason that there has yet been, and upon the facts as presented can be, no judicial ascertainment of the amount of the assessment that should be imposed. In *Cumberland Lumber Co. v. Clinton Hill Lumber Manufacturing Co.*, 57 N. J. Eq. 628, 42 Atl. 585, the New Jersey Court of Errors and Appeals held that an order like that now applied for is the result of an exercise of judicial power, and that before granting it the court must determine judicially what proportion of the unpaid subscriptions will probably be needed to meet the liabilities of the insolvent company, and that the assessment must be confined to the amount so needed. In the case in hand it appears that the receiver some time since instituted a suit in equity in the Circuit Court for the Eastern District of Pennsylvania to compel the defendants in that suit to disclose the real owners of some of the preferred stock of the American Alkali Company alleged by the receiver to be standing on the books of the company in the names of irresponsible dummies. The Circuit Court sustained a demurrer to the bill, but on appeal to the Circuit Court of Appeals for the Third Circuit the decree of the Circuit Court in *Arthur K. Brown, Surviving Receiver, etc., v. McDonald*, 133 Fed. 897, has just been reversed, and the receiver held to be entitled upon his bill to the discovery prayed for. In the proceeding now before me the receiver, in his petition, assumes that he will be able to collect nothing upon the stock alleged to be held by dummies, who, he says, hold about one-third of the total issue of the preferred stock; and he therefore asks to have the amount of the assessment fixed at \$2.50 per share. If the receiver, in the proceeding now pending in the Circuit Court for the Eastern District of Pennsylvania, shall discover that the holders of any considerable portion of the stock are mere dummies, and that the real owners of such stock are able to respond to an assessment made upon them, that assessment may, upon judicial inquiry, be found to be ample, if it be fixed at a sum considerably less than \$2.50 per share.

Another objection is that it appears by the receiver's petition that he has not disposed of all of the assets in his hands, and that until such disposition be made it will be impossible to ascertain the extent of the deficiency of the corporate assets. The receiver admits that he has in hand certain patents belonging to the American Alkali Company, for which the company paid \$950,000, and a claim against one W. W. Gibbs for \$50,000. The receiver believes that these assets are at the present time of nominal value only, but the respondents insist that some effort should be made to dispose of them, either at public or private sale. No such effort has been made, so far as the record discloses. The American Alkali Company is a New Jersey corporation, and the liability of its stockholders for the payment of the company's debts is fixed by

section 21 of the general corporations act (P. L. N. J. 1896, p. 284), which is as follows:

"Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations."

In construing this section the Court of Errors and Appeals of New Jersey, in *Weatherbee v. Baker*, 35 N. J. Eq. 501, said:

"It is manifest from a consideration of the circumstances under which delinquent stockholders are liable to creditors for their unpaid subscriptions, and of the nature of the trust which is created, that in any proceeding to enforce the liability of stockholders under this section all the property and assets of the corporation must be taken into account, and that the proceeding must be for the benefit of all the creditors. The assets of the corporation and its total indebtedness must be brought into the account, for until they are ascertained neither the amount of money required to satisfy the creditors of the corporation nor the proportion of the sum required to be paid by each stockholder can be ascertained."

The receiver is acting in the interest of creditors. The stockholders who may be liable upon their stock subscriptions for the debts of the company are entitled to have the assets of the company disposed of and applied to the payment of those debts before being themselves called on to contribute anything toward such payment. The unpaid subscriptions to capital stock constitute a trust fund for the payment of the debts of the corporation, but that trust fund is not liable to drafts upon it, especially where the stockholders object, until after the property of the corporation shall have been disposed of. As was further said in *Weatherbee v. Baker*:

"Each stockholder is made liable on his unpaid subscription only for the proportion thereof which may be necessary for the payment of the debts of the corporation when the property of the corporation has proved insufficient for that purpose."

For the reasons above stated, the petition of the receiver must be denied. This conclusion renders it unnecessary to consider the other questions argued by counsel.

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#### NICHOLS v. SOUTHERN OREGON CO.

(Circuit Court, D. Oregon. February 21, 1905.)

No. 2,845.

#### 1. PUBLIC LANDS—GRANTS—CONDITIONS—CONVEYANCE—OBJECTIONS.

Act Cong. March 3, 1869, c. 150, 15 Stat. 840, granted certain lands to the state of Oregon in aid of military road construction, on condition that the lands should not be sold to any one person, except in quantities not greater than a quarter section, and at a price not exceeding \$2.50 per acre. The succeeding year the state granted the lands in question to the road company in bulk, and by Act June 18, 1874, c. 305, 18 Stat. 80 [U. S. Comp. St. 1901, p. 1517], Congress authorized the issuance of patents to the state as fast as the lands should be selected and certified under the grant, under which act patents were issued to the road company for the

granted lands. *Held*, that under such circumstances the United States, and not a subsequent applicant to purchase, was the only authority entitled to object to the nonperformance of the conditions with reference to disposition of such lands.

**2. SAME—LACHES.**

Complainant, having permitted a long period of time to elapse, was barred by laches from maintaining a bill to compel defendant to convey a portion of the land to him on payment of the price specified in the grant.

Pipes & Tift and E. B. Seabrook, for complainant.  
Dolph, Mallory, Simon & Gearin, for defendant.

BELLINGER, District Judge. By the act of Congress approved March 3, 1869, c. 150, 15 Stat. 340, there was granted to the state of Oregon certain lands to aid in the construction of a military wagon road from Roseburg, in this state, to the navigable waters of Coos Bay. The grant contained this provision:

"Provided, further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and at a price not exceeding \$2.50 per acre."

On the 22d day of October, 1870, the state of Oregon, by an act of its Legislature, granted the lands in question to the Coos Bay Wagon Road Company, and that company built the road in aid of which the lands were granted. Thereafter, and on June 18, 1874, Congress passed "An act to authorize the issuance of patents for lands granted to the state of Oregon, in certain cases" (Act June 18, 1874, c. 305, 18 Stat. 80 [U. S. Comp. St. 1901, p. 1517]), in terms as follows:

"Whereas certain lands have heretofore, by acts of Congress, been granted to the state of Oregon to aid in the construction of certain military wagon roads in said state, and there exists no law providing for the issuing of formal patents for said lands,

"Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Governor of the state of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: provided, that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind except to provide for issuing patents for lands to which the state is already entitled."

In pursuance of this act, patents were issued to the Coos Bay Wagon Road Company for the granted lands. The defendant company has succeeded to the title to 30,000 acres in one body of the lands so patented, through mesne conveyances to the Southern Oregon Improvement Company, and from that company through a sale by a master in chancery, and it has succeeded through mesne conveyances to the remainder of such lands.

It is contended for the plaintiff that the grant in question is in effect an offer to sell the granted lands, to aid in building the road mentioned, in quantities of not more than one quarter section to

any one person, at \$2.50 per acre, and that the title acquired by the state was upon this trust; that the conveyance by the state of the lands in bulk was in violation of the trust which is impressed upon such lands in the hands of the defendant company, and that this trust will continue to exist until it is executed, in accordance with the terms of the granting act, by the sale of the granted lands in quantities to single purchasers of not more than 160 acres, and at a price not greater than \$2.50 per acre. The plaintiff tenders \$400 in payment for 160 acres of land included in the grant and particularly described, which land he alleges to be of a value in excess of \$2,000, and he prays that the defendant be required, by a decree of this court, to execute and deliver to him a deed of conveyance for the lands for which tender is made.

The grant was not a law for the sale of the granted lands. It did not offer them for sale. That was left to the state, subject to restrictions as to the price at which they should be sold and the quantity that should be sold to any one person. These restrictions were mere incidents of the grant, mere regulations that the state was required to observe in selling the granted lands, at such time after they were earned as the state should conclude to sell them. The object to be accomplished in no wise depended upon them. Whatever rights existed in respect to these restrictions belonged to the United States. No interest was created in the complainant. He is not a beneficiary in the grant, and he has no standing to complain that the state has violated its conditions in the manner in which it has disposed of the granted lands. That is a matter that can only be taken advantage of by the United States. Furthermore, above 30 years ago Congress authorized patents to issue to the state or to any corporation or corporations to which it had transferred its interest, and patents have been issued to the state's grantees in pursuance of that law. It is not necessary to consider whether this act was a waiver by Congress of the conditions subsequent in the grant. The transfer by the state and the several subsequent transfers were open disavowals of the trust relied upon, if it can be made out that there was such a trust. This great lapse of time is a complete bar to the recovery prayed for. When the bill shows upon its face that the plaintiff, by reason of lapse of time and of his own laches, is not entitled to the relief prayed for, the objection may be taken by demurrer.

The demurrer to the bill is sustained.

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#### THE CUMBERLAND.

#### THE ADMIRAL FARRAGUT.

(District Court, D. Massachusetts. February 15, 1905.)

Nos. 1,354, 1,359.

#### COLLISION—DAMAGES—DEMURRAGE.

Where, at the instance of claimant, the cost of repairing a vessel injured in collision has been adopted as the measure of damages to the libellant, he is entitled to recover, by way of demurrage, compensation for

the loss of her use during repair, or, where she was sold without repairing, but before the repairs could have been completed, he may recover demurrage to the time of sale.

[Ed. Note.—Demurrage, definitions and general principles, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

In Admiralty. Suit for collision. On exceptions to assessor's report.

Carver & Blodgett, for the Cumberland.

Frederic Dodge and Harrington Putnam, for the Admiral Farragut.

LOWELL, District Judge. This case comes before the court on exceptions to the assessor's report. The interlocutory decree directed that the damages should be divided, and it appears that both vessels were damaged.

The Cumberland was in collision July 7, 1902; was abandoned to the underwriters July 31st, and on that day the abandonment was accepted; was sold by the underwriters August 20th. The libellant claims demurrage between July 7th and August 20th. The claimant contends that no demurrage is allowable, but only interest. The assessor allowed demurrage to July 31st.

If the property of A. is injured by B., A. can recover from B. the damage suffered; but, in assessing this damage, a court or jury is guided by rules more or less artificial. Where a vessel is totally destroyed in a collision, the Supreme Court has decided that the libellant shall recover "the value of the vessel, with interest thereon, and the net freight pending at the time of the collision." *The Umbria*, 166 U. S. 404, 421, 17 Sup. Ct. 610, 41 L. Ed. 1053. See *The Columbus*, 3 W. Rob. 158. Under the circumstances stated, this rule is deemed to furnish a *restitutio in integrum*. That the wreck has been sold for a sum more or less considerable does not affect the rule, except by crediting the price received to the wrongdoer. But no plaintiff is permitted to enhance his damages, and so the respondent, whom the libellant seeks to charge with the original value of the vessel damaged (either the total value, or the balance left after deducting from the total value of the vessel the proceeds of the wreck), may show in reduction of damages that she can be restored by repair to her original condition for a smaller sum. He may then satisfy his liability by paying the cost of these repairs. The substitution of cost of repair for diminution in value as a measure of damages is ordinarily a concession to the claimant, and not a substituted method of assessment of which the libellant can avail himself at his discretion. If the repairs cost more than the loss of value, the claimant can ordinarily satisfy his liability by paying the latter. *The Havilah*, 50 Fed. 331, 1 C. C. A. 519; *The Venus* (D. C.) 17 Fed. 925. Where loss of value is awarded, interest is ordinarily allowed from the collision to the time of payment. *The Illinois* (D. C.) 84 Fed. 697. Where the cost of repairs is awarded, the libellant recovers, in addition thereto, compensation for loss of the vessel's use during repair. This compensation is called "demurrage."

Applying these rules to the case at bar, we find that the libellant sought to recover the difference between the value of the Cumberland before collision and her value after collision, as determined by the

price received for the wreck. Had the libellant obtained the assessment of damages by this rule, he would have received only interest on the sum awarded; but the claimant contended that the damages awarded should be limited to the cost of repair. Since this contention has prevailed, the payment of demurrage cannot now be resisted. There are cases in which demurrage has been allowed, although the vessel was sold before repair. *Philadelphia Steam Towboat Co. v. Philadelphia R. R.*, Fed. Cas. No. 11,085, affirmed in 23 How. 209, 16 L. Ed. 433. In *The Catherine*, 17 How. 170, 174, 175, 15 L. Ed. 233, the wreck was sold, and the reference in the opinion of the Supreme Court to *Williamson v. Barrett*, 13 How. 101, 110, 14 L. Ed. 68, indicates that demurrage was to be allowed. In *The Empire State*, 2 Ben. 178, Fed. Cas. No. 4,473, nothing was said about demurrage. The interest there mentioned may well have been interest on the cost of repairs after they were made. The distinction between interest and demurrage is not based, as the claimant contends, upon the actual repair of the injured vessel by the owner. Interest attends an allowance for loss of value; demurrage, an allowance for cost of repair. *The Empress Eugenie*, Lush. 138; *The South Sea*, Swab. 141; *The Ernest A. Hamill* (D. C.) 100 Fed. 509. In *La Champagne* (D. C.) 53 Fed. 398, the cost of repair was used as a criterion (not the only one) of loss of value, but the award was based upon "the difference between her value in her damaged condition and her value before the collision." In *The Rhode Island*, Abb. Adm. 100, 106, note, Fed. Cas. No. 11,744, interest was allowed by the Circuit Court as compensation for loss of use (the method of computation adopted by the District Court), "not because I think it founded upon any fixed or established principle, but because it is just enough in itself, and I have not been able to find any principle that would justify the adoption of a higher measure of damages in the given case." The *Rhode Island* is not authority for depriving the libellant of demurrage where his recovery has been limited to the cost of repair.

The contention of the libellant is sustained, and demurrage is allowed to August 20th, when the vessel was sold. The libellant asks for no more, and the repairs could not have been completed by that time.

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In re ALVORD.

(District Court, D. Connecticut. February 8, 1905.)

No. 1,244.

**BANKRUPTCY—DISCHARGE—FAILURE TO KEEP BOOKS.**

A discharge in bankruptcy is a great privilege, and demands that reasonable care, at least, shall be taken in advance by one who asks for it; and where a bankrupt, who was a man of business experience, failed to keep any books whatever from which his financial condition could be ascertained, he must be presumed to have intended to conceal such condition, and under Bankr. Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], is not entitled to a discharge.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 752-757.]



In Bankruptcy. On application for discharge.

Joseph R. Taylor and Samuel E. Hoyt, for bankrupt.  
George A. Mullen, for opposing creditors.

PLATT, District Judge. The referee's report finds certain facts, and upon them bases his recommendation that the bankrupt shall be discharged. Whether his report shall be followed depends upon the construction given to the second objection to a discharge in section 14 (b) of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) as it stands since the amendment of February 5, 1903 (32 Stat. 797, c. 487 [U. S. Comp. St. Supp. 1903, p. 411]). Before amendment the objection read, "(2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained." By the amendment of February 5, 1903, the words "fraudulent \* \* \* true \* \* \* and in contemplation of bankruptcy \* \* \* true" were stricken out, so that the paragraph now reads, "with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained." This question may properly be examined by the court without lessening the force of the general rule that conclusions of fact reached by the referees, unless manifestly improper, will be uniformly accepted and acted upon. We must examine the matter in the light of three undeniable propositions: (1) This is a court of equity. (2) Suitors who seek its favors must take care that their hands are unsoiled. (3) Such a discharge is a great privilege, and demands that reasonable care, at least, shall be taken in advance by the one who asks for it.

The specific charge against this bankrupt is that, with intent to conceal his financial condition from his creditors, he failed to keep books of account or records which would disclose his condition. It is not that he failed in some respect to keep such books or records, but that he absolutely failed to do so in every respect. The few records which he had were of no consequence, and those which he had lost or disposed of would have thrown no light on the case if they had been retained. It might be possible, by going to the books of certain corporations with which he had been connected, to ascertain his income, but no book or record exists or has existed from which any creditor, even were he "a Philadelphia lawyer," could learn about his outgoing funds. He was the only witness at the creditors' meeting, and it is from his own lips that we derive this information. When he filed his petition in this court, it is clear from his own admissions that neither his creditors nor himself could, at any time since he left the Swords Lumber Company, have discovered his financial condition. During his service as manager of the lumber company he must have learned the value of accurate bookkeeping; in fact, he must have known it earlier, or he would not have been selected for such a position. When he left that service he was, beyond peradventure, amply equipped

with the knowledge, which educated intelligence must possess, that such reckless conduct as he has indulged in for the past three or four years is unwise and unwarranted.

The referee says that intent cannot usually be proved by direct evidence, and that one is ordinarily presumed to intend the direct natural consequences of his acts, but that there must be some testimony from which such intent can be found. The trouble with his reasoning lies right there. He does not see that he has found a condition of negligence, carelessness, and incontinence which, when found to exist, leads directly and inevitably to the inextricable confusion into which the bankrupt's financial affairs were plunged, and produces a situation which, by the referee's own reasoning, the bankrupt must be held to have intended. If in these circumstances the bankrupt can be discharged, the door will be opened to a vast quagmire of recklessness and carelessness which, by its very nature, will be disastrous to honest enterprise and thrift. If his expectations had been realized, a successful man would have been launched upon the business world; his dreams were visionary and futile, and he comes here to be absolved from his financial sins. I cannot see my way clear to help him.

Prior to the amendment of February 5, 1903, the reasoning of the referee from the conceded facts would have been unanswerable. The Congress, in its wisdom, has by that amendment seen fit to eliminate the fraud, and the further element that the fraudulent concealment should be in contemplation of bankruptcy; but it would seem that the habit of construing the paragraph as it stood before the change has not been, to the last analysis, avoided by the referee. It is impossible to reach the referee's conclusion unless there shall be found haunting the idea of intent in the statute a notion that it must involve some tinge of active and intentional moral wrong when the condition existed. If the statute said intent to "deceive" the creditors as to his financial condition, that would be another story. I cannot so construe it. When, with deliberation, the fraudulent taint was removed, the rights of the creditors were materially enlarged.

The report is rejected, and the discharge refused.

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ARENBURG v. GRUPE et al.

(District Court, E. D. New York. December 28, 1904.)

**SHIPPING—CHARTER PARTY—MEASUREMENT OF TIMBER.**

A provision in a charter party for the carriage of a cargo of timber from a Cuban port to New York, fixing the freight per thousand feet, "Cuban invoice," means the same as "Cuban invoice measure"—the term having a known meaning in the trade, as relating to a peculiar system of measurement; and the vessel owners are bound by such provision, although the agents who negotiated the charter had no actual knowledge of such meaning.

In Admiralty. Suit for charter hire.

MacFarland, Taylor & Costello (W. W. MacFarland, of counsel), for libelants.

Benedict & Benedict (E. G. Benedict, of counsel), for respondents.

THOMAS, District Judge. This action involves the interpretation of the charter party of the schooner *Maple Leaf*, employed to bring a cargo of cedar and mahogany from Cochines Bay, Cuba, to New York. The charter was negotiated by Walford & Co., representing the owners, with the respondents, and before the charter was signed it was agreed that the compensation should be, on square sticks \$10 per thousand superficial feet, and on round sticks \$13 per thousand feet. After the charter party had been made out, but before execution, one of the respondents stated to the agents that he wanted the words "Cuban invoice" inserted, and to this the agents agreed. Thereupon the charter party was executed, and makes provision for the payment for the service of the vessel, "On square sticks ten (\$10) dollars per thousand superficial feet, Cuban invoice, on round sticks thirteen (\$13) dollars per thousand feet, Cuban invoice." The bill of lading was signed by the master after loading and refers to Cuban invoice measurement, although the master demurred to it at the time on the ground that it did not correctly state the amount of the cargo. The timber measures about 30 per cent. less, employing what is known as the "Cuban invoice measurement," than if measured according to the system employed by Constantine, who measured the timber for the libelants. The libelants show that their agents, Walford & Co., had no knowledge of the nature of Cuban invoice measure, and that, so far as such agents knew, no such term, having a peculiar significance, was recognized at the port of New York. The evidence shows, however, that on the 6th day of October, two days before the charter purports to be executed, a ship consigned to Walford & Co. arrived at this port, and that her cargo came in "Cuban invoice measure," or "Cuban invoice freight measure." There is no question but there is a distinct system of measuring, known as "Cuban invoice measurement," and that freight according to such system has been fully paid by respondents. The evidence discloses that the expressions "Cuban invoice" and "Cuban invoice measurement," used in the connection in which the words "Cuban invoice" are employed in the charter party, mean the same thing. The witness Ferrer, called by the libelants, understood the meaning of the term "Cuban invoice measure," and stated how measuring was done under that system, and his description accords with the respondents' claim in such regard. The same witness gave this evidence:

"Q. 'Cuban invoice'— Would those words, without the words 'Cuban invoice measure,' indicate anything to you, as a merchant? A. 'Cuban invoice' might. I would understand 'Cuban invoice' to mean invoice of any merchandise. But 'Cuban invoice measure,' relating to timber, would mean the same thing. Q. What would the expression '\$10 per thousand superficial feet Cuban invoice' mean? A. That would mean timber. I mean a measure of timber—a price on the timber for the freight."

Other evidence in the case shows that "Cuban invoice measure" is a term understood in the trade, and has a known meaning; and

the parties are deemed to have made the contract with the intention of using the words in the sense in which they would be accepted by persons engaged in the trade, which was the subject-matter of the charter party. It is urged by the libelants that a great injustice comes to the libelants if such system of measurement obtain in the present case. Such conclusion is by no means established, but, even so, the contract deliberately made by the parties cannot now be refashioned for the purpose of more justly adapting the compensation to the service.

The libelants are entitled to recover charter hire according to Cuban invoice measurement, as employed by Black, who measured the timber for the respondent. If there is any question as to the accuracy of his results, it can be determined by a commissioner.

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### THE CONEMAUGH.

(District Court, N. D. Illinois. August 24, 1904.)

No. 9,576.

**COLLISION—CARGO DAMAGE RECOVERED FROM ONE VESSEL—ACTION TO ENFORCE CONTRIBUTION BY OTHER VESSEL EQUALLY IN FAULT.**

Where, in a suit for collision, although both vessels were adjudged in fault, the libeled vessel was held liable for all cargo damage, the other not being in court, a subsequent suit against such other vessel to recoup one-half the damages so paid rests upon the doctrine of contribution, rather than of subrogation, and it is no defense that actions against the respondent vessel by her cargo owners are barred by limitation.

In Admiralty.

See 86 Fed. 814, 30 C. C. A. 628.

C. E. Kremer and W. O. Johnson, for libellant.

Harvey D. Goulder, for claimant.

KOHLSAAT, District Judge. On November 11, 1891, the owners of the defendant brought suit to recover damages sustained by defendant in collision with the propeller New York, owned then by the Union Steamboat Company, to which ownership libellant herein has succeeded, and also to recover as trustee for the owners or underwriters of the cargo. The New York, being for the purposes hereof the libellant herein, filed a cross-libel for damages sustained by her. The District Court held the New York to be alone in fault. On appeal the Circuit Court of Appeals for the Sixth Circuit reversed the finding and held the respondent herein to be alone in fault. 82 Fed. 819, 27 C. C. A. 154. On certiorari the Supreme Court held both vessels in fault, and decided that the New York must pay the full damages of the cargo owners or their intervening representatives. 20 Sup. Ct. 67, 44 L. Ed. 126. On receiving the mandate the District Court entered a decree in favor of the Conemaugh to the effect that the interveners and the Conemaugh, as trustee for cargo owners, recover the full amount of

the damages against the New York, and at the same time refused to permit the New York to recoup or offset any damages except such as were sustained by the propeller New York. On appeal from this decree the Court of Appeals affirmed the same (108 Fed. 102, 47 C. C. A. 232), and in its opinion stated that, the right of set-off, counterclaim, or recoupment being in no way set up in the pleadings, the appellants, not being obliged to assert such claim for contribution by way of recoupment in that cause, were left "free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied." The cause was again taken to the Supreme Court by certiorari and affirmed (23 Sup. Ct. 504, 47 L. Ed. 854), the court stating in its opinion that, "The New York, having been in fault, was responsible to the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it." This proceeding is instituted in accordance with the suggestion of the said Circuit Court of Appeals and the Supreme Court for contribution. The main contention here is as to whether the rights of libellant are based upon the doctrine of subrogation or that of contribution. The Conemaugh had a good defense as against claims of the cargo owners and other interveners, and seeks to interpose that fact as a defense to any attempt on the part of libellant herein to recover from her any part of the cargo damages. If the libellant was compelled to pay damages for cargo losses by reason of negligence to which the Conemaugh contributed, as was held by the Supreme Court, then it is of no consequence whether the Conemaugh was liable to her cargo owners or not, and she must be held to be liable for one-half of the damages caused by her negligence jointly with that of the libellant. She had no such contractual relations with libellant. If the right of recovery rests wholly upon the doctrine of subrogation, then libellant's claim would be disallowed. It cannot be that the Court of Appeals and the Supreme Court meant to decide that libellant herein should be denied the right to save its rights under the statute of limitations by amendment, and be remitted to a barren attempt to assert them in a separate proceeding which would be barred by the statute. If, however, the right of recovery is based upon the doctrine of contribution, then libellant's demands are not outlawed. This seems to me to be the reasonable construction to be placed upon the decisions of the upper court.

Libellant may present a draft of a decree in accordance herewith.

**BENEDICT & WARNER v. UNITED STATES.**

(Circuit Court, S. D. New York. November 11, 1904.)

No. 8,421.

**CUSTOMS DUTIES—CLASSIFICATION—ROCK CRYSTAL INTAGLIOS—PAINTED PRECIOUS STONES.**

In construing the provision in paragraph 435, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process," in reference to intaglios incised in rock crystal (a precious stone), which have been attractively and skillfully painted, the value and salability of the articles being chiefly attributable to the painting, held, that the words "or other process" include such process of painting, and that such intaglios are dutiable under said provision, rather than as manufactures of rock crystal, not specially provided for, under paragraph 115 of said act, c. 11, § 1, Schedule B, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636].

On Application for Review of a Decision of the Board of General Appraisers.

The decision under consideration (G. A. 5,402, T. D. 24,614) affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Benedict & Warner.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for appellants.

Charles Duane Baker, Asst. U. S. Atty.

HAZEL, District Judge. The importation herein consists of rock crystal intaglios painted. Rock crystal is admittedly a precious stone, and, in the form as assessed for duty, is useful only for scarf pins or brooches. Duty was assessed at 50 per centum ad valorem, under paragraph 115 of Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], as "manufactures of rock crystal." The importers claim this liquidation and assessment to have been erroneous, and that a duty of 10 per centum ad valorem, under paragraph 435 (Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676]), as "precious stones advanced in value," would have been proper and in accordance with the statute. The paragraph in question specifically refers to "precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process." The Board of General Appraisers, in an exhaustive and apparently well-considered opinion, reached the conclusion that the words "or other process," in paragraph 435, were restricted to processes of the same description, such as cutting, splitting, or cleaving. The government claims that the intaglio, representative of a head or figure incised in the rock crystal, was attractively, skillfully, and expensively painted, and that its value was chiefly attributable to the painting, which embellished and beautified its appearance and added to its salability. All this is unquestionably true. Nevertheless a fair interpretation of the words "or other process," found in paragraph 435, includes the process of painting or coating, as applied to precious stones. It was not seriously denied on the argument that the principle enunciated in *Hartranft*

v. Wiegmann, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012, controlled the disposition of this controversy. In that case the importation consisted of shells of which the epidermis was removed, and which were then embellished and prepared for the market by cleaning with acid and grinding on an emery wheel to expose the pearly interior. They were generally sold for ornaments, and were also useful for buttons, handles of penknives, etc. The Lord's Prayer was painted or superimposed on some. The court held that grinding and polishing the shells for the market did not advance them beyond the condition of shells. The language of the court upon this point applies here, and may be appropriately quoted:

"We are of opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 85 per centum upon such manufactures, but were shells not manufactured, and fell, under that designation, in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of shell. The application of labor to an article, either by hand or mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff law."

This case apparently was not called to the attention of the Board of General Appraisers. Moreover, it is believed that paragraph 115 is not intended to refer to articles of this character. True, the broad language employed has reference to manufactures of rock crystal and other precious stones, but consideration of the more specific provision of paragraph 435 constrains me, though not without doubt, to hold that articles of the kind in question were not intended to be assessed for duty under that provision. The questions presented are not free from doubt. Such indicated state of mind, however, according to the highest authority, must be resolved in favor of the importer. *Hartranft v. Wiegmann*, *supra*.

The decision of the Board of General Appraisers is reversed.

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#### LEBER & MEYER v. UNITED STATES.

(Circuit Court, S. D. New York. November 11, 1904.)

#### 1. CUSTOMS DUTIES—CLASSIFICATION—DRUGS—ARTICLES USED IN DYING OR TANNING.

Articles used in dyeing or tanning are not "drugs," within the meaning of that expression as used in paragraph 20, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628], and paragraph 543, Free List, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683]; that term being limited in its common acceptance to medicinal preparations, though broadly it may include besides all preparations used in the arts.

#### 2. SAME—LENTISCUM—LENTISCUS—ARTICLES USED IN DYING OR TANNING—CRUDE ARTICLE.

So-called lentiscum or lentiscus, consisting of the leaves or stems of the pistacia lentiscus, or mastic tree, ground or crushed to a finely powdered condition, is held to be a crude article, and to be within paragraph 482, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 195 [U. S. Comp. St. 1901, p. 1680], relating to "articles in a crude state used in dyeing or tanning."

On Application for Review of a Decision of the Board of General Appraisers.

The decision in question affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Leber & Meyer. Note In re Montgomery, G. A. 4,904, T. D. 22,949.

Hatch & Wickes, for appellants.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. The merchandise here in question consists of lentiscum or lentiscus, which is the finely ground powdered leaves of the pistacia lentiscus, or mastic tree, used for dyeing or tanning. Duty was assessed thereon by the collector of customs under paragraph 20, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]. The importers duly protested against such classification, claiming free entry under the provisions of paragraph 482, § 2, Free List, 30 Stat. 195 [U. S. Comp. St. 1901, p. 1680], or, in the alternative, under paragraph 548, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683]. The first-mentioned paragraph provides for the free entry of "articles in a crude state used in dyeing or tanning, not specially provided for"; while the latter exempts from the payment of duty drugs and certain specified vegetable substances in a crude state, and "woods used expressly for dyeing." The definition of the word "drugs" may broadly include not only medicinal preparations, but generally all preparations used in the arts. The common acceptance of that term, however, would seem to limit its meaning to medicinal substances. The testimony before the Board of General Appraisers, and the further testimony taken after the appeal to this court, is opposed to classifying the imported article as a drug. The proofs show that in a commercial sense lentiscum is a material used in dyeing or tanning, and that it is never imported into the United States except in the pulverized form. The sole question, therefore, is thought to be whether the article, not being specially provided for, is an article in a crude state, used in dyeing or tanning. The government has not attempted to overcome the evidence of the importers that the article imported is so used. The decision of the Board of General Appraisers is based upon an earlier decision (G. A. 4,904) that the merchandise was within the term "drugs," and assessable for duty at one-fourth of one cent per pound and 10 per centum ad valorem, under paragraph 20 of the present tariff act. The evidence before the court in this case does not support a similar finding. Although the article results from the grinding or crushing of leaves, stems, or shrubs to a finely powdered substance, it may, nevertheless, fairly be considered as crude in view of the purposes for which it was intended. According to the construction which well-considered cases have given the words "crude," "manufactured," and "unmanufactured" for the purpose of tariff classification, the importation, as heretofore stated, may fairly be classified as a crude product. This view is thought to find sup-



port in *United States v. Godwin* (C. C.) 91 Fed. 753; *United States v. Merck*, 66 Fed. 251, 13 C. C. A. 432; *Roessler & Hasslacher Chemical Co. v. United States* (C. C.) 94 Fed. 822, affirmed 99 Fed. 552, 39 C. C. A. 651; *United States v. Klipstein* (C. C.) 123 Fed. 996. It is also clear, from an examination of the various paragraphs bearing upon materials for dyeing and tanning, that Congress intended that materials of the character in question should be admitted free under paragraph 482.

The decision of the Board of General Appraisers is reversed.

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### UNITED STATES v. DEARBERG BROS.

(Circuit Court, S. D. New York. November 11, 1904.)

No. 3,527.

#### CUSTOMS DUTIES—PROTEST—SUFFICIENCY—REFERENCE TO SIMILITUDE CLAUSE.

Where imported merchandise is subject to the provisions of the so-called similitude clause in Tariff Act Aug. 27, 1894, c. 349, § 4, 28 Stat. 547, prescribing that any article not enumerated in the tariff shall pay the rate of duty applicable to the enumerated article which it most resembles, *held*, that an importer, in protesting against an erroneous assessment of duty on such merchandise, need not refer in his protest directly to said provisions. If he cites the provision enumerating the article which his merchandise resembles, it is a sufficient compliance with Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], requiring that protests shall set forth "distinctly and specifically" the grounds of the importer's objections.

#### On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question reversed the assessment of duty by the collector of customs at the port of New York on goods imported by Dearberg Bros., consisting of horsehair braids, erroneously classified as wool braids. Horsehair braids, being nowhere enumerated in the tariff act of August 27, 1894, c. 349, 28 Stat. 509, under which they were imported, became subject to the application of the so-called "similitude clause" found in section 4 of said act (28 Stat. 547), reading in part as follows: "Sec. 4. That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned." By virtue of this provision the braids in controversy should have been assessed with duty at the rate (45 per cent. ad valorem) applicable to braids of silk, or of cotton, or other vegetable fiber, which are articles enumerated, respectively, in paragraphs 300 and 263 of said act, Schedules L and I, § 1, c. 349, 28 Stat. 529, 532. The importers, in their protests, contended that the goods should have been classified under said paragraphs, but made no reference to said section 7 as authorizing such classification. The Board of General Appraisers held that the importers' protests were sufficiently specific, and that under the decision of the Circuit Court of Appeals for the Third Circuit in *Re Guggenheim Smelting & Refining Company*, 112 Fed. 517, 50 C. C. A. 374, and *Re Balbach Smelting & Refining Company*, G. A. 5,171, T. D. 23,852, it was not necessary to make such reference. The protests were accordingly sustained. The government appealed from this ruling on the ground that the protests were insufficient in that they failed to meet the requirements of section 14, Customs Administrative Act June 10, 1890, c. 407,

28 Stat. 187 [U. S. Comp. St. 1901, p. 1933], wherein it is required that protests shall set forth "distinctly and specifically" the importer's objections to the assessment of duty.

Charles D. Baker, for appellant.  
Comstock & Washburn, for appellees.

HAZEL, District Judge. The decision of the Board of General Appraisers holding the protest filed by the importers as sufficient is affirmed. This conclusion finds support in a recent decision of the Circuit Court of Appeals for the Third Circuit in *Re Guggenheim Smelting Co.*, 112 Fed. 517, 50 C. C. A. 374. It was stated at the hearing that the Guggenheim Case was in conflict with a decision of the Circuit Court of Appeals for this circuit in *Hahn v. Erhardt*, 78 Fed. 620, 24 C. C. A. 265, where it was broadly held that an importer who intends to object to the action of the collector on the ground that due effect has not been given to the similitude clause of the tariff act is obliged by statute to specifically and distinctly state such objection in his protest. From the protest submitted by the importers it appears that they intended to rely upon other provisions of the tariff act for reduction of the duty assessed by the collector, but in the judgment of the Board of General Appraisers, by reason of a prior decision rendered by this court (*Donat v. United States*, 134 Fed. 1023), the merchandise in question is similar to silk braids or cotton braids, and accordingly is dutiable under the similitude provision of the act. The facts here would seem to be precisely like those in the Guggenheim Case. In *United States v. Salambier*, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167, it was held that a protest need not be made with technical precision, and that the statute is sufficiently complied with if the collector is advised of the importer's objection in order to secure "to the government the practical advantages which the statute was designed to secure." The Circuit Court of Appeals for this Circuit in *Shaw v. The United States*, 122 Fed. 443, 58 C. C. A. 425, held that a protest claiming free entry under a certain paragraph was sufficient to advise the collector that a claim for exemption from duty was in fact asserted under another paragraph. True, the court found in that case that there was a mistake in the protest, but the nub of the decision indicates a liberal construction of the provisions of the statute, and therefore does not require the importer to make his protest with exactitude and absolute precision. See *United States v. Fleitmann & Co.*, 131 Fed. 396. Such being the holding of the cases, the Board of General Appraisers correctly decided that the protests were sufficient.

An order of affirmance may be entered.

## ELSON V. TOWN OF WATERFORD.

(Circuit Court, D. Connecticut. February 16, 1905.)

No. 559.

**FEDERAL COURTS—SERVICE OF PROCESS IN ACTIONS AT LAW—CONFORMITY STATUTE.**

The federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), which provides that the practice and procedure in civil causes at law in the federal courts shall conform, "as near as may be," to the state practice, does not require the federal court in the District of Connecticut, in an action against a town, to deviate from its long-established practice, under which service is made by the marshal by having copies of the process made and attested by the clerk, and to follow Gen. St. Conn. 1902, § 571, which provides that in actions against towns a true and attested copy of the process, including the declaration or complaint, shall be served on the clerk or a selectman of the defendant, and which, under the decisions of the state courts, requires the copies to be attested by the officer making the service.

At Law. On demurrer to replication to plea in abatement.

Shutz & Edwards, for plaintiff.

Donald G. Perkins and C. A. Gallup, for defendant.

PLATT, District Judge. Strictly speaking, the replication is bad, but it was agreed at the hearing that the essential question involved at this stage of the controversy shall be settled, and it will be assumed that the plea in abatement has been attacked by a demurrer. It has been for many years a settled practice in the federal court for this district, after writ and process has issued in obedience to section 911, Rev. St. [U. S. Comp. St. 1901, p. 683], for the clerk to prepare the requisite number of copies thereof, attesting the same as true copies of the original writ and process, and to deliver them to the marshal or his deputy for service. The officer, having made service of such true and attested copies, makes indorsement to that effect upon the original. This course was followed in the case at bar.

Section 914, Rev. St. [U. S. Comp. St. 1901, p. 684], provides that:

"The practice, pleadings, and forms and modes of proceeding in civil causes \* \* \* shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state \* \* \* any rule of court to the contrary notwithstanding."

The service of mesne process is a matter upon which the Congress has not laid down any rule, and it is therefore our duty to obey the law as found in the above section. Our mode of proceeding, however, must only conform "as near as may be" to the state law and practice; and the authorities seem to have clearly established the principle that such slight modifications of the state practice as will serve to develop in a wholesome manner the peculiar practice inherent in the federal court, leaving to all suitors herein a "square deal," must be upheld.

The defendant in this cause appears specially, and invokes the

aid of section 571, Gen. St. Conn. 1902; the relevant portion of that section being that process against a town shall be served upon the defendant by leaving a true and attested copy of the process, including the declaration or complaint, with the clerk or one of the selectmen. He insists that the highest court of the state, in *McGuire v. Church*, 49 Conn. 249, has construed the law to mean that the copy must be attested by the officer, and that he cannot delegate his authority. That case had to do with the attachment of property, and the court, by a majority opinion, decided that the attachment lien was a nullity, by reason of the failure of the officer to personally attest the copy of the process and declaration, and of his return thereon. It is very far from an authoritative construction of a law like that found in section 571 of the present revision, with the point in mind which now arises. We can concede, however, that the highest court would so construe the section if confronted with the issue. The Connecticut practice in the matter of mesne process is a peculiar one. Much can be done by those demanding redress before the process has come near the forum where the redress will be demanded. Such opportunity to harass defendants who may be found at last to have been worthy of kinder treatment makes it incumbent upon the state courts to curtail that power in every legitimate way. Process in the federal court does not lend itself with equal facility to such attempts, but I understand, nevertheless, that our practice in attachment proceedings carefully follows the local law. In a matter like the one in hand, which serves merely as a notice to appear at a stated time and make answer to a complaint, the contents of which are spread before the defendant with entire accuracy, it is impossible to accept the contention that the court has lost its power because its officers have set its process in action in a way which it has long accepted as the better way, in the light of its peculiar machinery.

The plea in abatement is overruled, without costs.

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#### REISS & BRADY v. UNITED STATES.

(Circuit Court, S. D. New York. November 15, 1904.)

Nos. 2,373, 2,549.

#### CUSTOMS DUTIES—CLASSIFICATION—FRUIT IN SPIRITS—CHERRIES IN MARASCHINO—UNENUMERATED ARTICLES.

*Held*, that certain fruit in spirits, consisting of cherries in maraschino, is not dutiable under paragraph 218, Tariff Act August 27, 1894, c. 349, § 1, Schedule G, 28 Stat. 524, relating to "fruits preserved in sirup," but under section 3 of said act (28 Stat. 547), as unenumerated manufactured articles.

On Application for Review of Decisions of the Board of United States General Appraisers.

The decisions under review affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Reiss & Brady. Note in *Re La Manna*, G. A. 3,392, T. D. 16,964.

Hatch & Wickes, for appellants.  
D. Frank Lloyd, for appellee.

HAZEL, District Judge. The importation covered by the protests involved consists of cherries in maraschino, which were imported during the year 1895. Resort must therefore be had to the tariff act of 1894 (Act Aug. 27, 1894, c. 349, 28 Stat. 509) to ascertain the rate of duty. The collector assessed the merchandise at 30 per cent. ad valorem as "fruits preserved in sirup, not specially provided for," under paragraph 218 (section 1, Schedule G, 28 Stat. 524). The importers claim liability under section 3 (28 Stat. 547) of the tariff act, which fixes a duty of 10 per cent. ad valorem on unmanufactured articles not enumerated or provided for, or, in the alternative, under the same provision at 20 per cent. ad valorem as "articles manufactured in whole or in part" and not provided for, or at 20 per cent. ad valorem, under paragraph 219 (28 Stat. 524) as "fruits preserved in their own juices." The question presented, solely one of fact, is whether the liquor surrounding the cherries is maraschino cordial or alcoholic spirits. The decision of the board was principally based upon the testimony of Mr. Ball, a chemist and attaché of the appraisers' department, given in other cases pending before them involving practically the same class of merchandise. The opinion of the board states that the cherries mentioned in the invoices herein were of the same character as those covered by their prior decision in the Case of La Manna, Azema & Farnan, and in relation to which Mr. Ball had given expert testimony. In that case an analysis was made by him of the liquor in two of the bottles. No maraschino or spirits whatever were found in one of them, while in the other there was present about nine-tenths of 1 per cent., which, as the witness stated, was produced by fermentative action. The board accordingly found in this case that the importation consisted of cherries preserved in sirup composed of sugar and fruit juices; that, although a taste resembling maraschino was imparted by steeping the cherry stones in water, no alcoholic spirits in appreciable quantities were found to surround the cherries. Subsequent to the decision additional evidence was given, solely, however, in behalf of the importers. Such evidence has been carefully read. If a similar showing had been made at the initial hearing, it is thought that the board would have found as a fact that the cherries were fruits preserved in spirits, and not fruits preserved in sirup. The evidence satisfactorily establishes that the supernatant fluid consists principally of maraschino. The undisputed evidence of Mr. Brady, the importer, tends to show that the liquid surrounding the cherries contained from 10 to 15 degrees of alcohol. He testifies that he saw the imported articles manufactured at their place of exportation, and that they were classified in their price list as "fruits in cordials." His evidence is supported by expert witness Stilwell, who testifies that he made an analysis of a sample of the merchandise, and found 8.57 per cent. alcohol per volume in the liquid, and in the fruits 6.48 per cent. This condition, the witness testifies, could not have been produced by fermentation. The tariff act of August 27, 1894, contains no provision for fruits preserved in spirits. A specific duty, however (paragraph

218), is placed upon fruits preserved in sirup or sugar or in their juices. The merchandise in question has been advanced to make it salable as a completed product, and hence is dutiable at 20 per cent. ad valorem, under section 3, as articles manufactured in whole or in part and not provided for. This view was adopted by the board of general appraisers in the matter of Tuller & Foth, T. D. 15,683, G. A. 2,864, an analogous case. There the classification was likewise under the tariff act of 1894, and the article consisted of cherries preserved in cheap spirits. The board, in its opinion, used the following language:

"Paragraph 303 of the act of 1890 [Act Oct. 1, 1890, c. 1244, § 1, Schedule G, 26 Stat. 587] provided for 'comfits, sweetmeats, and fruits preserved in sugar, syrup, molasses, or spirits.' In the corresponding provision of the present tariff, paragraph 218, the words 'or spirits' are omitted. On account of this omission the merchandise falls under the provisions for nonenumerated manufactured articles."

The omission of the words "or spirits" in paragraph 218 of the act of August 27, 1894 (28 Stat. 524), left the articles unprovided for, except, as already stated, under the general terms of section 3 of the act. The decision of the board of general appraisers may be modified accordingly.

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UNITED STATES v. R. F. DOWNING & CO.  
(Circuit Court, S. D. New York. November 3, 1904.)

No. 3,457.

**CUSTOMS DUTIES—CLASSIFICATION—PARAFFIN—PETROLEUM PRODUCTS—COUNTERVAILING DUTY.**

Certain paraffin was imported from Germany, where it was manufactured from petroleum produced in Russia, both of which countries impose a duty on petroleum and paraffin when imported from the United States. Under paragraph 626, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], which, with regard to "crude petroleum or the products of crude petroleum, produced in any country which imposes a duty on petroleum or its products exported from the United States," provides that a countervailing duty shall be levied "upon said crude petroleum or its products so imported equal to the duty imposed by such country," *held*, that such countervailing duty should be based on the duty imposed by the country of production of the petroleum (Russia), and not of the paraffin (Germany), on petroleum or its products imported from the United States.

**On Application for Review of a Decision of the Board of United States General Appraisers.**

The decision in question, which is known as G. A. 5,470, T. D. 24,778, reversed the assessment of duty on merchandise imported by R. F. Downing & Co. into the port of New York. It related to the construction of the proviso in paragraph 626, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685), providing for a countervailing duty on petroleum and its products, in the following terms: "Provided, that if there be imported into the United States crude petroleum, or the products of crude petroleum, produced in any country which imposes a duty on petroleum or its products exported from the United States, there shall in such cases be levied, paid, and collected a duty upon said crude petroleum or its products so imported equal to the duty imposed by such country." The merchandise consisted of paraffin manufactured in Germany from petroleum produced in Russia. Both of these countries impose a duty on petroleum and on paraffin

when imported from the United States. The question to be decided was whether the duty to be levied on the paraffin under consideration should equal the rate imposed by the country of manufacture (Germany) on like merchandise when imported from the United States, or that imposed by the country of production of the petroleum (Russia). The collector of customs adopted the first of these alternatives, against the contention of the importers that he should have applied the rate imposed by Russia on petroleum or its products imported from the United States.

In a previous decision (*Re Vacuum Oil Company*, G. A. 4,853, T. D. 22,763) the board had considered a somewhat similar state of facts, the only difference from the present case being that the paraffin then in question was made in, and imported from, England, which country imposes no duty on petroleum or its products when imported from the United States. It was there held that the countervailing duty should equal that imposed by Russia, the country of origin of the petroleum from which the paraffin was produced, on petroleum imported into that country from the United States; and it was observed by the board, per Fischer, General Appraiser: "The fact being admitted that the crude oil from which this product was made was produced in Russia, a country imposing a duty upon petroleum imported from the United States equivalent to the rate assessed in this case, the only question to be determined is whether the fact that the oil was refined in England removes it from the operation of the proviso. We are clearly of opinion that it does not. A careful reading of the proviso shows that Congress did not speak of the origin of the products made from crude petroleum, but only of the origin of the crude petroleum from which the products were made. The article before us is a product of crude petroleum produced in Russia, and therefore is one of the very articles covered by the language of the proviso, namely, a product 'of crude petroleum produced in a country which imposes a duty,' etc. The clear intent of the law is to impose a countervailing duty against the country producing the crude oil, and not against a country producing something from that crude oil." Following the conclusion in that case, the Board sustained the importers' contention, namely, that the Russian rate governed. The government thereupon brought these proceedings for review.

Charles D. Baker, Asst. U. S. Atty.  
Albert Comstock, for the importers.

HAZEL, District Judge. The decision of the Board of General Appraisers is affirmed. So ordered.

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In re REUKAUFF, SONS & CO., Incorporated.  
(District Court, E. D. Pennsylvania. February 24, 1905.)

No. 1,420.

**BANKRUPTCY—REVIEW—CERTIFICATION OF QUESTIONS—JURISDICTION OF REFEREE.**

Bankr. Act July 1, 1898, c. 541, § 39a, cl. 5, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3436], requires referees to make up records embodying the evidence in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; and general order 27 (89 Fed. xi) declares that when a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file his petition therefor, etc. *Held*, that both such sections contemplate a contested matter, and hence a referee has no jurisdiction of his own motion to certify a question not raised by the parties to a bankruptcy proceeding, which the referee foresees may arise, on which he desires to be advised.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

In Bankruptcy.

Edwin S. Dixon, for petitioner.

J. B. McPHERSON, District Judge. In my opinion, no question is properly presented to me for decision by the certificate of the referee. The fund in the hands of the trustee consists entirely of the proceeds of personal property that was found upon the premises occupied by the bankrupt under a lease, and was claimed in toto by the landlord under the Pennsylvania statute concerning rent. It also appeared that the bankrupt was probably indebted to the states of Pennsylvania, New Jersey, and New York for taxes, but no claim was made by either state, and no evidence was offered to show the character of the tax or the amount due. The referee made no order either directing or refusing to direct the trustee to pay over the money to the landlord, but of his own motion certified the question whether the taxes had priority to the landlord's claim. There was no petition for review, and, indeed, there was nothing to which such a petition could apply. In effect, the referee is asking the court's opinion on a question which he foresees may arise, upon which he desires to be advised. I find nothing in the bankrupt act or in the general orders or forms to sanction such a proceeding. Section 39a, cl. 5 (Act July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3436]), requires referees to "make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges." General order 27 (89 Fed. xi) is as follows:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Both section 39 and the order thus quoted contemplate that there shall be a contested matter, a finding or an order, and a party aggrieved, and I see no indication anywhere that the judge may be required to answer questions before the referee himself takes action. An exceptional case might perhaps call for such instructions, but certainly in the ordinary proceeding the referee must make some order or ruling before there is anything to certify.

The certificate must be dismissed.

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In re LEWIN.

(District Court, W. D. Texas, Waco Division. February 24, 1905.)

No. 422.

**BANKRUPTCY—DISCHARGE—APPLICATION—EXTENSION OF TIME.**

Where a bankrupt resided in a city where access to his attorneys was easy, and he failed to apply for a discharge until the latter part of the year within which he was entitled to make the application, when sickness in his family was alleged to have prevented him from filing his applica-



tion within the year, but it did not appear that such sickness or other cause prevented the attorneys from preparing the petition for his signature and verification during the time prescribed, he was not entitled to an extension of time in the discretion of the court, as authorized by Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427].

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 694.]

### Application for Leave to File a Petition for Discharge.

Bounds & Hart, for petitioner.

MAXEY, District Judge. The bankrupt in this case, who resides in Hillsboro, Tex., has applied to the court for leave to file a petition for discharge. It is alleged in the application that he was adjudged bankrupt December 15, 1903, that he was aware that the law permitted him to file a petition for discharge within one year from the date of the order of adjudication, and that he deferred doing so until the latter part of the year. To excuse his failure to seasonably file his petition for discharge, he alleges that his family became seriously ill during the latter part of the year within which the petition could be filed, and so remained until after December 15, 1904.

Section 14 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), provides as follows:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."

No reason is assigned by the bankrupt for failing to seasonably file a petition for discharge, except that "he deferred doing so until the latter part of the year," when sickness in his family prevented him from filing the same. To authorize a petition for discharge to be filed after the expiration of a year from the date of the order of adjudication of bankruptcy, it must be made to appear that the bankrupt was unavoidably prevented from filing it within the one-year period. It is discretionary with the judge to grant the application, but the discretion to be exercised in determining the question is a judicial one, and not a discretion of an arbitrary nature. If it appear, using the language of the act of Congress, that the bankrupt was "unavoidably prevented" from filing his application in due time, he should be permitted to file it within the additional six months allowed by law. But where it is apparent that he could have timely filed it, but failed to do so for reasons wholly inadequate, the application should be denied. In the present case it is evident that the bankrupt could have filed a petition for discharge prior to the time that sickness appeared in his family, and no reason is alleged, nor is one perceived, why it could not have been filed while the family were ill. It does appear from his application that the bankrupt resided in the city of Hillsboro. That being true, his attorneys were easily accessible, and there is naught in the record to show that sickness or other cause prevented them from preparing a petition for his signature and verification during the twelve-months period.

The court, not being satisfied that the bankrupt was unavoidably prevented from filing his petition for discharge in due season, is of the opinion that the application should be denied, and it is so ordered.

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**B. BLUMENTHAL & CO. v. UNITED STATES.**

(Circuit Court, S. D. New York. November 11, 1904.)

No. 3,541.

**CUSTOMS DUTIES—CLASSIFICATION—RHINESTONES—PASTE BUTTONS.**

Certain so-called rhinestones, articles composed of metal and paste, the latter being the more valuable component, which are merely used to decorate and ornament women's outer apparel, are dutiable as manufactures of paste, not specially provided for, under paragraph 112, Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635]. They are excluded from the provision in paragraph 414 of said act, c. 11, § 1, Schedule N, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1674], for "buttons made of glass," because they are not strictly buttons, and because, though paste is a species of glass, it is differentiated therefrom elsewhere in the tariff as a separate substance.

On Application for Review of a Decision of the Board of General Appraisers.

In the decision in question, G. A. 5,640, T. D. 25,194, said board affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by B. Blumenthal & Co. Note U. S. v. Marshall Field & Company, 85 Fed. 862, 29 C. C. A. 458, and Seeberger v. Cahn, 137 U. S. 95, 11 Sup. Ct. 28, 34 L. Ed. 599.

Albert Comstock, for appellant.

Charles D. Baker, for appellee.

**HAZEL**, District Judge. The importation consists of rhinestones. They are properly classified as manufactures of metal and paste, of which paste (the rhinestone) is the component material of chief value. They are therefore assessable for duty under paragraph 112 (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635]). The importers claim that the merchandise consists of glass buttons, and should be assessed at three-fourths of 1 cent. per line per gross, and in addition thereto 15 per centum ad valorem, under paragraph 414 of the present tariff act (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 190 [U. S. Comp. St. p. 1674]). This paragraph specifically mentions "buttons made of glass or metal." It is not disputed that paste is a species of glass, but it is quite clear, as stated in the opinion of the Board of General Appraisers, that Congress has differentiated paste as a separate substance, and has provided a specific duty for manufactures thereof. Moreover, the articles are not strictly buttons, but, according to the evidence, are merely used to decorate and ornament women's outer apparel, such as gowns, waists, etc.

The opinion of the Board of General Appraisers is sustained.

THE PATRIA.

(District Court, E. D. New York. January 6, 1905.)

SHIPPING—LIABILITY OF VESSEL—INJURY TO CONTRACTOR'S EMPLOYÉ.

Where a workman employed by a contractor to do work on a steamship while she lay at a wharf undertook to climb from the wharf to the deck by means of a ladder which had been temporarily in use and had not been removed, after he was told to use the gangway, and when, by reason of the rising tide, the ladder had been lifted from the dock, and hung by a small cord to the rail, his injury by the falling of the ladder was due solely to his own negligence, and not to any fault or negligence on the part of the ship.

In Admiralty. Suit for personal injury.

Towns & McCrossin, for libelant.

Butler, Notman, Joline & Mynderse and A. G. Thacher, for claimant.

THOMAS, District Judge. The Patria came into port, and, for the purpose of furnishing access to her deck, a ladder was put over her side, one end of which rested upon the dock, while the other end rested against the railing, to which it was tied by a small cord to prevent lateral motion. The libelant was a machinist employed by a person engaged to make repairs on the vessel. In the morning he went aboard by means of this ladder, but by the noon hour a regular gangway had been put out from the same side of the steamer, a short distance away. The uncontradicted evidence is that, when the libelant was about to leave the steamer for dinner, he was told by the mate not to use the smaller ladder; that there was a better ladder aft. However, he did use it. Upon returning from dinner the libelant found that the tide had risen, so that the lower end of the ladder had been lifted from the dock, and the ladder itself had fallen and lay against the side of the ship, but was still supported at its upper end by the cord. Notwithstanding this known condition, and the difficulty of even putting the toe of his foot upon the round, on account of the close proximity of the ladder to the side of the ship, the libelant did step on the ladder, whereupon it necessarily fell, and he received the injuries on account of which the action was brought. It was perfectly apparent to the libelant that the ladder was not in a position to be used. He knew that it had no sufficient support. He knew that a roomy gangway was near at hand.

It is considered that the claimant was in no way negligent, and that the libelant did not employ even ordinary prudence. The libel is dismissed.

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HENSEL, BRUCKMANN & LOEBACHER v. UNITED STATES.

(Circuit Court, S. D. New York. November 2, 1904.)

No. 3,350.

CUSTOMS DUTIES—CLASSIFICATION—TIME DETECTORS—WATCH MOVEMENTS.

So-called time detectors, used for registering the movements of watchmen, which have a clock mechanism or time indicator, are dutiable under

the provision in paragraph 191, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645], for "watch movements, whether imported in cases or not."

### On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Hensel, Bruckmann & Lorbacher. This merchandise was known as "time detectors," and consisted of watch movements inclosed in cases, having only an hour hand, and equipped with a paper revoluble dial and other registering apparatus; being intended for use in buildings in which watchmen are stationed, for the purpose of recording the watchman's rounds. They were classified as manufactures of metal, under paragraph 193, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], and were claimed by the importers to be dutiable under paragraph 191 of said act (30 Stat. 166 [U. S. Comp. St. 1901, p. 1645]), relating to "watch movements, whether imported in cases or not," etc. This contention was overruled, as indicated above, on the authority of a former decision of the board. *Re United States Express Company*, G. A. 5,038, T. D. 23,401.

W. Wickham Smith, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, J. The evidence before the court satisfactorily shows that the merchandise consists of so-styled time detectors having a clock mechanism or time indicator. Duty was assessed under paragraph 193 at 45 per centum ad valorem. This was error. The article should be assessed for duty under paragraph 191, which provides for the payment of duty upon watch movements, etc. The decision of the Board of General Appraisers is reversed.

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### HUBBARD et al. v. CENTRAL OF GEORGIA RY. CO.

(Circuit Court, S. D. New York. December 17, 1904.)

#### REMOVAL OF CAUSES—JURISDICTION—SUIT IN REM.

A suit begun in a state court by attachment of property, and removed into a federal court, will not there be dismissed for want of jurisdiction because there has been no personal service on defendant, custody of the res being recognized as giving jurisdiction.

#### On Motion to Set Aside Service and to Vacate Attachment.

F. W. M. Cutcheon, for the motion.

Wm. D. Guthrie, opposed.

LACOMBE, Circuit Judge. The facts as to Rhett's connection with defendant are set forth in greater detail, but the facts are substantially the same as were before this court in *Reehan v. Central of Georgia* (no opinion filed). The motion to set aside the service on him as representative of the defendant is granted.

The rule laid down in *Purdy v. Wallace* (C. C.) 81 Fed. 513, is a sound one, and should be followed here, and defendant have been actually informed of the pendency of the action before removal.

The motion to vacate the attachment is denied.

DIMMICK V. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 20, 1905.)

No. 1,112.

1. CRIMINAL LAW—REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

The credibility of witnesses and the probative force of facts introduced in evidence are matters solely within the province of the jury to determine. An appellate court cannot weigh the evidence, and the sole question thereon for its determination is whether there is any legal evidence to sustain the verdict.

2. LARCENY—SUFFICIENCY OF EVIDENCE.

It is not necessary to a conviction for larceny of money that the money, or any part of it, should be shown to have been in defendant's possession.

3. CRIMINAL LAW—PROOF OF CORPUS DELICTI.

It is now the well-settled rule that in all criminal cases the corpus delicti, as well as that defendant committed the crime, may be proved by circumstantial evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1269.]

4. LARCENY—SUFFICIENCY OF EVIDENCE.

Circumstantial evidence considered, and *held* sufficient to sustain a conviction for larceny.

5. CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Instructions upon circumstantial evidence in a criminal prosecution considered and approved.

6. LARCENY—SUFFICIENCY OF INDICTMENT—AVERMENT OF OWNERSHIP OF PROPERTY.

An indictment under Act March 3, 1875, 18 Stat. 479 [U. S. Comp. St. 1901, p. 3675], which charges defendant with stealing money "belonging to" the United States, sufficiently avers the ownership of the property stolen.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 81.]

7. CRIMINAL LAW—ADMISSION OF EVIDENCE—HARMLESS ERROR.

The admission of irrelevant testimony in a criminal case, which was afterward stricken out on motion of defendant's counsel, and which the jury were instructed to disregard, was not prejudicial.

8. LARCENY—EVIDENCE TO SHOW MOTIVE—FINANCIAL CONDITION OF DEFENDANT.

While evidence to show motive is not essential to conviction in a criminal prosecution, where the guilt of defendant is clearly established it is admissible; and in a prosecution for larceny of money, where the evidence was largely circumstantial, it was not error to admit evidence to show that defendant was in debt at the time as tending to some extent to show a motive for the crime.

9. WITNESSES—IMPEACHMENT—EVIDENCE OF REPUTATION.

Where the reputation of a witness for truthfulness is assailed, the party calling him has the right to introduce testimony to show that his reputation is good not only at the time, but that it has always been good.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1167-1169.]

10. LARCENY—EVIDENCE.

Where defendant charged with larceny of money from a mint while employed therein as clerk, to account for his presence there at unusual hours, testified that he went to check up the pay rolls, it was competent for the government to show the length of time required to perform such work.

**11. CRIMINAL LAW—ARGUMENT OF COUNSEL.**

Where counsel for defendant in a criminal case based an argument to the jury on an assumption of facts not shown by the evidence, he cannot assign it as error that counsel for the prosecution, in answering such argument, also went outside the record.

**12. SAME—MISCONDUCT OF COUNSEL—OFFER OF INCOMPETENT EVIDENCE.**

Where it was sought to be shown on the cross-examination of a witness for the prosecution that he had not mentioned certain facts to which he testified at the time of their occurrence, the action of the district attorney in attempting to show by a subsequent witness that such mention had been made by the previous witness, while the evidence may not have been admissible, was not such misconduct as to be ground for reversing a judgment of conviction.

**13. SAME.**

Offers of evidence by the prosecution with respect to prior convictions of defendant for other offenses held not prejudicial to defendant's rights in view of the rulings and charge of the court.

**14. SAME—INSTRUCTIONS—REFUSAL OF REQUESTS.**

The refusal of requests for instructions is not error where the court in the charge given clearly and correctly covers all the principles applicable in the case.

In Error to the Circuit Court of the United States for the Northern District of California.

See 112 Fed. 350, 352.

The \$30,000 alleged to have been stolen was taken from the vault of the mint between the annual settlement of June, 1900, at which time there was no shortage, and the annual settlement made in June, 1901, when the loss was discovered. The contention of the prosecution is that the money was stolen between February 5, 1901, and the 29th day of June, 1901. There were three trials of this case. On the first and second the jury disagreed; on the third, Dimmick was convicted. The testimony upon the third trial is exceedingly lengthy. Much of it was circumstantial in its character. Dimmick denied having taken the money, and gave many explanations in regard to the testimony of the witnesses for the government. His testimony on these points was the subject of much testimony on the part of the government, tending to show that some of the explanations given by him were not true. It was shown by the testimony on the part of the prosecution that Dimmick was discharged by the superintendent of the mint on February 5, 1901, for alleged peculations and fraud committed by him as chief clerk of the mint, but was retained, at Dimmick's request, for the purpose of enabling him to find some other employment. Late at night on the 18th of March, 1901, Cyrus Ellis, an inside watchman at the mint, testified that, being attracted by some noise in the cashier's room, he saw Dimmick come out of the receiving room into the corridor and go into the superintendent's room with two bags of coin in his arms, and soon thereafter saw him come out of the superintendent's room carrying a dress-suit case, which had the appearance of being very heavy, and go out at the main door upon the steps and down into the street. Dimmick denied that he was at the mint at night on March 18, 1901, and also denied that he ever had a dress-suit case at the mint, or that he ever had a dress-suit case. There were three mint employes, besides Ellis, who each testified that he saw Dimmick at the mint on the night in question. Healey, one of the inside watchmen, testified that he saw him leave the mint carrying a dress-suit case. Metcalf, the doorkeeper, saw a package in Dimmick's hand about the size of a dress-suit case, but did not notice it sufficiently to discern its character. When Dimmick went down the steps at the mint he was met by Bickford, an outside watchman, who testified that he walked with him to the street cars, and that Dimmick was carrying a dress-suit case. There were several other witnesses, who testified that on various other occasions they had seen Dimmick with a dress-suit case. Dimmick testified that he had carried some of his mint books, tied up in brown

paper, with a hand strap, to his home, in order to do some work thereon, and stated that the witnesses might have been mistaken as to the character of the bundle. The entries in the books were very few, and the last entry was made December 31, 1900, long previous to March, 1901. In the course of Dimmick's examination it was admitted by him that he never brought them away from the mint or carried them to his home between February 5, 1901, and June 30, 1901. There is a mass of testimony concerning the numbers of the combination of the locks, tending to show Dimmick's knowledge thereof, especially the fourth number, 15. There was testimony to the effect that Dimmick told Cole that 15 was his fourth number, and that 15 was a fixture. Dimmick testified at the last trial, "I have no recollection whatever of telling him [Cole] that my last figure was 15." On the second trial he testified as follows: "Q. Did you ever mention to Mr. Cole a single one of your old numbers before he stepped to the vault door to acquire a combination? A. I may have indicated to him the last figure; nothing else. Q. Did you? What is the fact? Did you give him any of your old numbers? A. When I set up the combination I stopped on 15, and, of course, showed him where the figures were on the dial. Q. I will try you once again. Did you give him any of the old numbers of the combination? A. Not for the purpose of making up his combination. Q. Did you give him any of the numbers of your combination for any purpose? A. Yes, sir. Q. What number did you give him? A. I told him I stopped on 15; it was my last number." Mr. Waltz, a witness on behalf of the government, testified that Dimmick told him that 15 was his last number; that 15 was a fixture; that he told Cole that 15 was a fixture. Dimmick's testimony in answer to Waltz was: "Q. Did you tell Mr. Waltz that 15 was a fixed number? A. No, sir, except he may have misunderstood, or I may have misunderstood his question. I told him the last figure was a fixed figure, and he probably asked me, 'Well, what is the last figure?' I could not recollect definitely what was the last figure on that combination, for I had in the meantime had charge of seven or eight other combinations. My experience with that combination was nearly two years previous, or a year and a half, and I could not recollect what was the last figure, and my impression is he then stated to me that 15 was the last figure. I said, 'Then that is the fixed number;' but I never intended to convey to him that the 15 which was the last changeable figure was a fixed figure. \* \* \* Q. Taking that to be the interpretation of the record, did you at any time say to Mr. Waltz—I repeat that simply so that there will be no misunderstanding about it—that number 15 was a fixed figure, one of those figures that could not be changed? A. Only as I may have had a misunderstanding about what was the last figure of the combination on that lock. All locks differ. On all of them the last figure or number or letter is a fixture, and each lock, each combination lock, differs as to the last number; and I could not recollect and did not recollect what was the fixed number on this particular combination, this upper lock." Dimmick's testimony at the mint investigation was: "Q. When you gave the combination to Mr. Cole, you say you gave him four numbers to change, and the last one stayed—remained. Is that what I understand you? A. Yes, sir. \* \* \* Q. In other words, it changed three numbers? A. Yes, sir. Q. Was the first one changed? A. Yes, sir, and the second one, and the third one; those three changed. Q. The fourth one, I understand, is a fixed number? A. Yes, sir; I was so informed by the locksmith who taught me." Ryan, the locksmith, testified that he never told Dimmick that the fourth number was a fixed number. There was much testimony relative to the condition of the locks in the cashier's vaults. The different combinations that had been made, the intimate knowledge of Dimmick as to the locks and combinations, the changes Dimmick made in his testimony upon the three different trials of the case as to the condition of the locks, and the testimony of witnesses on the part of the government tending to show that some of the statements as made by Dimmick were not correct. It was shown that Dimmick had been cashier before he was appointed chief clerk of the mint, and as such was familiar with the locks, especially with the upper lock. There were nine witnesses who testified that they had seen Dimmick at this lock, looking at its parts, removing the hammer of the lock, and examining its interior in 1898 and 1899, while he was cashier. Dimmick

testified that he opened the lock only three times, once after an illness, in order to change his combination, and once later, because his numbers were so close as to make an interference between the tumblers of the lock; and once thereafter to oil the lock. At one of the former trials Dimmick testified that he had repeated occasions to oil the lock; at the last trial, that he oiled the lock only once. The testimony of the prosecution was to the effect that he took the back plate off over 25 times, and that it was unnecessary to remove the plate in setting up a new combination.

When Cole was installed as cashier, the testimony shows that the superintendent instructed Dimmick to have Major Noggle, of the mint, who understood the business, or some locksmith, change the combination for Mr. Cole. Noggle was in the room, and offered to assist the cashier in changing the lock, but Dimmick had previously offered his services, and himself changed the combination for Cole. Cole testified that the first thing Dimmick did was to take off the back plate, and then he told Cole to pass him his number, giving an extra turn to the dial; that the effect of the extra turn was to throw out one of the numbers of the combination and reduce it to a three combination instead of four. Then Dimmick told him that the fourth number was a fixed number, 15. The testimony of Cole and Fitzpatrick was to the effect that Dimmick was engaged for two or three days, an hour or so at a time, in making these changes in the combination; that he stood before the lock with its back plate removed. Dimmick testified that he took off the back plate in order to line up the tumblers with his lead pencil; that when he first entered the mint as cashier, a locksmith was there and took off the back plate to change his combination, and lined up the tumblers with a lead pencil. We quote from the testimony of Dimmick: "The dial on this upper lock is peculiar in the fact that the numbers are mixed—that is, they do not run consecutively—and on the first time turning I turned a little too far to catch my number, and in putting up the combination in that way I told him I had turned past the number. He said, 'Very well, we will fix that,' and with that he asked for a screwdriver, took off the back plate, and lined up the tumblers. \* \* \* Q. I want to know from you whether it was at the time the locksmith took off that back plate that he showed you about lining up the tumblers with a lead pencil? A. Yes, sir. Q. That was on the upper lock, was it not? A. Yes, sir." His testimony in regard to this matter at the mint examination was as follows: "Did he take out what you are doing now? A. No, I do not think he went through the same performance, because I did not make any mistake on mine. It only took fifteen minutes. He charged at the rate of a dollar a minute." At the first trial of this case Dimmick testified that the locksmith took off the back plate for the purpose of oiling the lock. At the mint investigation he said the locksmith took off the back plate in order to work the side clutch. At the second and third trials he testified that the locksmith removed the back plate because he (Dimmick) had made a mistake on the first turning. The government introduced testimony showing that one Ryan was the locksmith who changed the combination for Dimmick, that he was sent by his employers, and the written memorandum of the transaction was produced in evidence. Ryan testified that he was the locksmith, and that at no time in the course of changing the combination did he remove the back plate. Dimmick testified that Ryan was not the locksmith on the occasion referred to.

The testimony about the locks is, by a long train of circumstances, connected with another line of circumstances as to the conduct of Mr. Dimmick on the 28th and 29th days of June, 1901, at the time of counting the money at the annual settlement. This began at what is designated as the "M. and R. Vault." Cole, the cashier, was sick, and unable to be present to open the vault. It was shown in the testimony that Dimmick was perfectly familiar with the locks, and knew of the different combinations, and had taught Mr. Cole how to make his combinations. When it came to opening the vault at the time of settlement, Dimmick stated that he wanted nothing to do with the cashier's vault. After the superintendent, Major Noggle, and Mr. Day tried to open the vault on Cole's combination, and failed in their efforts for want of an extra turn, Dimmick never said a word about this extra turn, which he



himself had taught Cole, and was silent as to certain figures of the combination which he knew. He attempted, however, at their request, to open the vault, but did not succeed. It was proven that Dimmick had said he would not open the vault for any amount of money; that Cole was a crank, and that he (Dimmick) did not want to have anything to do with the cashier's vaults; and at one of the trials Dimmick testified that he did not want to bear the brunt of the cashier's mistakes. After the vault was opened, on June 28th, Dimmick, as chief clerk, made the daily count of the money in the vault. There was a pile of eagles in the vault, 135 bags, which Dimmick had counted for several nights before at 135, but on the evening in question he counted it as 136, making an overage of \$5,000. On Sunday, June 30th, Dimmick went to the mint and counted 351 bags in a pile, which had been previously discussed. On the preceding Saturday night O'Neal, one of the mint employes, made the count 349, and advised Dimmick on the same day, but Dimmick set down the number of bags at 351, making an overage of two bags, \$10,000.

There are several assignments of error which require examination. They may generally be classified under a few heads: (1) That the court erred in overruling the demurrer to the indictment; (2) that the court erred in admitting or refusing certain testimony, or in sustaining or overruling objections thereto; (3) that the evidence is wholly insufficient to sustain the verdict; (4) that the court erred in refusing to give certain instructions (about 50 in number) as asked for by counsel for plaintiff in error; (5) that the court erred in denying the motion of plaintiff in error in arrest of judgment; (6) that the conviction of the plaintiff in error is in violation of the fifth amendment to the Constitution of the United States, without due process of law, and "contrary to the law of the land."

George D. Collins, for plaintiff in error.

Marshall B. Woodworth, U. S. Atty., and P. F. Dunne, Sp. Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after making the foregoing statement). 1. One of the principal questions discussed by counsel for the plaintiff in error relates to the credibility of the respective witnesses, and the weight and effect of the testimony given by them. The case was submitted upon briefs, the greater portion of which is directed to these points. The contention of the plaintiff in error is that the testimony on behalf of the government is false, and totally unworthy of belief, and that the testimony of the plaintiff in error is true, and should be accepted and acted upon by the court. The argument of counsel for the plaintiff in error is, in many respects, remarkable in its nature and character. It consists chiefly of a tirade of abuse against several of the witnesses who appeared and testified on the part of the government. To show the style of his argument, we quote his language with reference to one of the important witnesses:

"He gives testimony of such a character that no court could hesitate to denounce it and to condemn it for its manifest falsity. He tells a story that for downright infamy, flagrant and shameless mendacity, clearly apparent upon the very face of it, has never been equaled by the most reckless perjury ever committed in a court of justice. He is the only witness in the case who attempted to implicate the plaintiff in error. No court can read his testimony and accord it the slightest credence, it is so glaringly rank perjury."

Turning from this point, we quote the remarks of counsel as to the testimony of Dimmick:

"It furnishes a complete and most satisfactory explanation of every act and circumstance relied upon by the prosecution as imputing at least a suspicion, if not an incriminating suggestion. No one can read the testimony of Mr. Dimmick without being convinced that the charge made against him is absolutely unfounded."

It was the duty of the jury, under proper instructions from the court, to pass upon the question whether the witnesses told the truth or swore falsely. The court, at counsel's request, instructed the jury as follows:

"It is exclusively your province to determine from the evidence the facts in this case, and to decide the question of defendant's guilt or innocence. You are the exclusive judges of the credibility of the witnesses, and of the effect and value of their testimony."

It is not within the province of this court to interfere with the verdict of the jury upon this ground. The rule is well settled that the credibility of witnesses and the probative force of facts introduced in evidence are the sole province of the jury; that the appellate court cannot weigh the evidence; that the only question before the court is whether there is any legal evidence to sustain the verdict. In *Humes v. United States*, 170 U. S. 210, 212, 18 Sup. Ct. 603, 42 L. Ed. 1011, the court said:

"The alleged fact that the verdict was against the weight of evidence we are concluded from considering, if there was any evidence, proper to go to the jury, to sustain it. *Crumpton v. United States*, 138 U. S. 361 [11 Sup. Ct. 355, 34 L. Ed. 958]"; 2 Enc. Pl. & Pr. 391.

2. Is the testimony in the record sufficient to sustain the verdict of the jury? The record contains 1,095 pages of typewritten testimony, and covers a great variety of facts. Most of the testimony may be said to consist of what is known as circumstantial evidence, and, as is usually the case, there are many links in the long chain of circumstances which tend to show the guilt or innocence of the plaintiff in error. This being the third trial of the case, some of the testimony of the witnesses on the former trials was brought to the attention of some of the witnesses for the purpose either of impeachment or of weakening the testimony by showing a variance therein upon the respective trials; and all of these points are elaborately dwelt upon in the respective briefs of counsel. We have epitomized some of the testimony of the witnesses on the part of the prosecution in the statement of facts. It might, perhaps, be sufficient to say that the facts thus stated are, in our opinion, sufficient to authorize the court to submit the questions of fact to the jury, and to justify the jury in finding the plaintiff in error guilty of the offense charged in the indictment. It is, however, broadly claimed that, as against the theory of the prosecution "is the all-controlling fact that not as much as one cent of the missing thirty thousand dollars was ever traced to the possession or custody of Mr. Dimmick. There is not a word of testimony to show the essential trespass or asportation. In fact, the government has never been

able to follow, even darkly, the thirty thousand dollars, from and subsequent to its location in the cashier's vault, if it ever was located there. This point alone is conclusive against the conviction." It is a sufficient answer to this to say that it was not absolutely necessary, in order to convict, that the money alleged to have been stolen, or any part of it, was ever found in the possession of Dimmick. This question was raised and properly disposed of in the court below. At the close of the trial, counsel for the plaintiff in error asked the court to instruct the jury that:

"While it is not necessary, in order to convict the defendant, that you should find the money alleged to have been stolen, or any part of it, was seen in his possession, yet it is indispensable that the money, or some part of it, be shown to have been in his possession, or he must be acquitted."

This instruction was clearly erroneous. Among other things, the court correctly charged the jury:

"The precise time of the commission of an offense need not be proven as laid in the indictment; and if you believe that the defendant did steal, take, and carry away from the United States Mint the money described in the indictment, or any part thereof, between July 1, 1900, and June 27, 1901, and that such money was the property of the United States, it will be your duty to find the defendant guilty. \* \* \* I further charge you that, in order to convict the defendant, it is not necessary that you should find that the money alleged to have been stolen, or any part of it, was ever seen in his possession."

Every criminal charge necessarily involves two distinct propositions: (1) That a criminal act has been committed; (2) that the guilt of such act attaches to the particular person charged with the commission of the offense. Each of these facts must be proved beyond a reasonable doubt, either by direct testimony or by presumptive evidence of the most cogent or irresistible kind. The proof must in both cases be clear and distinct, but it is not necessary that it should be direct and positive. The general rule is now well settled that in all criminal cases the corpus delicti may be established by circumstantial evidence. 7 Am. & Eng. Ency. Law (2d Ed.) 863, and numerous authorities there cited. See, also, *State v. Minor*, 106 Iowa, 642, 646, 77 N. W. 330; *State v. Gates*, 28 Wash. 689, 695, 69 Pac. 385, 387; *Flower v. United States*, 116 Fed. 241, 247, 53 C. C. A. 271; 6 Am. & Eng. Ency. Law (2d Ed.) 582, and authorities there cited.

It is argued by counsel for plaintiff in error that the evidence as to the shortage of money does not prove that the money had been stolen. That depends upon the character of the testimony. Can the shortage of the money be accounted for upon any other theory than that of theft? The shortage was discovered during the annual settlement about June 29, 1901. At first it was thought that there might have been a mixup of denominations in changing the money from one vault to another. Next, there might have been a mistake in the books. The matter was talked over by Mr. Dimmick, Mr. Leach, and other officers of the mint. Many theories were advanced and efforts made to discover how the shortage could have occurred. Mr. Dimmick was active in endeavoring to ascertain how it had occurred. His testimony in relation to this

point covers many pages of the transcript. The conclusion he arrived at is stated by him as follows:

"Q. Taking you to the next day, Monday, July 1st, what transpired with reference, of course, to that \$30,000? A. In coming from Oakland on Monday morning, July 1st, after leaving the boat at the Oakland Depot, I got on a Mission street car, and while seated on the car Mr. Leach very soon got aboard, and he came and sat alongside of me, and said, 'Good morning, Mr. Dimmick. What do you think of this nightmare, for it is a nightmare; at least I have dreamed of it all night, or thought of it all night? What do you think of it?' I said, 'Mr Leach, I think it is a very serious matter.' He said, 'Well, it is a difference in count, is it not?' I said, 'No, I do not think it is a difference in count.' He said, 'Well, what do you think of it?' I said, 'I think it is a case of shortage.' He said, 'You astonish me.' I said, 'Yes, I think it is a case of shortage; and, further, I think it is a case of theft, for I have made some investigations of this matter, and I can arrive at no other conclusion than it is a case of shortage.' He said, 'Oh, it has not come to that.' I said, 'Yes, Mr. Leach, I think it is your duty to immediately report this matter to the secret service, and have them investigate or make an investigation of this matter, and in the meantime I think you should put all of us under surveillance until this matter is cleared up.' He said, 'My God, it has not come to that!' \* \* \* Q. That is all that occurred? A. I think that is all that occurred."

There was ample testimony given at the trial tending to show that the money of the government was stolen from the mint, and that Dimmick was the person who committed the theft. A conviction based on reasonable inferences which the jurors had the right to draw from the evidence cannot be set aside as unsupported by evidence. In establishing the facts in this case the prosecution did not "rely solely upon inferences, presumptions resting upon the basis of another presumption," as repeatedly claimed by the plaintiff in error, but independently proved by a chain of facts the essential elements necessary to be proven. It is true, as stated in *Wills on Circumstantial Evidence*, 283, that every circumstance not clearly shown to be connected as its correlative with the hypothesis it is supposed to support must be rejected from the judicial balance. But, as recognized by the author, when it is distinctly established that there exists between the *factum probandum* and the facts which are adduced in proof of it, a real connection, "either evident and necessary, or so highly probable as to admit of no other reasonable explanation," the proof becomes sufficient.

The instructions of the court upon circumstantial evidence were full, clear, and correct, and are here inserted, in order to show that the court embodied therein the principles of law applicable to such cases:

"The law in regard to circumstantial evidence is this: In order to justify a jury in finding a verdict of guilty based entirely on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in another form, it is not sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis of guilt asserted by the prosecution, but they must exclude to a moral certainty and beyond a reasonable doubt, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty. In order to warrant a conviction of crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts necessary to the conclusion must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken to-

gether, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the defendant, and no other person, committed the offense charged; and unless the evidence does so it will be your duty to acquit the defendant. So, gentlemen, you will observe that there is nothing very peculiar or hard to understand about this doctrine of circumstantial evidence. The jury, in the first place, must determine from the testimony of the witnesses what are the facts and circumstances in the case—the facts and circumstances which you believe have been established by the testimony; and then you simply apply your common sense and judgment to a consideration of what deductions or inferences or conclusions ought to be drawn from those facts. And if, on consideration of all the facts which you may believe to have been established by the evidence, you are satisfied in your own minds, beyond all reasonable doubt, that the defendant is guilty, then it is your duty to so declare; but, if you are not so satisfied, it will be your duty to render a verdict of not guilty."

In the light of all the facts contained in the record, we cannot accept the contention of counsel for the plaintiff in error, so earnestly and persistently set forth in his brief, that the evidence is so utterly deficient that this court would be justified in setting aside a verdict with which both the jury and the judge before whom the case was tried were satisfied.

3. It is claimed that in the first count of the indictment upon which the plaintiff in error was convicted "there is no averment of ownership in the United States," and that the word "belonging" is wholly insufficient. The statute reads:

"That any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony, and on conviction thereof \* \* \* shall be punished," etc. Supp. Rev. St. vol. 1 (2d Ed.) p. 88, c. 144 [U. S. Comp. St. 1901, p. 3675].

The objection urged to the sufficiency of the indictment is purely technical, and is trivial in its character. The word "belonging," in its common meaning, is "that which belongs to one; that which pertains to one; hence, goods or effects." Webster's Dictionary. The words as used in the statute would be sufficient in alleging the ownership of the property, but it is not necessary to use the exact words of the statute if words of equivalent import are employed. In *State v. Ware*, 62 Mo. 597, where the ownership of the property was alleged as "goods and chattels of one M.," instead of "belonging to," as used in the statute, this was held sufficient. While every indictment for larceny must allege an ownership of the property stolen, and would be defective without such allegation, there are no particular words or phrases which the law requires to be used. The allegation may be made by a variety of words and phrases, any of which will be sufficient if it clearly conveys the idea that such persons are the owners. 12 Enc. Pl. & Pr. 959, and authorities there cited.

4. With reference to the rulings of the court as to the admission or rejection of testimony:

(1) It is argued that the court erred in permitting the superintendent of the mint to narrate a conversation which he had with Dimmick on the 5th day of February, 1901, with reference to his position in the mint, and especially to the request then made of Dimmick by Leach, the

superintendent, to bring back the \$1,338 that was claimed to be due on the bluestone account. There was considerable controversy between counsel as to whether that conversation and transaction had any relation whatever to the accusations made in the indictment. The record shows that the testimony of Leach in relation to these matters was, on motion of counsel for the plaintiff in error, stricken out. The court properly instructed the jury to disregard it, and the ruling of the court cannot be complained of by the plaintiff in error.

(2) The next specific objection is to the following questions asked Dimmick on his cross-examination: "What was your financial condition when you went first into that mint, in respect to your being in debt? \* \* \* Did you continue to be in debt from that time until February 5, 1901, and thenceforward to July, 1901?" It is proper to state, in relation to these questions, that the existence or nonexistence of motive is immaterial where the guilt of the accused is clearly established; but, although not an essential element, it may throw some light on the intent with which the act was committed, and as a matter of evidence is frequently an important element in the case of the prosecution. *Pointer v. United States*, 151 U. S. 396, 414, 14 Sup. Ct. 410, 38 L. Ed. 208. We are of opinion that the court did not err in allowing these questions. The case depended, more or less upon circumstantial evidence, and the fact that Dimmick was in debt upon February 5, 1901, and in debt during the time that he had been in the employment of the mint, was a circumstance of perhaps no great weight or importance, but we are not prepared to say it was improper. The tendency of courts in cases of this character is to admit such testimony for what it is worth, because in a greater or less degree, under the facts of each case, it tends to show temptation or motive on the part of the defendant. *United States v. Camp*, 2 Idaho (Hasb.) 231, 10 Pac. 226; *Bridges v. State* (Ga.) 29 S. E. 859; *Bish. New Cr. Pro.* 327; 2 *Wharton's Cr. L.* §§ 1030, 1062a; 10 *Am. & Eng. Ency. Law* (2d Ed.) 1030.

In *Bridges v. State*, supra, the prosecution offered in evidence certain receipts, certificates, and promissory notes signed by the accused, for the purpose of showing that he was financially embarrassed during and at the time of the alleged embezzlement; that he was pressed for money, and in straitened circumstances, and that he had resorted to devious methods to raise money. The court said:

"In the trial of cases of embezzlement we think that any evidence which tends to show these things is competent and admissible. That a man is financially embarrassed, that he is in straitened circumstances, and that he owes money, tend in some degree to show a motive for the embezzlement."

(3) Objection is made to the allowance of the question propounded by the prosecution to the witness Dargie as to the reputation of the witness Ellis "in the community for truth, honesty, and integrity," and whether it "was good or bad," and it is claimed to be irrelevant because it was for the years 1883 and 1884, and therefore too remote. The plaintiff in error in the trial introduced witnesses who testified that Ellis' reputation in this regard was bad. His testimony was important, and tended strongly to implicate Dimmick as the person who had taken the money from the mint. A number of witnesses testified to his good reputation, covering a long period of years from 1883 up to the

time of the trial. This range of time covered by the inquiry was not, in the light of the circumstances of this case, too remote. The prosecution could not be limited to the years testified to by the witnesses on the part of the plaintiff in error. It had the right, after introducing testimony to the effect that his reputation was good during the years when it had been assailed by the other side, to show what his reputation had been in previous years. The limit placed upon time as to reputation is usually confined to a reasonable period with reference to the time when it is called in question. A man's reputation may change as years go by, but when assailed for a period of time he has the right not only to show that it was good during those years, but had always been good.

(4) It is claimed that the court erred in overruling the objection to the question asked by the prosecution of the witness Day as to how long it takes to check up pay rolls. Dimmick, in his testimony, in explaining why he went to the mint at the unseemly hours of night, had testified, among other things, in explanation thereof, that he went there to check up the pay rolls. Surely it was proper for the prosecution to show how long a time it would take to discharge this duty.

5. Did the court err in permitting counsel for the prosecution to comment upon testimony that had been offered and ruled out? Were the circumstances leading up to the argument of counsel of such a character as to prejudice the rights of the accused? What are the facts? The witness Ellis had testified to seeing Dimmick, on the night of March 18, 1901, remove two sacks of money from the vaults of the mint, and afterwards saw him carrying a dress-suit case, which seemed to be very heavy, when he left the mint that night. The question of whether Dimmick ever owned or carried a dress-suit case was the subject of much testimony pro and con. Dimmick testified that he never owned or carried a dress-suit case, and his testimony upon this point was, to a certain extent, corroborated by other witnesses. On the other hand, several witnesses testified to having seen him with a dress-suit case. Dimmick, in the course of his testimony, explained that he had at one time carried a large bundle of books bearing some resemblance in form to a dress-suit case, why he carried them, etc., leaving the impression, at least, that certain of the witnesses had mistaken what the bundle was. After Ellis had testified in chief as to what he saw on the occasion referred to, he was subjected to a rigid and lengthy cross-examination upon these points, and Ellis was asked whether he had ever told anybody about it, and the witness said he had told his wife and daughter. The wife and daughter were not called as witnesses to bolster up the testimony of Ellis upon this point, but the prosecution did undertake to put such statement in evidence upon the direct examination of the witness D. Edward Collins, and the court, upon motion of the plaintiff in error, ruled that such testimony was inadmissible. The United States attorney, in his opening argument to the jury, referred to the imputations which had been cast by counsel upon Ellis, and remarked, in substance, that, if counsel had desired to press the inquiry so as to ascertain the truth of the statement made by Ellis that he had reported on the following morning to his wife and daughter the occurrences at the mint on the night of March 18th, he could have called

the wife and daughter as witnesses, and have questioned them as to whether or not such statements had been made; and further said that the prosecution was unable, in view of the ruling of the court upon the offered testimony of the witness Collins, to call the wife and daughter. The court thereupon promptly said that counsel had no right to make the reference to the question objected to and ruled out, and informed the jury that there was no evidence in the case that Collins knew anything about the matter. We are not called upon to answer the question whether the court ruled correctly in refusing to allow the question asked of Collins to be answered. The ruling was in favor of the plaintiff in error. We are here dealing solely with the remarks of counsel, which are claimed to be such "gross misconduct" as to justify this court in reversing the case on the ground that the plaintiff in error did not have a fair and impartial trial. This charge is made not only against the remark of the United States attorney, but also against the associate counsel for the prosecution. The associate counsel, in his remarks, claimed that the counsel for the plaintiff in error "had made an unfair argument to the jury," in this: that he had argued against Ellis; that he reported the transaction which occurred on the night of March 18, 1901, to his wife and daughter, and then was "silent evermore." The associate counsel, in replying to the argument of counsel for the plaintiff in error, among other things said:

"Counsel for Dimmick told you here yesterday that Ellis reported this thing to his wife and daughter, and then he was silent evermore. A more baseless misrepresentation was never uttered to a jury. Is it true that he was silent evermore after he had reported this occurrence to his wife and daughter? \* \* \* Did Dimmick's counsel ask Ellis, 'Were you silent evermore after you spoke to your wife and child?' \* \* \* Gentlemen, I am dealing here with the cross-examination of Ellis, and I am dealing here with the perverted statement made to you yesterday that after he reported to his wife and daughter he was silent evermore. Who says he was silent evermore? Dimmick's counsel, who had it in the hollow of his hand to prove out of Ellis' testimony, if it were the fact, that he was silent evermore. Why did he not ask him? Why did he not prove it, instead of standing here before you and perverting the truth and the fact about Ellis, and telling you that after Ellis reported to his wife and daughter he was 'silent evermore'?"

Taking all the facts in relation to this matter into consideration, we are unprepared to say that the remarks of counsel were wholly uncalled for, or made for the purpose of prejudicing the rights of the accused. The first portion of the remarks of the United States attorney was a proper comment upon the course pursued by the opposing counsel; and when he commented on the fact that certain testimony had been ruled out the court informed him that he had no right to refer to this matter, and that was the end of it. The remarks of the associate counsel questioned the truth of the statements made by the opposing counsel. Counsel for the accused had challenged counsel to answer his argument, and counsel accepted the challenge. Counsel for plaintiff in error ought not to complain because counsel for the government accepted his challenge and replied to it.

In *Crumpton v. United States*, 138 U. S. 361, 363, 11 Sup. Ct. 355, 34 L. Ed. 958, testimony had been offered to implicate one Burt as the criminal agent in the commission of the crime of murder. Dur-



ing the argument of the case the defendant's counsel said to the jury:

"Either the defendant or Burt is guilty of this crime. I will show you that Burt is guilty, and therefore that defendant is not."

In reply to this, the District Attorney, in his closing argument, said:

"The issue is squarely made by Mr. Neal that either the defendant or William Burt is guilty of this crime. I have shown you that Burt is not guilty; therefore, by his logic, the defendant is guilty."

The court said:

"In the present case it is by no means clear that the District Attorney transcended the proper limits of an argument. Counsel for the defendant had tendered the issue to the jury that either his client or Burt was guilty of the crime, and we perceive no impropriety in the District Attorney accepting the challenge, and attempting to demonstrate that Burt was not guilty, and arguing that the jury, upon the issue thus presented, had a right to infer that the defendant was guilty."

In *Siberry v. The State*, 133 Ind. 677, 682, 33 N. E. 681, 682, the arguments of counsel for the state, which were claimed to be improper and prejudicial, were made in answer to the argument of counsel for the defendant in relation to the absence of Mr. and Mrs. Campbell as witnesses. The court said:

"It would seem that counsel for the defense, in their argument, desired to base their defense, or gain some advantage for their client, on some supposed testimony of the Campbells, or some fact in relation to the Campbells not before the jury, and stepped outside the bounds of legitimate argument to discuss the absence of the Campbells, and their supposed knowledge of the case; and that counsel for the state felt called upon to answer it, and did so. \* \* \* This mode of conducting an argument in either a criminal or civil case is to be condemned; but when counsel for the defense step outside the bounds of the case, and indulge in the discussion of matters not before the jury, and thus pursue a line of illegitimate argument, it comes with ill grace and with poor favor to ask the court to restrain opposing counsel from answering such illegitimate argument, and prevent them from clearing away the rubbish illegitimately brought into the case, and casting it out that it may not mislead the jury. \* \* \* It is immaterial to determine whether the statements of counsel were strictly within the bounds of legitimate argument or not. As the door was opened for it by counsel for the appellant, they cannot complain if counsel for the state walked in at the door which they had opened."

As was said by the court in *Pierson v. State*, 21 Tex. App. 14, 60, 17 S. W. 468, 471:

"If the defendant wishes to invoke the rule of confinement to the record, they, themselves, must keep within the record. When they voluntarily go outside, they at least invite, if they do not render it necessary, that the prosecution should follow."

6. In answer to the claim that counsel for the government were guilty of gross misconduct in asking the question of Collins, knowing it to be improper, and that the object was simply to improperly prejudice the plaintiff in error, it cannot, we think, be said that counsel were guilty of misconduct in asking the question. The decided weight of authority unquestionably is that proof of declarations made by a witness out of court, and not under oath, is inad-

missible. But, without questioning the ruling of the court below in excluding Collins' testimony, there are exceptions to the general rule which would tend to justify counsel in asking the question in the light of all the circumstances in the case. The exception mentioned in the books is that witnesses may testify as to statements made to them by a witness who has been charged with testifying under the influence of some motive prompting him to make a false statement. It may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement of facts. It may, in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of a recent date, be shown that he gave a similar account, before its effect and operation could be foreseen. *State v. Flint*, 60 Vt. 304, 316, 14 Atl. 178; *State v. Petty*, 21 Kan. 54, 60; *People v. Doyell*, 48 Cal. 86, 91; *Stolp v. Blair*, 68 Ill. 541, 544; *Herrick v. Smith*, 13 Hun, 446, 448; *Railway Co. v. Knee*, 83 Md. 77, 79, 34 Atl. 252. If counsel for Dimmick offered any testimony to sustain the charges he makes in his brief that the testimony of Ellis was false and fabricated, Collins' testimony might have been admissible. But, whether admissible or not, the asking of it seems to have been more an act of "good faith" than of "willful misconduct."

In *People v. Ward*, 105 Cal. 335, 340, 38 Pac. 945, 946, the court discussed the character of cases which would justify a reversal on the ground of alleged improper remarks of counsel, and said:

"There seems a disposition on the part of counsel for defendants in all criminal cases since the decision in *People v. Wells*, 100 Cal. 459, 34 Pac. 1078, to count upon the alleged misconduct of the prosecution as cause for reversal. That was an extreme case, in which this court was of opinion the assistant district attorney had willfully and persistently offered incompetent evidence to the prejudice of defendant, well knowing its inadmissibility. The animus of the prosecution there was so apparent, and its effect so pronounced, that the court deemed it but just to stamp with the seal of its disapprobation, not only for that case, but as a warning against like conduct in other cases, a course of proceeding militating against justice and the fair and orderly conduct which should characterize judicial proceedings in criminal cases. It is only in extreme cases, of which this is not one, that the remedy there administered applies. The attack in that case was not upon error by the prosecution, but upon willful error persisted in for an illegitimate purpose, followed by injustice to the prisoner."

See, also, *People v. Gordan*, 103 Cal. 568, 573, 37 Pac. 534; *People v. Smith*, 134 Cal. 453, 457, 66 Pac. 669.

7. It is further argued that the plaintiff in error did not have a fair and impartial trial, in this: that he was prejudiced in his rights by the efforts of counsel for the prosecution to show that he had been convicted of other offenses in relation to the mint not charged in the indictment, and that matters had been stated by counsel for the prosecution that were not borne out by the evidence in the cause. Touching all these matters, we are of opinion that no prejudicial error occurred; that the rights of the plaintiff in error were carefully guarded by the rulings and instructions of the court in relation thereto. The record shows that the plaintiff in error requested an instruction on the question of other offenses not men-

tioned in the indictment, with which the evidence showed him to have been connected, and also requested an instruction that the plaintiff in error had not been convicted of a felony or of an infamous crime "affecting his credibility as a witness." The court, in its charge to the jury, said:

"There was introduced in evidence the record of the conviction of the defendant in this court of two offenses of willfully failing to make deposit with the Assistant Treasurer of the United States at San Francisco within the time required by the Secretary of the Treasury and the Director of the Mint certain moneys belonging to the United States and in his possession as chief clerk of the United States Mint at San Francisco. This judgment of conviction has not become final, because the case has not been finally disposed of by the Circuit Court of Appeals upon writ of error, and you will therefore disregard these convictions; that is, you will not consider them for any purpose whatever. There was also introduced in evidence the record of the conviction of the defendant in this court of the offense of presenting for payment to the cashier of the United States Mint at San Francisco a false, fictitious, and fraudulent claim against the United States in the sum of \$498.37, and also the record of the conviction of the defendant for using \$498.37 of the money of the United States for a purpose not prescribed by law, to wit, for his own use and purpose, in violation of section 5497 of the United States Revised Statutes. Neither of these offenses is a technical felony. They are, however, grave offenses, for which the law provides an infamous punishment, and the latter offense is declared by the statute to be an act of embezzlement of public moneys. I now charge you that you cannot consider the defendant's conviction of the offenses just referred to for any other purpose than to determine his credibility as a witness; that is, you can only consider his conviction of these offenses in weighing his testimony and reaching a conclusion as to the degree of credit to which it is entitled. These convictions cannot be considered by you as evidence that the defendant is guilty of any offense charged in this indictment, but can be considered by you solely for the purpose of passing upon his credibility; and to what extent, if any, his credibility is affected by these convictions, is a question solely for your consideration. \* \* \* You are further instructed that you must carefully exclude from your minds in the consideration of this case all of the evidence and testimony that the court has ordered stricken out, and all that it has refused to admit. You must not permit such evidence or offered testimony to in any manner whatever influence your judgment or your views in arriving at a verdict, and you are further instructed that you must carefully exclude from your consideration all matter or matters appertaining to any other charge or charges that are contained in the indictment in this case. \* \* \* Statements of counsel are not evidence, and should not be so considered. Offers to prove certain alleged facts, which may have been made in your presence, are not evidence, and you should not take the same into consideration, nor allow yourselves to be in any manner influenced thereby."

8. Did the court err in refusing to give the instructions requested by the plaintiff in error? No exception was taken to the charge of the court, nor to any specific part thereof, except in a general way to take exceptions to all instructions that were modified or refused. We have repeatedly stated that:

"The rule is well settled that the court is never required to give instructions in the language used by counsel. The duty of the court is always fully discharged if its charge embraces all of the principles of law arising in the case, in the court's own language." *Mountain Copper Co., Ltd., v. Van Buren* (C. C. A.) 133 Fed. 1, 7, and authorities there cited.

See, also, *People v. Dodge*, 30 Cal. 448.

The charge of the court not only covered every legal point involved in the case, but was in all respects clear, and the language

used was as strong and favorable in favor of the defendant as the law would warrant, and bears evidence that the court in its charge carefully guarded the rights of the plaintiff in error.

The judgment of the District Court is affirmed.

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SOUTHERN PAC. CO. v. HETZER.

(Circuit Court of Appeals, Eighth Circuit. January 25, 1905.)

No. 2,039.

**1. PERSONAL INJURY—DAMAGES—MENTAL PAIN SEPARABLE FROM BODILY SUFFERING INADMISSIBLE.**

In actions for personal injury the plaintiff may recover for the bodily suffering and mental pain which are inseparable and which necessarily and inevitably result from the injury. But mortification and distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows, that mental pain which is separable from the bodily suffering caused by the injury, is too remote, indefinite, and intangible to constitute an element of the damages in such a case, and evidence of it is inadmissible.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 100, 222, 255-259, 479.

Mental suffering as an element of damages, see note to Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 556.]

**2. NEGLIGENCE—DUTY OF MASTER TO EMPLOY COMPETENT SERVANTS.**

It is the duty of the master to exercise reasonable care to employ competent servants, and, when he has exercised this care, this duty is discharged.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 836.]

**3. SAME—DUTY OF MASTER TO DISCHARGE INCOMPETENT SERVANT.**

Another duty of the master is to discharge a servant when he knows or by the exercise of reasonable diligence would have known, that the servant has contracted the habit or character of negligence, of drunkenness, or of lack of skill, so that he is incompetent.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 842-846.]

**4. SAME—CARE REQUIRED TO ASCERTAIN HABITS OF COMPETENT SERVANTS—PRESUMPTION THAT COMPETENT SERVANT REMAINS SO.**

The diligence required of the master to learn the habits or characters of servants employed with due care is not of that degree demanded in his employment of servants or in his inspection of machinery, because careful and skillful men grow more careful and skillful, and the legal presumption is that servants once competent continue so. The master may rely upon the presumption of competency until he has notice or knowledge to the contrary.

**5. SAME—REASONABLE CARE OR DILIGENCE REQUIRED NOT THAT WHICH EMPLOYER USES TO PROTECT HIS OWN PERSON.**

The reasonable diligence and care which the master is required to exercise here is not that high degree of care which a prudent business man would use if the want of it endangered his own person. It is that degree of care which prudent railway officials exercise under like circumstances, that care which such officials charged with the duty of discharging servants employed with due care commonly exercise as soon as they know, or by the exercise of reasonable diligence would know, that such servants have become incompetent.

**6. SAME—ASSUMPTION OF RISK—OCCASIONAL ACTS OF NEGLIGENCE.**

Servants assume the risk of the occasional acts of negligence of their fellow servants, and the master is not liable for them, but the servants may by notice cast the risk of the habitual negligence of their co-employees upon the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 567-573.

Assumption of risk incident to employment, see note to *Chesapeake & O. Ry. Co. v. Hennessey*, 38 O. C. A. 814.]

**7. SAME—SPECIFIC ACTS OF NEGLIGENCE—THOSE KNOWN TO MASTER ADMISSIBLE TO PROVE INCOMPETENCE OF SERVANT.**

Evidence of specific acts of negligence known to the master, and of acts of negligence like those which cause the death of passengers, so notorious that the master must have known of them if he exercised reasonable diligence, is admissible to prove the habit or character for incompetence of a servant who is employed with due care.

**8. SAME—SPECIFIC ACTS OF NEGLIGENCE—THOSE UNKNOWN TO MASTER INADMISSIBLE TO PROVE INCOMPETENCE OF SERVANTS.**

Specific acts of negligence, of drunkenness, of lack of skill, or of incompetence, of which the master had no notice, are inadmissible to prove the incompetence of a servant employed with due care. The proper proof of habit and character, as of reputation, in such a case, is the testimony of witnesses qualified to speak of them, subject to proper cross-examination relative to the facts upon which their testimony is based.

**9. SAME—GENERAL REPUTATION—REPUTATION IN A PARTICULAR CLASS.**

After proof of the incompetence of a servant, his general reputation among those acquainted with him or his work is competent to prove notice of the habit of incompetence to the master. But reputation among a particular class, which obviously includes but a part of those who knew his character or work, is inadmissible for this purpose.

**10. PRACTICE—REFUSAL TO GIVE SEVERAL REQUESTS—SINGLE EXCEPTION.**

A single exception to a refusal to give a number of requests to submit to the jury several propositions of law and of fact is futile, if any of those propositions is erroneous or inapplicable.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Utah.

Henry G. Herbel (Martin L. Clardy, on the brief), for plaintiff in error.

Herbert R. Macmillan (Hiram H. Henderson, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. About 5 o'clock in the afternoon of July 23, 1902, P. R. Hetzer, the plaintiff below, was the brakeman on the rear of a train of 22 cars which Tom Delano, one of the engineers of the Southern Pacific Company, was backing into a gravel pit. As this train approached a switch which it was Hetzer's duty to throw, he gave the slow signal, and his fellow brakeman gave the stop signal, to the engineer. Delano applied the air, Hetzer fell to the track, one of the wheels of the rear car passed over his leg, and the train stopped. The injury to the leg necessitated its amputation above the knee. He sued the company for causal negligence for employing and keeping in its employment an incompetent engineer. At the trial there was no

evidence to sustain his averment that the company was guilty of negligence in selecting and employing Delano, this charge was withdrawn from the jury by the court, and the only issues submitted to them were the question whether or not the defendant was guilty of any want of ordinary care in continuing Delano in its employment at the time of the accident, and the amount of plaintiff's damages. There was a verdict and judgment against the company for \$11,450.

It is assigned as error that at the trial of the action, more than 15 months after the accident, in answer to questions of his counsel relative to the effect upon his mind at that time of the injury to his leg, the plaintiff testified that the fact that other people looked down upon him because he was crippled, and seemed to shun him, made him feel very badly and distressed him mentally. There is a conflict of authority upon the question which this assignment presents. In some states, notably in Wisconsin and Michigan, evidence of mental pain caused by disfigurement, apart from the physical suffering produced by an injury, is admissible to enhance the damages in an action for personal injury. *Heddles v. Chicago & N. W. Ry. Co.* (Wis.) 46 N. W. 115, 116, 20 Am. St. Rep. 106, and cases there cited; *Sherwood v. Chicago & W. M. Ry. Co.* (Mich.) 46 N. W. 773, 776. The rule which has been adopted by this court, however, and the rule which seems to us the better one, is that in actions for personal injury the plaintiff may recover for the bodily suffering and the mental pain which are inseparable and which necessarily and inevitably result from the injury. But mortification or distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows, that mental pain which is separable from the physical suffering caused by the injury, is too remote, indefinite, and intangible to constitute an element of the damages in such a case, and evidence of it is inadmissible. *Chicago, R. I. & P. Ry. Co. v. Caulfield*, 63 Fed. 396, 399, 11 C. C. A. 552, 555; *Kennon v. Gilmer*, 131 U. S. 22, 26, 9 Sup. Ct. 696, 33 L. Ed. 110; *Bovee v. Danville*, 53 Vt. 183; *C., B. & Q. R. Co. v. Hines*, 45 Ill. App. 299, 302, 303; *City of Salina v. Trosper*, 27 Kan. 544, 564; *Dorrah v. Railway Co.*, 65 Miss. 14, 3 South. 36, 7 Am. St. Rep. 629; *Railway Co. v. Stables*, 62 Ill. 313, 321; *Joch v. Dankwardt*, 85 Ill. 331, 332; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 236, 3 Am. Rep. 245. Mental pain of this character, the suffering from injured feelings, is intangible, incapable of test or trial. The evidence of it, like that which convicted the alleged witches, rests entirely in the belief of the sufferer, and it is not susceptible of contradiction or rebuttal. Many other causes, the education, temperament, and sentiment of the sufferer, the mental attitude, the acts and words, of his friends and acquaintances, concur with the accident to cause this mental distress, in such a way that it is impossible to separate and ascribe the proper part of it to the injury caused by the defendant. And the amount of the mental pain caused by any disfigurement necessarily varies so with the character, temperament, and circumstances of the injured person that no just measure of the damages from it can be found. Such mental suffering is too remote, intangible, and immeasurable to form the basis of any just adjudication, and the objections to the testimony of the plaintiff concerning it should have been sustained.

One of the counsel for the plaintiff asked him if there was any other occurrence of sudden stopping or jerking of the train while Delano was acting as engineer during the day of the accident. Defendant's counsel promptly objected to the testimony which the question was intended to elicit, upon the ground that it was evidence of a specific act other than the one pleaded. The witness testified that about three hours before the accident Delano stopped his train in a very rough manner, so that the plaintiff staggered around, but did not fall. Evidence of another act of Delano of a similar character was admitted, under a like objection, and these rulings of the court are assigned as error. The issue of law which these rulings present is not without importance, and it may be well, before entering upon its discussion, to place clearly before the mind the legal relation of the plaintiff and the defendant, and the exact question to be decided. It is the duty of the master to exercise reasonable care to employ competent servants to work with his employes. When he has exercised this care, he has fully discharged this duty. There is another duty of the master. It is to discharge a servant whom he has employed with due care when the employe has contracted the habit of negligence or of lack of skill, so that he has become incompetent, and the master knows, or by the exercise of reasonable care would have known, of this habit. This duty, however, is not imposed until the habit has been formed, nor until the master knows, or by the exercise of reasonable care would have known, of its existence. It is not invoked by occasional acts of negligence. Wood's Law of Master and Servant (2d Ed.) § 432. Moreover, the master is not required to exercise that degree of care to ascertain this habit which is imposed upon him in reference to the selection of employes or the inspection of machinery which deteriorates with its use, because careful and skillful men become more careful and skillful with the practice of their occupations or professions, and the legal presumption is that competent servants continue to be so, and because servants assume the risk of the negligence of their fellows, a risk which, when that negligence becomes habitual, they may cast upon their master by a simple notice of their incompetence. When the master has exercised due care to employ a servant, he may rely upon the presumption of his competency until he has notice or knowledge to the contrary. *Walkowski v. Consolidated Mines*, 115 Mich. 629, 634, 73 N. W. 895, 41 L. R. A. 33; *Weeks v. Scharer*, 49 C. C. A. 372, 378, 111 Fed. 330, 336; *Chapman v. Erie R. Co.*, 55 N. Y. 579, 585, 586; 1 *Bailey on Master and Servant*, § 1413; 1 *Labatt on Master and Servant*, p. 428; Wood's Law of Master and Servant (2d Ed.) § 433, p. 841.

One who enters the service of another assumes all the ordinary risks and dangers of that service. One of those risks is the danger of injury from the negligence of his fellow servants. The association of a servant with his co-workmen, as in the case at bar of a brakeman in the same crew with an engineer, is often closer, his knowledge of their characters, habits, and competence more intimate and more exact, than that of his master can be. As he generally has a better knowledge of the characters, habits, and negligence of his fellow servants, he is better able to protect himself against their negligence than the master can be, and for this reason the law charges him with the risk. So it is

that under the law the duty of employing fit servants is imposed upon the master, and, when that duty is discharged, the duty of protecting themselves against the negligence of their fellow servants is imposed upon the employés.

The claim of the plaintiff is that his master was negligent because it retained in its employment one whom it engaged with due care after he had become incompetent by reason of his habitual negligence in the use of the air to stop his trains. But the risk of the negligence of this servant was *prima facie* that of the plaintiff. One who would charge the master with negligence here must prove not only that the servant was incompetent, but that the master knew, or by the exercise of reasonable diligence would have known, of his unfitness. A habit of negligence that is known, or that by the exercise of reasonable care would have been known, to a master, and notorious acts of negligence, such as those which cause collisions of trains and the death of passengers, may render a servant incompetent, and impose upon the master the duty of discharging him. A single specific act of ordinary negligence, however, has no tendency to prove incompetence, and imposes no such duty upon the master, because perfection is not an attribute of humanity, because ordinary care implies occasional forgetfulness, and hence the risk of the casual negligence of his fellow servant is that of the servant, and not that of the master. Wharton on Law of Negligence, § 238; Baltimore Elevator Co. v. Neal (Md.) 5 Atl. 338, 343; Davis v. Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364; Moss v. Pacific Rd. Co., 49 Mo. 167, 8 Am. Rep. 126; Wood's Law of Master and Servant, § 432.

Specific acts of negligence of which the master has notice are conceded to be admissible to prove incompetence, and a general reputation for incompetence is admissible to show that the master, by the exercise of ordinary care, would have known of the incompetence of the servant. In the case at bar there was no evidence that the master knew, or that by the exercise of reasonable care it would have known, of the two specific acts of negligence, the evidence of the commission of which is here challenged, and the question is, are specific acts of negligence of which the master has no notice admissible to prove the incompetence of his servant whom he has exercised due care to employ?

The burden of proof was upon the plaintiff to show (1) that the engineer had contracted the habit of negligence in the use of the air to stop his trains, to such an extent that he was an incompetent operator, and (2) that he had so notorious a reputation for this incompetence that the defendant, by the exercise of reasonable diligence, must have known it. The contention of counsel for the plaintiff is that specific acts of negligence are admissible to prove the habit, the character, and hence the fact of incompetence. Counsel for the defendant insist that this fact is properly evidenced by the testimony of those who knew the habit or character alone, and that isolated acts are inadmissible to establish it, because the habit or character is conditioned not by a few sporadic deeds, but by all the acts of the employé which relate to the charge against him. In support of their position, counsel for the plaintiff have cited the following cases: Cosgrove v. Pitman, 103 Cal. 268, 275, 37 Pac. 232; Gier v. Los Angeles Consol. Electric Ry. Co., 108



Cal. 129, 131, 132, 41 Pac. 22, 23, 24; *Western Stone Co. v. Whalen* (Ill.) 38 N. E. 241, 244, 42 Am. St. Rep. 244; *Baulec v. N. Y. & Harlem R. R. Co.*, 59 N. Y. 356, 358, 360, 17 Am. Rep. 325; *Southern Pac. Co. v. Huntsman*, 55 C. C. A. 366, 367, 118 Fed. 412, 413; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105, 113, 123, 124, 125, 4 Am. Rep. 364; *Norfolk & W. R. Co. v. Hoover* (Md.) 29 Atl. 995, 996, 25 L. R. A. 710, 47 Am. St. Rep. 392; *Monahan v. City of Worcester* (Mass.) 23 N. E. 228, 15 Am. St. Rep. 226; *Lake Shore, etc., R. Co. v. Stupak* (Ind.) 23 N. E. 246, 249; *B. & O. Railroad Co. v. Henthorne*, 19 C. C. A. 623, 627, 73 Fed. 634, 637, 638; 1 *Labatt on Master and Servant*, §§ 411-414. The learned author of the work last cited expresses an opinion favorable to the contention of plaintiff's counsel, but the authorities to which he refers in his notes in support of his view present cases in which notice of the specific acts was brought home to the master, such as *Pittsburgh, etc., Ry. Co. v. Ruby*, 38 Ind. 294, 298, 318, 10 Am. Rep. 111; *Couch v. Watson Coal Co.*, 46 Iowa, 17, 24; *Grube v. Missouri Pac. Ry. Co.*, 98 Mo. 330, 11 S. W. 736, 4 L. R. A. 776, 14 Am. St. Rep. 645; *Sutton v. N. Y., L. E. & W. R. Co.* (Sup.) 21 N. Y. Supp. 312; *Barkley v. N. Y. Cent. & H. R. Co.* (Sup.) 54 N. Y. Supp. 766, 769; *Malay v. Mt. Morris Electric Light Co.* (Sup.) 58 N. Y. Supp. 659; and *Consolidated Coal Co. v. Seniger*, 179 Ill. 370, 53 N. E. 733—cases in which the remarks of the courts upon the admissibility of the acts were obiter dicta, as in *Gier v. Los Angeles Consol. Elec. Ry. Co.*, 108 Cal. 129, 130, 131, 132, 41 Pac. 22, 23, 24, and cases where the habit of drunkenness or of negligence was proved, presumably by competent witnesses who knew it, and no question of the admissibility of specific acts to establish it was considered or decided, as in *Hilts v. Chicago & G. T. Ry. Co.* (Mich.) 21 N. W. 878, 882; so that the argument of Mr. Labatt is not as persuasive as it would have been if it had been supported by decisions of courts which had necessarily considered and decided the question.

Bearing in mind, now, that it is conceded that specific acts of incompetence of the servant, notice of which was brought home to the master before the accident, are admissible on the issue of his negligence in failing to discharge him, and that the question here is not whether acts known to the master, or so notorious that they ought to have been known, are admissible, but whether or not specific acts of which he had no notice or knowledge are competent to establish the incompetence of the servant, let us consider the authorities upon which counsel for the plaintiff rely.

In *Cosgrove v. Pitman*, 103 Cal. 268, 275, 37 Pac. 232, evidence of several specific acts of drunkenness of which the master had no notice was introduced, and the court held that an instruction that, if an engineer was unsteady and unreliable on account of a habit of drinking intoxicating liquors to excess, he was not a competent operator, was erroneous, and reversed the judgment which had been rendered for the plaintiff, because the specific acts did not constitute competent evidence of the incapacity of the servant. The court said:

"Proof of specific acts is not equivalent to proof that Murphy had either this reputation or the habit. 'Character for care, skill, and truth of witnesses, parties, or others must all alike be proved by evidence of general reputa-

tion, and not of special acts. 1 Greenleaf on Evidence, §§ 461-469. Character grows out of special acts, but is not proved by them, though, indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established; and sometimes the very frailties that are proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character.' *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. 110, 80 Am. Dec. 467."

In *Gier v. Los Angeles Consol. Elec. Ry. Co.*, 108 Cal. 129, 130, 131, 132, 41 Pac. 22, 23, 24, the conductor of a motor car sued his master for retaining a careless motorman. Evidence that the motorman's reputation for care was bad was introduced, but there was no evidence that he had the habit of negligence, or that he had been guilty of any specific acts of negligence before the accident. The court reversed the judgment for the plaintiff, upon the ground that a reputation for negligence was insufficient alone to prove the fact of negligence, and in the course of its argument said that evidence of individual acts evincing negligence or incompetence was admissible to prove the fact. This remark, however, was an obiter dictum. The question whether or not such acts, unknown to the employer, were admissible for this purpose, was not presented by the record in that action. The decision of that question was neither necessary nor material to the determination of the case, and the court which decided that case, in *Cosgrove v. Pitman*, where the decision of the question was necessary to the adjudication of the case, expressly held that specific acts were not admissible to prove the alleged unfitness of the employé.

In *Western Stone Co. v. Whalen* (Ill.) 38 N. E. 242, 243, 244, 42 Am. St. Rep. 244, the court remarked, in the course of the opinion, that it seemed to be well settled that proof of specific acts was admissible to establish incompetency. But that question was not before the court for adjudication, and its dictum is without authority. The question the court was considering in that case, and the one it decided, was whether or not evidence of reputation was admissible to show notice to the master. No other opinion cited by counsel for the plaintiff either discusses or decides the question before us for determination.

In *Lake Shore, etc., R. Co. v. Stupak* (Ind.) 23 N. E. 246, 249, the habit of recklessness was alleged and proved; and in *B. & O. Rd. Co. v. Henthorne*, 19 C. C. A. 623, 627; 73 Fed. 634, 637, 638, and *Norfolk & W. R. Co. v. Hoover* (Md.) 29 Atl. 995, 996, 25 L. R. A. 710, 47 Am. St. Rep. 392, the habit of drunkenness was proved. But there is nothing in the reports of either of these cases to indicate that specific acts of negligence or of drunkenness were received to establish these habits, or that they were not proved by the testimony of qualified witnesses who were acquainted with them. Indeed, in the case last cited, the court said:

"The evidence overruled and admitted related to specific or isolated acts of negligence. These, unless brought home to the knowledge of the master, would not have been admissible as reflecting on the question of the master's care."

In *Monahan v. City of Worcester* (Mass.) 23 N. E. 228, 15 Am. St. Rep. 226, there is no reference to the issue in hand.

In *Baulec v. N. Y. & Harlem R. R. Co.*, 59 N. Y. 356, 358, 360, 364, 17 Am. Rep. 325, and in *Southern Pac. Co. v. Huntsman*, 55 C.

C. A. 366, 367, 118 Fed. 412, 413, notice of specific acts was brought home to the master, and for that reason they were clearly admissible.

And in *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105, 113, 124, 128, 4 Am. Rep. 364, a judgment in favor of the defendant was sustained, because the knowledge of specific acts of negligence, proof of which was introduced in the case, was not brought home to the master.

This brief review of the opinions to which counsel for the plaintiff have referred us discloses the fact that, while there are two dicta, there is no adjudication among them in support of the position they have taken. And why should there be such a decision? The issue on trial in a case of this character is the negligence of the master, in that he failed to dismiss a servant who was employed with due care, and whom the law presumed to continue to be competent. Why should specific acts of negligence or of lack of skill of such a servant, of which the master has no knowledge or notice, and of which every servant subject to the infirmities of human nature must necessarily sometimes be guilty, be admitted in evidence to establish the negligence of the master in failing to discharge him? The employer is not liable for such acts. The fellow servant has assumed the risk of them. It is only when they have become so grave and numerous as to establish the habit and character, and so notorious as to establish the reputation of lack of care or of skill, that any liability for negligence in retaining the servant can attach to the master. The habit, the character, of a man or of a servant is not made, and it ought not to be provable by isolated, sporadic acts. It is the product of all the acts he performs during his life or his service. If the plaintiff may introduce in evidence two specific acts of alleged negligence of an engineer in stopping his train to prove his habit and character in this regard, and if he has stopped his train a thousand times within a reasonable period preceding the accident, may not the defendant also introduce in evidence the other 998 stops for the same purpose? And may not the parties litigate and submit to the jury the question whether each of these 1000 stops was careful or negligent? It by no means follows from the fact that a servant was guilty of negligence or of a lack of skill on a few specified occasions that he is not ordinarily a careful and skillful workman, and the investigation of his specific acts to ascertain his character and habits would tend to confuse the case with collateral inquiries, which, if carefully made, would indefinitely prolong the trial, and would lead the court and jury far away from the issue before them.

This is not the only reason why such specific acts should not be received. A defendant is entitled to fair notice of the issues upon the trial of which his liability hinges. A complaint that a servant was incompetent, and that the defendant was negligent in that it did not discharge him, informs the master indeed that the habit, character, and reputation of the employé are in issue; but it is no adequate notice that the character of an isolated or specific act which the servant may have committed is to be tried, and that upon the character of that act the liability of the defendant is to hinge, and it gives the master no opportunity to prepare or to fairly try any such issue.

These considerations, and the deliberate and carefully considered adjudications of this question in the cases in which it was necessary to decide it, which are cited below, persuasively lead to the conclusion that specific acts of negligence, of drunkenness, or of incompetence, no notice of which was given to the master before the accident, are inadmissible to prove the incompetence of the servant, or the negligence of the master in failing to discharge him. *Hatt v. Nay*, 144 Mass. 186, 187, 10 N. E. 807; *Connors v. Morton*, 160 Mass. 333, 335, 35 N. E. 860; *Cosgrove v. Pitman*, 103 Cal. 268, 275, 37 Pac. 232; *Frazier v. Pennsylvania Rd. Co.*, 38 Pa. 110, 80 Am. Dec. 467; *Norfolk & W. R. Co. v. Hoover (Md.)* 29 Atl. 995, 996, 25 L. R. A. 710, 47 Am. St. Rep. 392.

The review of the authorities which the decision of this question has invited, and a consideration of the reasons upon which the rules relating to the liability of the master for negligence in the employment of and in the failure to discharge servants, convince that the following rules are well established, and should prevail in the trial of actions to enforce that liability: It is the duty of the master to exercise reasonable care to employ competent servants, and, when he has exercised this care, this duty is fully discharged. Another duty of the master is to discharge a servant whom he has employed with due care, when he knows, or by the exercise of reasonable care would have known, that the servant has contracted the habit or character of negligence or of lack of skill, so that he has become incompetent. The diligence or care required of the master to learn the habits or characters of servants whom he has employed with due care is not of that degree which is required in his employment of servants or in his inspection of machinery that deteriorates with its use, for the reason that careful and skillful men grow more careful and skillful in the practice of their occupations, and the legal presumption is that servants once competent continue to be so. Servants assume the risk of the occasional acts of negligence of their fellow servants, and the master is not liable for them. The servants may by notice to the master cast upon him the risk of the habitual negligence of their co-employés. Evidence of specific acts of negligence known to the master, and of acts of negligence, like those which cause the death of passengers, so notorious that the master must have known of them if he exercised reasonable diligence, is admissible to prove the habit or character of a servant, who was employed with due care, for incompetence. But specific acts of negligence, of lack of skill, or of incompetence, of which the master had no notice or knowledge prior to the alleged accident, are inadmissible to establish the incompetence of a servant who was employed with due care.

The court instructed the jury that after the defendant had used due care to select and employ the engineer, Delano, it was its duty to exercise that degree of care to supervise his subsequent conduct "that an ordinarily prudent business man would use under similar circumstances if the danger to be apprehended from a want of care was his personal danger." This portion of the charge laid too heavy

a burden on the defendant: (1) Because the supervision and discharge of the engineer did not condition the personal danger of those to whom they were intrusted. The law never requires the impossible, and the imperfection of human nature is such that ordinarily prudent men do not and cannot commonly exercise that high degree of care to insure the safety of others which they instinctively use to protect their own safety. (2) Because the limit of the duty of the defendant was to exercise ordinary care, and the standard of ordinary care is that degree of caution which ordinarily prudent persons commonly exercise under like circumstances—that is to say, in the case at bar, when the danger to be apprehended from the want of care does not condition the personal safety of those who exercise the care—while the court directed the jury to test the duty and the liability by the degree of care ordinarily exercised by such persons under different circumstances; that is to say, when the want of care conditions the personal safety of those who use it. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 416, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 691, 14 Sup. Ct. 756, 38 L. Ed. 597; *Washington, etc., Ry. Co. v. McDade*, 135 U. S. 554, 569, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Choctaw, etc., Ry. Co. v. McDade*, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; *Choctaw, etc., Ry. Co. v. Holloway*, 191 U. S. 334, 338, 24 Sup. Ct. 102, 48 L. Ed. 207; *Charnock v. Texas & Pac. Ry. Co.*, 194 U. S. 432, 437, 24 Sup. Ct. 671, 48 L. Ed. 1057. And (3) because a rule which would require a master to exercise that high degree of care to supervise the conduct of his servants, after their careful employment, which he would commonly exercise to protect his own person from danger, would abrogate the rule that servants assume the risk of the ordinary negligence of their fellows.

Cases may be found in the books in which courts have expressed the opinion that it was the duty of defendants under certain circumstances to exercise the same degree of care for the persons and property of others that they would use if their own personal danger was conditioned by it, but they involve other duties due under different circumstances, and no decision has been called to our attention which sustains the application of such a rule to the duty of a master to supervise the conduct of servants once carefully selected. Thus, where the liability of one who erects a structure on his own land for damages to the property of his neighbor is in issue, the declaration has sometimes been made that the former should exercise that degree of care which a discreet and prudent person would use, or ought to use, if the whole risk of loss were to be his own exclusively (*Mayor v. Bailey*, 2 Denio, 433, 440); and "that the question is not what the plaintiffs could have done, but what discreet and prudent men should do, or ordinarily do, in such cases, where their own interests are to be affected, and all the risk their own." *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413, 419. This, however, is far from declaring that the degree of care required, even in such cases, is that which one would exercise if his own personal danger was involved; and the statement that the care

required is such as a prudent person ought or should be expected to exercise presents a rule that abrogates every criterion of duty and liability, unless these statements are the simple equivalent of the rule that the requisite degree of care is such as ordinarily prudent persons commonly use under like circumstances. Moreover, the degree of care of the property and lives of adjoining proprietors required of those erecting structures on their own land, like the care of passengers which is required of carriers, is much higher than that which a railroad company owes to its employes, who assume the risk of the ordinary negligence of their fellows.

In several cases involving alleged negligence in the selection of appliances, it is said that the master has discharged his whole duty, and has absolved himself from liability, if he has used as much care as a person of ordinary prudence would exercise to protect his own safety (*Carlson v. Bridge Co.*, 132 N. Y. 273, 30 N. E. 750; *Probst v. Delamater*, 100 N. Y. 266, 3 N. E. 184; *Sappenfield v. Railroad Co.*, 91 Cal. 48, 27 Pac. 590; *Brymer v. Southern Pac. Co.*, 90 Cal. 496, 498, 27 Pac. 371), a statement obviously correct, whether ordinary care is that which prudent men commonly exercise under similar circumstances, or that which such men would exercise if the danger from the lack of it was their own personal danger; so that the decisions in these cases do not rule this question.

There are other opinions which treat of the master's duty to exercise care in the selection of tools and machinery, and one in which the care of the place of work was in question, in which declarations have been made that the ordinary care which the master was required to use was such as a man of ordinary prudence would employ, or would be expected to employ, to secure his own safety if he was to do the work. (*Westinghouse, etc., Co. v. Heimlich*, 127 Fed. 92, 94, 62 C. C. A. 92; *Burke v. Witherbee*, 98 N. Y. 562, 565; *Hoffman v. Dickinson*, 31 W. Va. 142, 152, 6 S. E. 53; *Berns v. Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; *Central R. Co. v. Ryles*, 84 Ga. 430, 11 S. E. 499; *Louisville & Nashville R. Co. v. Allen*, 78 Ala. 494; *Smoot v. Ry. Co.*, 67 Ala. 13, 18. These decisions, however, do not commend themselves to our judgment, because they require of employes, the discharge of whose duties does not condition their personal safety, the exercise of a degree of care that is extraordinary and unattainable, and because the courts in those cases did not consider or determine the degree of care required of employes whose duty it is to discharge competent workmen for subsequent negligence, the ordinary risk of which the co-employes assume in the first instance.

For the same reasons, and also because that statement has been repeatedly repudiated by the later decisions of the Supreme Court, the declaration of that court in *Wabash R. Co. v. McDaniels*, 107 U. S. 459, 2 Sup. Ct. 932, 27 L. Ed. 605, to the effect that the ordinary care required of corporations in the selection of employes is not the care which prudent and cautious officials charged with that duty ordinarily exercise in similar circumstances, but that degree of care which such officials ought to exercise in such circumstances, is neither persuasive nor controlling. By what stand-

ard could that requisite degree of care be measured under that declaration? What is the test of duty or of liability under it? Does it not abrogate every test, and leave the determination of the degree of care which conditions the liability of masters to their servants to the necessarily varying opinions of courts and juries, formed after the events, as to the care which such masters ought to use, so that neither master nor servant could ever know under it until long after his action what the limit of his duty or liability was to be in any case, and so that the degree of care required in any two cases arising under like circumstances would never be the same? This declaration in the McDaniels Case was made 22 years ago. The question of law which it treated has since been considered, and decided otherwise by the Supreme Court again and again. That court has cited and referred to its decisions of this question which were rendered before and those which were rendered after the opinion in the McDaniels Case, but, so far as we have been able to learn, it has never cited or referred to the declaration in that case upon this subject from the year 1882, when it was rendered, to the present day, except in the single case of Texas & Pac. Ry. Co. v. Behymer, 189 U. S. 468, 470, 23 Sup. Ct. 622, 47 L. Ed. 905. In that case the question was not controlling. It received no discussion. The court declared that a charge which made ordinary care—"that is, the care that a person of ordinary prudence would use under the same circumstances"—the test of liability was right, and then, apparently casually, said that "what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not," and cited Wabash R. Co. v. McDaniels. With this single exception, the decision in the McDaniels Case has suffered that silent repudiation which is the accustomed fate of opinions of that court which it subsequently finds to be erroneous.

In Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 416, 417, 12 Sup. Ct. 679, 36 L. Ed. 485, the Supreme Court decided that the exact converse of that declaration was the law.

In Union Pac. R. Co. v. Daniels, 152 U. S. 684, 691, 14 Sup. Ct. 756, 38 L. Ed. 597, the charge of the court was that the duty of exercising ordinary care to employ competent servants "was discharged by the defendant if the care disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men engaged in the same kind of business ordinarily exercise," and the Supreme Court failed to suggest that this statement of the law was either erroneous or inaccurate.

In Washington, etc., R. Co. v. McDade, 135 U. S. 554, 569, 10 Sup. Ct. 1044, 34 L. Ed. 235, that court decided that a charge that one was only bound to use ordinary care and prudence in the selection, arrangement, and care of its machinery was right, and in Texas & Pac. R. Co. v. Barrett, 166 U. S. 617, 619, 620, 17 Sup. Ct. 707, 41 L. Ed. 1136, that a charge that a master was bound to use reasonable care in providing and repairing machinery, and that "by ordinary care is meant such as a prudent man would use under the same circumstances," laid down "the applicable rules with sufficient accuracy and in substantial conformity with the views of this court as expressed in Hough v.

Railway Company, 100 U. S. 213, 25 L. Ed. 612; *Northern Pacific Railroad v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Washington & Georgetown Railroad v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Union Pacific Railway v. Daniels*, 152 U. S. 684, 688, 14 Sup. Ct. 756, 38 L. Ed. 597; *Northern Pacific Railroad v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; and other cases."

In *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96, and in *Choctaw, etc., R. Co. v. Holloway*, 191 U. S. 334, 338, 24 Sup. Ct. 102, 48 L. Ed. 207, the Supreme Court again declared, after the foregoing definition of ordinary care had been repeatedly approved, that an employer is only required to use ordinary care to furnish reasonably safe and secure appliances and machinery.

And in *Charnock v. Texas & Pac. R. Co.*, 194 U. S. 432, 437, 24 Sup. Ct. 671, 48 L. Ed. 1057, that court laid down the general proposition that "negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances."

These later decisions of our highest judicial tribunal declare that the degree of care required of masters in dealing with their servants is ordinary care, and affirm the truth of that which seems axiomatic—that ordinary care is that care which ordinarily prudent and cautious men commonly exercise in similar circumstances. If prudent and humane officials who employ men for their masters partake of the infirmities of our common human nature and sometimes fail to exercise that high degree of care which they instinctively use to protect their own persons, then that degree of care is not ordinary, but is extraordinary care, and their master is not liable in damages for such a failure. The limit of the legal duty of such officials is the exercise of ordinary care, however so much higher in the varying conceptions of different minds may be their moral or ethical duty. For their failure to discharge the former, damages may be recovered of their master. But their failure, in common with all mankind, to perfectly discharge the latter, furnishes no cause of action in human tribunals. Any departure from this rule, any substitution for it of a test of liability which must necessarily change with the varying conceptions of moral duty, which will be formed after the events by the juries and courts that subsequently try the cases involving it, would put uncertainty, confusion, and injustice in the place of the proximate certainty of the law and its just administration.

In *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 416, 417, 12 Sup. Ct. 679, 36 L. Ed. 485, the Supreme Court decided that a charge to a jury was right which instructed them that negligence was "the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation, or doing what reasonable and prudent persons, under the existing circumstances, would not have done. \* \* \* You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men would do under these circumstances, and then test the conduct involved and try it by that standard." From this rule that court has never since



departed. Tested by it, the charge of the court below was erroneous, because it fixed the standard of negligence, not at what ordinarily prudent and cautious men do under like circumstances (that is to say, when their action does not involve their personal safety), but at what they do under radically different circumstances (that is to say, when their action does condition their personal safety). The true test of the duty and liability of the master is that degree of care which ordinarily prudent, cautious, and humane officials commonly exercise under similar circumstances; not that which they would exercise under different circumstances when their personal safety was involved, and not that which courts and juries, unguided by this test might think, after the event, they ought to have exercised in view of some ethical standard which they might then approve.

Witnesses who acknowledged that they were not acquainted with the general reputation of the engineer were permitted to testify to his reputation among conductors and brakemen, excluding consideration of the engineers and others acquainted with the workman and his service. The issue to which this testimony was directed was whether or not the reputation of Delano for incompetence was so notorious that the officers of the defendant whose duty it was to hire and discharge its servants would have been aware of it if they had exercised reasonable diligence. Reputation among specific classes of men to which such officials did not belong, and which obviously included only a part of those who were acquainted with the operator or his service, was too restricted to meet this issue. A reputation confined to only a part of those who must be familiar with the man and his service is not general reputation, and it is insufficient to evidence knowledge of that reputation by those who do not belong to the limited class in which it exists. General reputation alone is competent to charge the master with notice in cases where no knowledge of habitual incompetence of the servant is brought home to him.

Counsel for the defendant requested the court to give to the jury a charge which they had prepared, which covers 9 pages of the printed record and is divided into 30 paragraphs. The court refused to grant this request, and the defendant excepted to its refusal to give these 30 paragraphs, which in its exception it termed "instructions." A single exception to a refusal to give a series of instructions is futile if any proposition of law or of fact embodied in the instructions is either erroneous or inapplicable to the case. The only question which such an exception presents is whether or not all the instructions thus requested should have been given, and, if any of them should not have been submitted to the jury, the question of the correctness or applicability of the others is not presented to the appellate court for decision. In the series of instructions which counsel for the defendant requested there are several propositions of law which are erroneous, and some statements of fact that are inapplicable to the issues which the jury was required to determine. The questions presented by many of the requests which are discussed in the briefs of counsel are therefore not here for our consideration, and they are dismissed. *Union Pacific Ry. Co. v. Callaghan*, 161 U. S. 91, 95, 16 Sup. Ct. 493, 40 L. Ed. 628; *Waples-Platter Co. v. Turner*, 27 C.C. A. 439, 441, 83 Fed. 64, 66.

The various objections to the complaint in this action which were argued at the bar and presented in the briefs are purposely ignored, because this case must be tried again, and there will be opportunity to amend and reform the pleadings, so that any discussion of them now would serve no useful purpose.

The judgment below is reversed, and the case is remanded to the Circuit Court with instructions to grant a new trial.

HOOK, Circuit Judge (specially concurring). I concur in the reversal of the judgment in this case and in the reasons given therefor, excepting those pertaining to the measure of ordinary care, the exercise of which was incumbent upon the company, and the charge of the Circuit Court upon that subject.

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GEORGE et al. v. WALLACE et al. BROWNLEE et al. v. SAME. MORSEMAN v. SAME. POPPLETON v. SAME. MORTON et al. v. SAME. McCAGUE INV. CO. et al. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 8, 1904.)

Nos. 1,954-1,959.

**1. FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.**

Where a national bank executed a nonnegotiable note to another national bank, both being citizens of Nebraska, which note was assigned to a citizen of another state, an action by him thereon against the maker and other defendants, the most of whom were also citizens of Nebraska, cannot be maintained in the federal courts on the ground of diversity of citizenship.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

**2. SAME—STATUTES—REPEAL.**

Act Cong. June 30, 1876, c. 156, § 2, 19 Stat. 68 [U. S. Comp. St. 1901, p. 3509], giving federal courts original jurisdiction in equity of a creditors' bill against stockholders of a national bank having gone into liquidation, as authorized by Rev. St. § 5220 [U. S. Comp. St. 1901, p. 3503], was not repealed by Act July 12, 1882, c. 290, § 4, 22 Stat. 163 [U. S. Comp. St. 1901, p. 3458], providing that the jurisdiction for suits by or against any national bank, except suits between them and the United States, shall be the same as the jurisdiction for suits by or against state banks, nor by Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436 [U. S. Comp. St. 1901, p. 514], declaring that all national banks, for the purpose of actions by or against them, shall be deemed citizens of the states in which they are respectively located, etc., as such latter sections relate exclusively to suits by or against banking associations themselves.

**3. SAME.**

A suit which may be brought in a federal Circuit Court by or against a citizen of a state, because it arises under Constitution, laws, or treaties of the United States, may, for the same reason, be brought in such court by or against a national bank located in the same state, notwithstanding Act Cong. July 12, 1882, c. 290, § 4, 22 Stat. 163 [U. S. Comp. St. 1901, p. 3458], providing that the jurisdiction for suits hereafter brought by or against any national bank, except suits between them and the United States, etc., shall be the same and not other than the jurisdiction for suits by or against state banks, etc.

**4. SAME—CREDITORS' SUIT.**

An action by a citizen of another state on an assigned nonnegotiable note of a national bank which had gone into voluntary liquidation to subject assets to the payment thereof, and to enforce the liability of stockholders, was properly brought in the federal Circuit Court, in so far as the enforcement of the stockholders' liability was concerned, under Act Cong. June 30, 1876, c. 156, § 2, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509], providing that when any national banking association shall have gone into liquidation under Rev. St. § 5220 [U. S. Comp. St. 1901, p. 3503], the individual liability of stockholders may be enforced by a bill in the nature of a creditors' bill in the federal Circuit Court.

**5. SAME—SUIT TO ADMINISTER ASSETS.**

A suit against an insolvent national bank which has gone into voluntary liquidation to enforce a specific lien, or to enforce and judicially administer a trust previously created by contract, or arising from the insolvency and liquidation proceedings, is a suit arising under the laws of the United States, within the jurisdiction of the federal Circuit Court, as prescribed by Act Cong. Aug. 13, 1888, c. 866, § 1, 25 Stat. 484 [U. S. Comp. St. 1901, p. 514], and expressly excepted from the provisions of section 4 (25 Stat. 486) thereof.

**6. SAME—TRUST FUNDS.**

The tangible assets and the liability of stockholders of an insolvent national bank in process of voluntary liquidation in the hands of the liquidating agent is a trust fund for the primary benefit of creditors.

**7. SAME—CREDITORS' SUIT—BILL—MULTIFARIOUSNESS.**

A creditors' bill by one or more creditors of an insolvent national bank in process of voluntary liquidation, on behalf of all, to wind up the affairs of the bank, and to obtain a complete judicial administration of its affairs, involving an ascertainment of claims against it, the enforcement of trusts in respect to assets and capital stock, and for distribution of the proceeds, is not multifarious.

**8. SAME—CAPACITY TO SUE—NECESSITY OF JUDGMENT.**

All of the assets of an insolvent national bank in process of voluntary liquidation having been placed in the hands of a defendant, who, by express contract, was constituted a trustee for the primary benefit of another national bank, which became a creditor of the liquidating bank by the assumption and payment of the demands of all of the other creditors of the liquidating bank, complainant, the holder of the note executed by the liquidating bank as a part of the assumption contract sued to enforce an asserted lien by way of pledge on all of the undisposed assets of the liquidating bank, to obtain a judicial administration of its affairs, and to enforce the statutory obligation of stockholders. *Held*, that it was no objection to complainant's capacity to sue that his claim had not been reduced to judgment.

**9. SAME—TRUSTS.**

Where the insolvency of a national bank was accompanied by a conveyance of its assets to a trustee, and a pledge thereof for the benefit of creditors, and this was followed by affirmative proceedings in liquidation, authorized by law, and the selection by the shareholders of the same trustee as their liquidating agent, such agent held the assets under an express trust for the benefit of creditors.

**10. SAME—ULTRA VIRES ACTS—RIGHT TO PLEAD.**

Where a contract by which a national bank assumed all the obligations of an insolvent bank in contemplated liquidation was fully explained at a meeting at which 1,665 out of 2,000 shares were represented, and after the contract was executed it was ratified by a vote exceeding the proportion of stock specified by Rev. St. §§ 5220, 5221 [U. S. Comp. St. 1901, p. 3503], the stockholders were not thereafter entitled to claim that such contract was ultra vires.

**11. SAME—LIABILITY OF STOCKHOLDERS—DEBTS.**

Where a national bank assumed the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its stockholders were liable, as provided by Rev. St. § 5151 [U. S. Comp. St. 1901, p. 8465].

[Ed. Note.—Enforcement of statutory liability of stockholders in national banks, see note to *Williamson v. American Bank*, 52 C. C. A. 6.]

**12. SAME—APPEAL—ASSIGNMENTS OF ERROR.**

An objection to the computation of interest on claims against an insolvent bank in process of liquidation cannot be reviewed on appeal, where it was not made the subject of an assignment of error.

### Appeals from the Circuit Court of the United States for the District of Nebraska.

These are appeals from a decree of the Circuit Court of the United States for the District of Nebraska enforcing the liability of the appellants as shareholders of the American National Bank of Omaha. In December, 1895, the managing officers of that bank anticipated the withdrawal, about the first of the following year, of a large amount of deposits. The condition of the bank was such that it had not available funds sufficient to meet the expected demands and to thereafter continue in business and comply with the requirements of the national banking act. Consequently on December 21, 1895, a contract was entered into with the Union National Bank of the same city, the terms of which, so far as need be recited, are as follows: The Union National assumed the payment of the liabilities of the American National to its depositors and on account of bills payable, and in return was to receive its cash, cash items, and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed was to be represented by three nonnegotiable promissory notes of the American National, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee. This contract was carried out. The Union National moved into and took possession of the quarters of the retiring bank. It was ascertained that the total indebtedness of the American National on account of deposits, demand and time certificates and bills payable, which were assumed by the Union National, amounted to \$289,097.30; that the cash, cash items, and bills receivable taken without recourse by the Union National aggregated \$88,097.30; that a balance of \$201,000 remained. To evidence this balance the president and cashier of the American National executed to the Union National three nonnegotiable promissory notes, each for \$67,000, payable, respectively, in one, two, and three years from their date, December 23, 1895. In accordance with the contract the remaining assets of the American National were placed in the hands of Thomas L. Kimball, the president of the American National, as trustee for the contracting parties and for the protection of their respective rights under the contract. Kimball as trustee retained possession and controlled the collection of them until his death, which occurred during the pendency of the complainant's suit, when his successor, James Burness, was appointed and thereafter continued in the performance of the trust duties. The assets which were pledged to the Union National, although of large amount in face value, were found to be of little actual worth. The execution of the contract of December 21, 1895, by the president and cashier of the American National, was directed by resolution of the board of directors of that bank. On January 14, 1896, an annual meeting of the shareholders of that bank was held, at which were represented 1,665 $\frac{3}{4}$  shares out of a total of 2,000. At this meeting a resolution was adopted instructing the directors to take action looking to the liquidation of the bank. On February 25, 1896, another meeting of the shareholders was held, at which were represented 1,696 shares, and at which a resolution for the voluntary liquidation of the bank was adopted by an affirmative vote of 1,639 $\frac{3}{4}$  shares. Thomas L. Kimball, theretofore appointed as trustee

of the remaining assets of the bank, by the contract of December 21, 1895, was designated in the resolution as the agent and trustee of the shareholders in the liquidation proceedings. All of the subsequent proceedings provided by law for voluntary liquidation were thereupon duly adopted. The Union National fulfilled its obligations under the contract, having taken up the liabilities assumed by it. It being found that the trustee was meeting with little success in the collection of the assets, and that the principal of the note first maturing had been but slightly reduced, this suit was instituted August 8, 1898, by Sumner Wallace, a citizen of New Hampshire, as the assignee of the note, against the Union National, Thomas L. Kimball, trustee, and the American National and its stockholders, including the appellants. By an amended bill the complainant sought, on behalf of himself and all of the other creditors of the American National, the winding up of the affairs of that bank, the determination of the amount due him upon his note, the subjection of the remaining assets to the payment of his claim, the ascertainment of all of the creditors and the amounts of their claims, and the enforcement of the liability of the stockholders. The complainant had not reduced his note to judgment prior to the institution of the suit. During the progress of the suit the uncollected assets were sold by order of the court and the proceeds accounted for. Upon final hearing a decree was entered ascertaining the amounts due the complainant and the Union National after the application of all credits, the number of shares of stock held by each shareholder of the American National, and against each defendant shareholder for \$97.23 per share of stock held by him. The amount of the recovery was appropriately apportioned between the two creditors. From this decree the appeals were prosecuted.

W. W. Morsman, Howard B. Smith, and Richard S. Horton, for appellants.

R. S. Hall (J. H. McCulloch and James H. Macomber, on the brief), for appellees.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The complainant, a citizen of New Hampshire, sued as the assignee of a nonnegotiable promissory note. His assignor, the payee of the note, is a national bank located in the state of Nebraska, and is therefore to be deemed a citizen of that state so far as concerns the question of jurisdiction. Most of the appellants are also citizens of Nebraska. This being so, some ground of federal jurisdiction other than diversity of citizenship must be found to exist to justify the maintenance of the suit against them. May it be found in the provisions of the acts of Congress relating to cases for the winding up of the affairs of national banking associations and to enforce the liability of shareholders of such associations as may have gone into voluntary liquidation? It is obvious that any case of such a character would be one arising under the laws of the United States of which, in the absence of some specific limitation of the general grant of jurisdiction, a Circuit Court would have cognizance irrespective of the citizenship of the parties.

The statutes which are pertinent to this question are as follows:

"Any [national banking] association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." Section 5220 Rev. St. [U. S. Comp. St. 1901, p. 3503].

"That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and

twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established." Act of June 30, 1876, c. 156, § 2, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509].

"That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suits may be begun: and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." Proviso to section 4, Act of July 12, 1882, c. 290, 22 Stat. 163 [U. S. Comp. St. 1901, p. 3458].

"That all national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." Act of Aug. 13, 1888, c. 866, § 4, 25 Stat. 436 [U. S. Comp. St. 1901, p. 514].

Section 2 of the act of June 30, 1876, was not repealed either by the act of July 12, 1882, or by the judiciary act of August 13, 1888. The former authorizes suits against shareholders for the enforcement of their statutory liability, while the two latter relate exclusively to suits by or against the banking associations themselves. These subject-matters, while closely related, are in a legal sense quite different. But even if the later acts could be said to cover in a general way the purpose of the first, nevertheless, under well-known rules of statutory construction, the law prescribing the special remedy in a particular case would stand unrepealed. That it is still in force and operative has been judicially recognized. *Commercial Nat. Bank v. Weinhard*, 192 U. S. 243, 250, 24 Sup. Ct. 253, 48 L. Ed. 425; *McDonald v. Thompson*, 184 U. S. 71, 75, 22 Sup. Ct. 297, 46 L. Ed. 437; *King v. Pomeroy*, 121 Fed. 287, 58 C. C. A. 209; *Williamson v. Bank*, 115 Fed. 793, 52 C. C. A. 1.

Prior to the act of July 12, 1882, relating to national banking associations, the Circuit Courts of the United States had general cognizance of suits by or against national banks, but by the proviso of section 4 of that act such banks were placed, for purposes of jurisdiction, in the category of domestic corporations of the states in which they were respectively located, with an exception as to "suits between them and the United States or its officers and agents." This proviso was excerpted from the act of 1882, and embodied, with some change of phraseology, in section 4 of the judiciary act of March 3, 1887, and of the corrective act of August 13, 1888, the exception being expressed as follows:

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or

by direction of any officer thereof or cases for winding up the affairs of any such bank."

Cases of the latter character were not in terms excepted from the prohibition of the act of 1882. It seems clear that section 4 of the act of 1888 was intended to displace and to be a substitute for the proviso of section 4 of the earlier act.

It was not the purpose of Congress, by either of these acts, to wholly deprive the Circuit Courts of jurisdiction of suits by or against national banks arising from the subject-matter thereof. A suit which may be brought in a Circuit Court by or against a citizen of a state because it arises under the Constitution, laws, or treaties of the United States may for the same reason be brought in such court by or against a national bank located in the same state. *Petri v. National Bank*, 142 U. S. 644, 647, 12 Sup. Ct. 325, 35 L. Ed. 1144. All that was intended was that jurisdiction should no longer be asserted solely on the ground of the federal origin of such banks—merely because of the source of their incorporation. In respect of jurisdiction they are to be considered as though they were organized under the laws of the states in which they are respectively located.

So far, therefore, as the case at bar may be considered as one to enforce the liability of the stockholders of a national bank which has gone into voluntary liquidation, the jurisdiction of the Circuit Court is sustained by section 2 of the act of June 30, 1876.

But a broader and more satisfactory ground may be found in the provisions of the act of August 13, 1888. Section 1 of that act in general terms confers jurisdiction of causes arising under the laws of the United States, while those which are brought to wind up the affairs of national banks are expressly excepted from the prohibitions of section 4.

A suit against an insolvent national bank which has gone into voluntary liquidation to enforce a specific lien, or to enforce and judicially administer a trust previously created by contract, or to enforce and judicially administer the trust arising from the insolvency and proceedings in liquidation, is a suit arising under the laws of the United States. It is also a suit to wind up the affairs of such bank. The same is true of a suit to enforce the liability of the stockholders of such a bank. In *Guarantee Co. v. Hanway*, 104 Fed. 369, 44 C. C. A. 312, it was held by this court that an action to recover a judgment against an agent selected by the stockholders of a national bank to succeed a receiver appointed by the Comptroller of the Currency, and to enforce the same against the assets of the bank, is in effect a case to wind up its affairs, under section 4 of the act of 1888. This case was followed in *International Trust Co. v. Weeks* (C. C.) 116 Fed. 898, a suit to recover on a covenant in a lease from an agent appointed by the stockholders of a national bank to close its affairs. On appeal the jurisdiction of the court was upheld by virtue of section 4 of the act of 1888. *Weeks v. Trust Co.*, 125 Fed. 379, 60 C. C. A. 236. See, also, *Snohomish County v. National Bank* (C. C.) 81 Fed. 518, which was a suit to enjoin the stockholders' agent, engaged in winding up the affairs of the bank, from proceeding further, and to procure the appointment of a receiver to take charge of the remaining assets.

The tangible assets of an insolvent national bank which is in the process of liquidation constitute, in the hands of the liquidating agent, a trust fund for the primary benefit of creditors, and so of the liability of the shareholders of a bank similarly circumstanced.

In *King v. Pomeroy*, supra, it was said that the enforcement of the liability of the stockholders of a national bank in process of liquidation and the distribution of the proceeds "is as much a part of the liquidation of the debts of the bank as the collection and distribution of the proceeds of its bills receivable or any other of its assets." There is no sound reason why, at the suit of one or more creditors on behalf of all for the winding up of the affairs of the bank, there may not be had, if so desired, a complete judicial administration of the affairs of the bank, an ascertainment of the valid and subsisting claims against it, an enforcement of the trusts in respect of both the assets and the capital stock, and, finally, the distribution of the avails. Nor would a bill for such comprehensive relief be multifarious. *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. All of these results are accomplished in an involuntary proceeding in liquidation under the direction of the Comptroller of the Currency, which is said to constitute but one continuous transaction; and, as was observed by the Supreme Court:

"When in the case of voluntary liquidation the proceeding is instituted by one or more creditors for the benefit of all, by means of the jurisdiction of a court of equity, there seems to be no reason why the nature of the proceeding should be considered as changed. \* \* \* The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank." *Richmond v. Irons*, supra.

It was not essential to the maintenance of the suit in the court below that the complainant should have first reduced his demand to judgment. The debtor bank was insolvent and had gone into voluntary liquidation. The complainant, a contract creditor, asserted a lien by way of pledge upon all of the undisposed assets of the bank and sought the establishment of his claim. All of such assets had been placed in the hands of a defendant, who, by express contract, was constituted a trustee for the primary benefit of the Union National, which became a creditor by the assumption and payment of the demands of all of the other creditors of the bank; and the complainant, as an assignee of the Union National, sought the enforcement of the trust thereby created. The defendant, who was trustee under the contract, was also the liquidating agent or trustee by virtue of his selection and appointment by the stockholders acting in the liquidation proceedings.

A suit for the enforcement of a lien or for the enforcement and administration of a trust is one peculiarly of equitable cognizance, and may be maintained by a contract creditor whose demand has not been reduced to judgment. *Day v. Washburn*, 24 How. 352, 16 L. Ed. 712; *Case v. Beaufregard*, 101 U. S. 688, 25 L. Ed. 1004; *Townsend v. Vanderwerker*, 160 U. S. 171, 178, 16 Sup. Ct. 258, 40 L. Ed. 383; *Clews v. Jamieson*, 182 U. S. 461, 478, 21 Sup. Ct. 845, 45 L. Ed. 1183. In *Oelrichs v. Spain*, 82 U. S. 211, 21 L. Ed. 43, the court said that whenever an element of trust existed jurisdiction in equity was always



conferred. In these respects the case at bar differs from those cited by the appellants. *Jones v. Green*, 68 U. S. 330, 17 L. Ed. 553; *Smith v. R. Co.*, 99 U. S. 398, 25 L. Ed. 437; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; *Nat. Tube Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; *Hollins v. Brierfield Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. In the first three of these cases the absence of a lien was especially noticed, and in the last the absence of both a lien and an enforceable trust. It is no doubt true that the mere insolvency of a corporation will not in itself justify the maintenance of a suit in equity by a simple contract creditor, and that the trust which is frequently spoken of as arising from that condition is not an express trust which attaches to the property of the insolvent for the direct benefit of the creditor, but is merely one sub modo, which is recognized in the judicial administration of the affairs of the insolvent corporation. But when insolvency is accompanied, as in this case, by a conveyance of assets to a trustee and a pledge thereof for the benefit of creditors, and this is followed by affirmative proceedings in liquidation especially authorized by law and the selection by the shareholders of the same trustee as their liquidating agent, an express trust does attach to the assets of the insolvent corporation for the direct benefit of the creditors. Such a lien may be enforced and such a trust may be judicially administered at the suit of a simple contract creditor, and a court having lawfully acquired jurisdiction may, to give complete relief, proceed with the enforcement of the liability of the shareholders. *Richmond v. Irons*, supra; *King v. Pomeroy*, supra. In this connection it may be observed that while in section 1 of the act of 1876 it is expressly provided that a creditor who is entitled to call upon the Comptroller of the Currency to institute involuntary proceedings against a national bank must have reduced his demand to judgment, by section 2 "any creditor" may file a bill against the shareholders of a bank in voluntary liquidation.

It is contended that in making the contract, executing the notes, and transferring its assets the American National transcended its corporate powers, and that no debt was thereby created which could be enforced against its shareholders. *Ward v. Joslin*, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093. We may at the outset omit any consideration of what might be the case were these transactions dependent alone upon the authority of the officers and board of directors of the bank, for the evidence shows clearly that what was done by them was ratified and confirmed by the shareholders. The contract of December 21, 1895, was executed by Thomas L. Kimball as president of the American National pursuant to the instruction of a resolution of its board of directors. At the annual meeting of the shareholders held January 14, 1896, at which 1,665 out of a total of 2,000 shares of stock were represented, the contract was read, and an explanation made by the president of the condition of the bank which led up to and made its execution necessary. This was followed at the same meeting by the adoption of a resolution, by the votes of those representing more than 1,600 shares of stock, instructing the directors to take action looking to the liquidation of the bank. Pursuant to this resolution another meeting of the shareholders was held February 25, 1896, 1,696 shares

being represented, at which a formal resolution for liquidation in accordance with sections 5220 and 5221 of the Revised Statutes was adopted by a vote of those owning 1,639¾ shares, being some 300 more than were necessary under the law. In this resolution it was provided that "Thos. L. Kimball be and he is hereby appointed the agent and trustee of the shareholders of such bank to effect such liquidation." The significance of this appointment is apparent when it is recalled that Kimball was also designated as the agent or liquidating trustee in the contract of December 21, 1895. Another shareholders' meeting was held January 12, 1897, at which 1,531 shares were represented, and at this meeting there was presented a comparative statement over the signature of Thomas L. Kimball, trustee, showing the condition of the bank on December 21, 1895, when the contract was made, and on January 1, 1897. It included an account of transactions during the progress of the liquidation, and an expression of views as to the best course to be pursued with reference to the remaining assets. Reference was definitely and explicitly made in this statement to the Union National and to the payment to it of proceeds of collections which had been made by the trustee. It was ordered to be spread upon the records of the bank. Shortly after the execution of the contract of December 21, 1895, and before the adoption of the resolution for liquidation, a writing containing an express ratification of the action of the directors in respect of the contract between the two banks was executed by the owners of more than two-thirds of the stock of the American National. At no meeting of the shareholders, so far as the record shows, was there any word of criticism or objection to the transaction with the Union National except so far as it may be gathered from the mere fact that a small number of shares were voted against the resolution for liquidation. When it is considered that the Union National was engaged in carrying out its part of the contract, was disbursing its funds in taking up and caring for the contracts, debts, and engagements of the American National, the duty of the shareholders of the latter in meeting assembled to then repudiate the transaction, if they ever desired to do so, was imperative. Instead of so doing they supplemented the transaction with the Union National by proceedings in voluntary liquidation adopted by a vote largely in excess of that required by law and conducted such liquidation in connection with and as part of the performance of the contract of December 21, 1895. Every consideration of equity, good conscience, and justice leads to the conclusion that the shareholders should be held to have ratified and approved of what was done and what was then being done.

So far as the Union National was concerned the transaction between the two banks was in the exercise of its ordinary powers as a banking association. *Schofield v. Bank*, 97 Fed. 282, 38 C. C. A. 179. When the contract was entered into the American National was confronted by an emergency. A withdrawal from the bank of a large amount of deposits was anticipated, and it had not the money or available cash resources to meet it and thereafter continue business. At the time, as subsequent experience demonstrated, the bank was in fact hopelessly insolvent. But in the light of the conditions which were known it was within the power of the officers and directors of that bank to make the

contract of December 21, 1895, with the approval of the shareholders owning a larger proportion of the capital stock than was necessary under the law in case of a voluntary liquidation.

The expression "usual course of business" as one of limitation upon the powers of a corporation is generally referable to the activities of a going concern, and has little, if any, application to one which is upon the threshold of liquidation because of insolvency. In the latter condition the managing officers of a corporation, with the approval of the shareholders, may make any fair and equitable disposition of its assets which, not being in violation of any provision of law, will insure the payment of all of its debts and is reasonably calculated to preserve the largest equity for its shareholders. In such an emergency a corporation should not be held to be helpless and incapable of an act of duty to creditors, and of preservation of the interests of its shareholders merely because it may be outside of the usual routine or course of its business.

In the case at bar all of the obligations of the American National to the government were fully performed, no duty was omitted which called for the interposition of the Comptroller of the Currency, and no federal statute was violated. Upon insolvency and the institution of proceedings in liquidation the assets of a national bank stand pledged by law to the payment of the debts, and the surplus, if any, to a ratable distribution among the shareholders. The contract which is attacked by the appellants was intended to accomplish nothing substantially different. Instead of many creditors to be dealt with, it was arranged that there should be one whose demands should embrace those of all of the others. And in considering the relation of the Union National and the complainant, its assignee, to the American National, we need not stop at the three notes which they hold. In the same sense that a shareholder may go behind a judgment recovered against his corporation to show the character of the indebtedness which it represents, so in a case like the one in hand may a creditor, holding a note of the bank, show, if necessary, the nature of the debt which is evidenced thereby. In equity the claims of the complainant and the Union National represent the "contracts, debts, and engagements" of the American National for which the stockholders of the latter are responsible in accordance with the provisions of section 5151 of the Revised Statutes [U. S. Comp. St. 1901, p. 3465].

The complaint made on behalf of some of the appellants on account of the computation of interest upon the claims of the creditors was not made the subject of an assignment of error, and is therefore not considered.

**The decree of the Circuit Court is affirmed.**

## REES et al. v. OLMSTED.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1905.)

**1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—VALIDITY OF MUNICIPAL BONDS.**

The federal courts, in determining the validity of a legislative act, under which municipal bonds in suit were issued, under the state Constitution, will follow the construction placed upon the Constitution by the highest court of the state at the time the bonds were issued and sold.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 956.

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

**2. MUNICIPAL BONDS—ROAD IMPROVEMENT—VALIDITY OF OHIO STATUTE.**

Act Ohio March 21, 1894 (91 Ohio Laws, p. 543), which authorized counties of a certain population, on petition of a majority of the landowners in any election precinct, to levy an extra tax thereon, and an issuance of bonds in anticipation of such tax, for improvement of the public roads, was not a law of a general nature within the meaning of Const. Ohio, art. 2, § 26, providing that "all laws of a general nature shall have a uniform operation throughout the state," as such provision was judicially construed by the Supreme Court of the state when such act was passed, and bonds issued thereunder are valid and enforceable, although, subsequent to their issuance, a construction was placed upon the constitutional provision which would render the act invalid.

**3. STATUTES—CONSTITUTIONALITY—ACT CONFERRING CORPORATE POWERS.**

The mere fact that a special legislative act authorizing the appointment by a county board of road commissioners for a district in certain cases declares that such commissioners "shall be a body corporate with the powers and duties hereinafter specified" does not render the act invalid under Const. Ohio, art. 18, § 1, providing that "the General Assembly shall pass no special act conferring corporate powers," as such provision is construed by the Supreme Court of the state, where the powers and duties enumerated are only such as are ordinarily conferred and imposed upon officers or boards charged with the supervision of public improvements.

**4. MUNICIPAL BONDS—ROAD IMPROVEMENTS—ESTOPPEL BY RECITALS.**

Under Act Ohio March 21, 1894 (91 Ohio Laws, p. 543), which authorizes the board of commissioners of a county, on petition therefor, to appoint road commissioners for a district, who shall have power to issue bonds for road improvements, to be attested and registered by the county auditor, and at once reported to the county board, which has general charge of the improvement and the levying of the tax to pay the bonds, with power to remove any of the road commissioners and fill the vacancy, such commissioners, in the issuance of the bonds, as well as in supervising the work done, act simply as agents for the county board, and recitals made by them in the bonds that all things required by the act as conditions precedent to their issuance have been properly done and performed must be regarded as having been made by authority of the county board, and create an estoppel in favor of a bona fide purchaser of the bonds, which precludes a defense thereto on the ground of any irregularity in the action of the board as well as of the road commissioners.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Saltzgaber, Hoke & Osborn, Brown & Geddes, and Chas. A. Schmettau, for plaintiffs in error.

William B. Sanders (Squire, Sanders, & Dempsey, of counsel), for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This action involves the validity of \$30,000 of bonds, \$10,000 issued on August 14, 1894, and \$20,000 on February 15, 1895, the proceeds of which were used for the improvement of the public roads within a precinct of Van Wert county, Ohio, known as "Venedocia Pike No. 1." The suit was brought against the plaintiffs in error, "Commissioners of Venedocia Pike No. 1," by George G. Olmsted, a bona fide purchaser for value of coupons aggregating \$2,010. The bonds and coupons were issued under authority of the act of March 21, 1894 (91 Ohio Laws, p. 543), providing for the improvement of public roads in Van Wert county, describing it by population. A demurrer to the petition was overruled on the authority of the Board of Commissioners v. Gardiner's Savings Institution, 119 Fed. 36, 55 C. C. A. 614, decided by this court December 2, 1902, and an answer filed. The defenses relied on were the unconstitutionality of the act, and the irregularity of the action of the county commissioners under it. On the trial, testimony tending to establish the various defenses was excluded, and a verdict for the plaintiff directed, on the grounds, first, that the act was constitutional, and, second, that the recitals in the bonds estopped the defendants from setting up any lack of regularity in their issue.

1. It is urged the act violates section 26 of article 2 of the Constitution of Ohio, which provides that "all laws of a general nature shall have a uniform operation throughout the state." The act provides that upon the petition of a majority of the landowners in any election precinct of a county, residing in the county, the county commissioners, if they deem it advisable, may improve the public roads within such precinct, and for that purpose may levy an extra tax on the property within the precinct; the work of improvement to be done, and the bonds in anticipation of the collection of the tax to be issued, by three road commissioners to be appointed by the county commissioners. The act in terms applies to "any county of this state which, at the last federal census had, or which at any subsequent federal census shall have, a population of not less than 29,050, and not more than 29,800." It may be conceded that the act did not have a uniform operation throughout Ohio, because Van Wert was the only county answering to this description. *Field v. Com'rs Highland Co.*, 36 Ohio St. 476; *Ry. Co. v. Martin, Treas.*, 53 Ohio St. 386, 400, 41 N. E. 690. Was it "a law of a general nature"? This must be determined by the construction placed upon this clause by the Supreme Court of Ohio at the time the act was passed. *Board of Commissioners v. Gardiner's Savings Institution*, 119 Fed. 36, 47, 55 C. C. A. 614; *Loeb v. Trustees*, 179 U. S. 472, 491, 21 Sup. Ct. 174, 45 L. Ed. 280; *Wilkes Co. v. Coler*, 180 U. S. 506, 531, 21 Sup. Ct. 458, 45 L. Ed. 642. The rule then in force was laid down in *State ex rel. Hibbs v. Commissioners of Franklin Co.*, 35 Ohio St. 458, decided at the January term, 1880, in which an act directing the commissioners of Franklin county to levy a special tax

for the improvement of a certain avenue or road was sustained on the ground that the law was not one of a general nature. This continued to be the controlling authority until overruled by *Hixson v. Burson*, 54 Ohio St. 470, 43 N. E. 1000, decided April 20, 1896, in which an act providing for the improvement of roads in Athens county was held void on the ground that a law regulating road improvements is one of a general nature. The *Hibbs Case* was expressly overruled. It is suggested that the act involved in the *Hibbs Case* applied to but one road, and therefore was necessarily local. It may be admitted it was local in its application, but under the decision in the *Hixson Case* it was of a general nature, because it related to road improvements, and therefore the case which held it valid was overruled. The act in the *Hixson Case* was also local in its application, being restricted to Athens county, but, being of a general nature, was held invalid. We are satisfied that under this provision of the Constitution, as interpreted in the *Hibbs Case*, the act under consideration would not have been held unconstitutional. *Board of Commissioners v. Gardiner's Savings Institution*, 119 Fed. 36, 47, 55 C. C. A. 614.

2. It is also contended that this is a special act conferring corporate powers, in violation of the inhibition of section 1 of article 3 of the Constitution of Ohio. Conceding the act applied only to Van Wert county, and therefore was a special one, did it confer corporate powers? In determining this we must look to its operation and effect. *State v. Judges*, 21 Ohio St. 11; *State v. Hipp*, 38 Ohio St. 199. The mere fact that the act declared that the road commissioners who issued the bonds should be a "body corporate with the powers and duties hereinafter specified," did not definitively determine that the powers conferred were corporate within the meaning of this constitutional provision. We must look to their nature and the object for which they were bestowed. *State v. Powers*, 38 Ohio St. 54, 61. The question is whether the powers conferred are essentially such as are ordinarily possessed by corporations. It has reference to the intrinsic attributes of the board or body in question, and not to the form or manner in which the powers are exercised. Obviously, the mere name given or declaration made by the Legislature cannot furnish the test. If a special act should declare that the body created by it must not be deemed a corporation, when in fact the act conferred upon it all the attributes and powers of a corporation, it is clear that the declaration would not avail to avoid the inhibition of the Constitution. The converse of this proposition must be equally true. Article 13 regulates corporations, private and municipal. The first section provides that "the General Assembly shall pass no special act conferring corporate powers"; the second, that "corporations may be formed under general laws, but all such laws may from time to time be altered or repealed"; and the sixth, that "the General Assembly shall provide for the organization of cities and incorporated villages by general laws," etc. County and township organizations are regulated by article 10, the seventh section of which provides that "the commissioners of counties, the trustees of townships, and

similar boards, shall have such power of local taxation for police purposes as may be prescribed by law." Corporate powers being those which pertain to a corporation, which denote the existence of a corporation, obviously they may be conferred by either creating a new corporation or enlarging an existing one. Under the decisions of the Supreme Court of Ohio, the well-established rule appears to be that it is only when a law creates a new corporation or confers additional powers upon an existing one that it confers corporate powers within the meaning of section 1 of article 13. *Atkinson v. Marietta, etc.*, R. R. Co., 15 Ohio St. 21; *State ex rel. v. Cincinnati*, 20 Ohio St. 18, 26; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *State ex rel. v. Davis*, 23 Ohio St. 434, 443, 444; *State ex rel. v. Covington*, 29 Ohio St. 102, 111; *Neil v. Board of Trustees*, 31 Ohio St. 15, 21; *State v. Powers*, 38 Ohio St. 54, 61; *State ex rel. v. Pugh*, 43 Ohio St. 98, 110, 1 N. E. 439; *State ex rel. v. Smith*, 48 Ohio St. 211, 218, 26 N. E. 1069; *Commissioners v. State ex rel.*, 50 Ohio St. 653, 659, 35 N. E. 887; *City of Cincinnati v. Trustees of Hospital*, 66 Ohio St. 440, 445, 448, 64 N. E. 420; *State ex rel. v. Jones*, 66 Ohio St. 453, 488, 489, 64 N. E. 424, 90 Am. St. Rep. 592.

It is sought to bring the case within this rule by insisting that the road commissioners who issued the bonds constituted a corporation, because the act itself provided they should be "a body corporate." This mere provision did not constitute them a corporation. We must look to their powers and duties, as drawn from the entire act, to determine whether the General Assembly intended to make them a corporation. Counties, townships, school districts, educational institutions, and the boards in charge of them, are denominated by statute "bodies corporate." But it has repeatedly been held that they do not constitute corporations within the meaning of this provision of the Constitution. At the most, they are but local organizations which for purposes of civil administration are invested with a few functions characteristic of a corporate existence. *Board of Commissioners v. Mighels*, 7 Ohio St. 109, 116.

In *Boalt v. Commissioners of Williams Co.*, 18 Ohio, 13, 16, the court dismissed a bill in chancery to enforce the satisfaction of a judgment against the county, on the ground that, although the commissioners were capable of suing and being sued, they did not constitute a corporation, but merely represented the county for limited public purposes; that the county, the real defendant, was not a corporation, but a necessary organization for political purposes under the government of the state.

In *C. & W. & Z. R. R. Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77, Judge Ranney thus defined a county (page 89, 1 Ohio St.):

"But what is a county? It is not *imperium in imperio*, in any sense. It is invested, as such, with no single attribute of sovereignty, and, for reasons already stated, it cannot be. Rightly considered, it is a mere instrumentality, a means in the hands of the legislative power to accomplish its lawful purposes, and to this extent a creature in the hands of its creator, subject to be molded and fashioned as the ever-varying exigencies of the state may require. It would seem to follow that it may from time to time be clothed

with such powers and charged with such duties, of a local administrative character, not vested elsewhere by the Constitution, as the General Assembly may see fit to direct."

In *Board of County Commissioners v. Mighels*, 7 Ohio St. 109, it was held a suit could not be maintained against county commissioners for injuries resulting from their negligence in constructing or maintaining a courthouse, Judge Brinkerhoff saying (page 116, 7 Ohio St.):

"This statute does not in terms declare or constitute either the county or the board of county commissioners a body corporate proper; \* \* \* neither a county nor the board of county commissioners is a corporation proper; it is at most but a local organization which, for purposes of civil administration, is invested with a few functions characteristic of a corporate existence."

In *State ex rel. v. Cincinnati*, 20 Ohio St. 18, in which it was held that the inhibition against the granting of corporate powers by special act applies to municipalities, the court took pains to say that township and county organizations should not be included with municipal and other corporations proper, quoting from *Board of County Commissioners v. Mighels*, 7 Ohio St. 109.

In *Beach v. Leahy*, 11 Kan. 23, Judge Brewer, construing the provision of the Kansas Constitution forbidding the Legislature to pass any special act conferring corporate powers, held that a school district was not a corporation, although the statutes provided that every school district should be "a body corporate," citing *State ex rel. v. Cincinnati*, 20 Ohio St. 18, and saying (page 29, 11 Kan.):

"But with reference to counties, townships and school districts, the case is different. True, they are called in the statute bodies corporate. Yet they are denominated in the books and known to the law as quasi corporations, rather than as corporations proper. They possess some corporate functions and attributes, but are primarily political agencies in the administration of civil government, and their corporate functions are granted to enable them more readily to perform their public duties." (Citing cases.)

In *State v. Davis*, 23 Ohio St. 434, 443, it was held that the board of trustees of the Cincinnati Hospital, although clothed with all the powers to manage the institution, did not constitute a corporation.

In *Neil v. Board of Trustees, etc.*, 31 Ohio St. 15, the board of trustees of the Ohio Agricultural and Mechanical College, the predecessor of the Ohio State University, was held not to be a corporation, the court saying (page 21, 31 Ohio St.):

"It [the act] creates a board of trustees to be appointed by the Governor, \* \* \* and commits to such board the government, control, and general management of the affairs of the institution, and, while the statute authorizes the board to make contracts for the benefit of the college, and to maintain actions, if necessary, to enforce them, and to exercise other powers similar to those conferred on bodies corporate, it does not assume to, nor does it in fact, create or constitute such board of trustees a corporation, and hence does not clothe it with corporate functions or powers."

In the case of *State v. Powers*, 38 Ohio St. 54, it was held that common school districts and boards of education are not corporations within the meaning of section 1 of article 13, although it is provided by



statute that such boards shall be "bodies politic and corporate," Judge McIlvaine saying (page 61, 38 Ohio St.):

"Whether powers conferred by the Legislature upon a common school district be corporate or not, within the meaning of the provision of the Constitution, cannot be determined definitively by the mere fact that such district or its board of education is declared by statute to be a corporation, but rather by the object of its creation and the nature of its functions. The district is organized as a mere agency of the state in maintaining its public schools, and all its functions are of a public nature."

The case of *Beach v. Leahy*, supra, is cited as "a case exactly in point."

Finally, in the recent case of *Thomas v. Board of Trustees of the Ohio State University* (decided Nov. 14, 1904) 195 U. S. —, 25 Sup. Ct. 24, 49 L. Ed. —, the Supreme Court of the United States, following *Neil v. Board of Trustees, etc.*, 31 Ohio St. 15, 21, held that the board of trustees did not constitute a corporation, saying:

"Thus, upon an issue distinctly made, the Supreme Court of Ohio has adjudged that the defendant board is not, and was not intended to be made, a corporation of the state, but only an agency to manage and control a state institution as the state may direct or provide."

Returning to the case at bar, the act (91 Ohio Laws, pp. 543-546) provides that the road commissioners "shall be a body corporate with the powers and duties hereinafter specified." Section 2. To determine whether they constitute a corporation, we must consider the powers conferred and the duties imposed, for they have no other than those specified. They are appointed by the county commissioners, and are removable for cause. Section 2. They have charge, under the county commissioners, of the road improvements which the act provides the county commissioners shall make (section 1), and determine what roads shall be improved (section 6), issue the bonds (section 7), appoint the superintendents and agents, purchase material, enter into contracts, oversee the work, and issue orders for the payment of certain expenses (section 4). They are given no power to sue except for obstructions or injuries to the improved roads. Section 5. Each road commissioner is to receive \$1.50 a day "for every day actually employed," and his reasonable expenses (section 14), and, annually, the board is to report to and make "a full settlement" with the county commissioners (section 12). All of these were powers which might have been exercised by the county commissioners or township trustees, directly, without constituting either a corporation. They did not import corporate existence; they did not make the men who exercised them a corporation. They were none other than the powers and duties ordinarily conferred and imposed upon officers or boards charged with the supervision of public improvements, such as county commissioners, township trustees, school boards, boards of education, trustees of colleges, etc., daily discharge under the statutes, in doing public work, without thereby making themselves corporations. In our opinion, they did not constitute either the road commissioners, or the county commissioners, whose agents they were, a corporation within the meaning of article 13, § 1.

3. The answer admits (in its first defense) that the board of county commissioners, acting under the statute, appointed the defendants below as commissioners of Venedocia Pike No. 1, and that, subsequent to their appointment, the latter issued the bonds, as alleged in the petition, sold them, and that the amount averred in the petition is unpaid. In the fourth defense it is averred that, while the law made it a condition precedent to the action of the county commissioners that a petition be presented signed by a majority of the landowners of the precinct residing within the county, such majority did not sign the petition on which the commissioners acted, and not more than 70 signed out of the total of 160 landowners existing; that the commissioners made no finding that the petition was signed by a majority of the qualified landowners, or that the requested improvement was necessary or conducive to the public convenience or welfare; and that the recital made by the road commissioners in the bonds, "that all acts, conditions and things required to be done precedent to and in the issue of said bonds, had been properly done, happened and performed in regular and due time, and in the manner required by law," was made without authority, and did not operate to estop the making of this defense. We attach no importance to the alleged required finding that the improvement was necessary and conducive to the public convenience and welfare. That the county commissioners so found may be inferred from the fact that they appointed the road commissioners, and proceeded to make the improvement provided in the act. The act itself attaches no importance to this finding, because it provides, in the second section, that "such county commissioners, upon being satisfied that said petition was regular and that proper notice had been given, shall appoint three judicious freeholders of such precinct to be road commissioners," etc., thus ignoring the finding referred to altogether. Under other circumstances, the defense of the irregularity of the petition might be available, but a careful reading of the act has satisfied us that the road commissioners, in issuing the bonds, acted only as the agents of the county commissioners, with their full concurrence, and that the recital may be treated as if made by the county commissioners themselves. The act gave the road commissioners no authority to issue the bonds in any independent capacity. The responsibility of making the improvement was placed upon the county commissioners. Section 1. They were to appoint the road commissioners, and at any time could remove one who proved incompetent, or neglectful of his duties under the act, and supply the vacancy. Section 2. The road commissioners were to supervise the improvement, receiving a fixed sum per day for their services. Sections 4, 14. Whatever they did, they had to report to the county commissioners, and all the proceedings of the county commissioners under the act were to be entered upon their minutes by the county auditor. Sections 12, 2. With respect to the bonds, while they were empowered to issue them, the bonds were to be registered by the county auditor, signed by the road commissioners, and attested by the county auditor, and an immediate report of their issue and sale made to the county commissioners. Section 7. The road commissioners were given no power to levy a tax, but upon the report of

the issue of the bonds the county commissioners were immediately to direct the county auditor to levy the necessary tax, and the funds realized were to be used by the county treasurer and county auditor for the redemption of the bonds and interest. Section 8. Under the Ohio system the county auditor is the secretary of the county commissioners, required to aid them in the performance of their duties, and to keep an accurate record of their proceedings. Rev. St. 1021. All the things required of him under this act were in the line of his duty as secretary of the county commissioners. In this capacity he registered the bonds, attested them, levied the tax, etc. While it is true that a recital made by an unauthorized board or officer is not binding, the rule has no application here. It is conceded the county commissioners appointed the road commissioners, and that the latter issued the bonds, attested by the county auditor, which were sold. This is an admission that the county commissioners appointed the road commissioners for the purpose of issuing the bonds. Having done this, it necessarily follows that they authorized the road commissioners to make the usual recitals required to render the bonds marketable, such as they would have made themselves, namely, that all the things necessary to be done in order to authorize the issue had been done. A purchaser might fairly presume the road commissioners had authority to speak on this point. Certainly, they should have known they were lawfully appointed before they assumed to issue the bonds. At any rate, the county auditor knew, for he was the secretary of the county commissioners, and the act made it his duty to enter the action and finding in question on the minutes of the county commissioners. Section 2. His attestation to the recital made it good. Section 7. As to the county commissioners, if they did not expressly make the recital, they never repudiated, but, on the contrary, acquiesced in and ratified it, for the bonds were not only registered and attested by their secretary, but the issue was reported to them, and the proceeds used for the purposes contemplated by the act. Under the circumstances, justice demands that neither the road commissioners, who issued the bonds, nor the county commissioners, for whom they acted, be permitted to deny their authority to do what they did do, and thus escape the repayment of money obtained on the faith of the regularity of their action, as declared in the recital made to market the bonds. *Andes v. Ely*, 158 U. S. 312, 324, 15 Sup. Ct. 954, 39 L. Ed. 996; *Rondot v. Rogers Township*, 99 Fed. 202, 212, 39 C. C. A. 462, and cases cited; *City of Defiance v. Schmidt*, 59 C. C. A. 159, 165, 166, 123 Fed. 1.

4. The constitutional objections, based upon the provisions of the act for raising the money to make the improvements contemplated, are sufficiently disposed of by what is said in *Board of Commissioners v. Gardiner's Savings Institution*, 119 Fed. 36, 47, 55 C. C. A. 614, citing and following *Loeb v. Trustees*, 179 U. S. 488, 490, 21 Sup. Ct. 174, 45 L. Ed. 280.

The judgment is affirmed.

## CREARY et al. v. WEFEL.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1905.)

No. 1,428.

**ERROR—REVIEW.**

Where it is determined by the appellate court, on an assignment of error presenting the question, that the evidence, which is all in the record, not only warranted but required the verdict that was rendered, further assignments of error relating to the giving and refusal of instructions become immaterial, and will not be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4035-4036.]

In Error to the Circuit Court of the United States for the Northern District of Florida.

W. A. Blount and A. C. Blount, for plaintiffs in error.

Wm. C. Fitts and Richard W. Stoutz, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The plaintiff in error brought to this court, duly incorporated in a bill of exceptions, all of the evidence adduced on the trial in the court below, and, as his first assignment of error in this court, insists that the court below erred in refusing peremptory instruction to the jury to find thereon a verdict in his favor. A full examination and consideration of this evidence in the light of the pleadings has satisfied a majority of the judges that the evidence warranted and required a verdict in favor of the defendant in error, and that the same as rendered does substantial justice between the parties. It follows that the first assignment of error is not well taken, and that the other assignments, all relating to charges given and refused, need not be, and they are not, considered.

The judgment of the Circuit Court is affirmed.

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**BUCK v. MASON et al.**

(Circuit Court of Appeals, Fifth Circuit. February 15, 1905.)

No. 1,417.

**1. INTERPLEADER—PROCEDURE—LITIGATION OF ISSUES BETWEEN CLAIMANTS TO FUND.**

Where, on a bill of interpleader filed by a judgment defendant, by agreement of all the parties, the amount of the judgment was paid into court and the judgment satisfied in full, and an order was entered requiring the judgment plaintiff and the respective claimants to litigate their claims to the fund before the court, and subsequently by further stipulation all except two of those claiming adversely to the judgment plaintiff were paid from the fund, an order made by the court requiring one of the remaining claimants to plead under oath within seven days, and also to give a bond in favor of the other claimant to pay his costs and expenses and interest on the fund, should he establish his claim, was not

warranted, either by the recognized rules of procedure in such cases or by the agreement by which the court obtained jurisdiction, and was erroneous.

**2. SAME—SUFFICIENCY OF EVIDENCE.**

Evidence considered, and *held* sufficient to sustain the findings of the trial court on issues of fact joined between claimants to a fund paid into court on a bill of interpleader.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

Jno. C. Avery and Edgar H. Farrar, for appellant.

W. A. Blount and A. C. Blount, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a bill of interpleader, instituted in the Circuit Court by Martin H. Sullivan against the appellant, Samuel H. Buck, and the appellees, Harry B. Mason and W. A. Milliken, and several other parties, whose interests were disposed of during the progress of the cause, by consent. W. A. Milliken recovered in the Circuit Court for the Northern District of Florida a judgment against Martin H. Sullivan for \$51,202.25. Milliken's creditors brought suit in both the state and federal courts, and sought, by means of garnishment and otherwise, as stated in bill of interpleader, to arrest the payment of the judgment to Milliken and have it applied to the satisfaction of their demands. The bill of interpleader was filed by consent of all parties, as set forth in an agreement signed by and for them, and which stipulated that the fund in dispute should be paid into the First National Bank of Pensacola, subject to the order of the Circuit Court, and that the contesting claimants should litigate in the interpleader suit in the said court as to their rights. The decree entered in pursuance of the agreement provided that:

"Each and all of the claimants to the said money due upon said judgment should litigate with each other and with the said Milliken and the said Mason as to who was entitled to the said money herein ordered to be deposited in the said bank, and, further, the said Milliken mark on the records of this court the said judgment by him recovered against the said Sullivan satisfied in full; and by consent of all the parties to this suit it is further ordered, adjudged, and decreed that the said Sullivan be, and he is, upon complying with the terms of this decree, forever discharged from all liability for or on the said judgment, and from all liability thereafter to each and all and every of the parties to this suit for or on account of any and all matters involved in any and all of the said suits," etc.

The record shows that all claims against Milliken were paid by consent of all parties, except the claim of Harry B. Mason and the claim of Samuel H. Buck. After deducting these payments there was left the sum of \$34,856.34. The claim of Buck being supposed not to exceed \$22,000, an order was made *ex parte*, Milliken not objecting, to pay over \$12,856.34 to Mason. Immediately upon the above payments being made, upon motion of Mason, the court made the following order:

"It is ordered that on January 25, 1904, at 11 o'clock a. m., the remainder of the fund deposited in the First National Bank of Pensacola on January 18, 1904, in this cause, said remainder being the sum of twenty-two thousand

dollars (\$22,000), shall be paid over to the said Harry B. Mason, unless S. H. Buck shall before said time make and file in this court a bill of complaint or petition setting forth particularly and definitely the particulars of his claim against the defendant W. A. Milliken and against the said fund, and shall verify the said bill or petition by his oath, and shall make and execute and file in this court a bond, with good and sufficient security, to be approved by the clerk of this court, in the principal sum of \$5,000, conditioned to make good to the said Harry B. Mason any loss which he may sustain by reason of the impounding of said sum of \$22,000 under order of this court as aforesaid, and the costs and expenses taxable and incurred herein, and to pay to the said Harry B. Mason interest upon the said sum at 8 per cent. per annum for the length of time during which the said sum shall be detained upon deposit aforesaid, because of the pendency of the claim of him, the said S. H. Buck, thereto, in the event that the said Harry B. Mason shall be declared entitled by this court to receive said deposit at the end of the said litigation.

**"January 18, 1904."**

And on the 22d of January counsel for appellant, Buck, moved the court to set aside the order made upon the application of Mason upon the following grounds:

**"(1) Because the said order is beyond the jurisdiction of this honorable court.**

**"(2) Because there is no authority in the law for the making of such order.**

**"(3) Because the said order is unwarranted by the practice of this honorable court.**

**"(4) Because the said order in effect deprives the movant of his right in the premises without an opportunity to have the same legally adjudicated.**

**"(5) Because the same is contrary to the spirit and intention of the agreement and order bond therein entered into between the complainant and the several defendants, including said Mason, by virtue of which the bill of interpleader herein was filed and this action commenced."**

Such application appears to have been denied upon the same day as made. The making and enforcing of this order is the ground of the first error assigned on this appeal.

At the time of this order, requiring Buck within seven days to plead under oath and give bond to secure the fund in court and interest thereon, Buck himself was in the city of New York and his counsel in Pensacola, and it is evidence of his belief in the justice of his claim that he complied with the hard conditions, although it resulted in a petition requiring substantial amendment to fit the actual evidence afterwards taken in the case. The order to plead and give bond within such short delay was not only a hardship, but, so far as we are advised, was without precedent in bills of interpleader, and was a distinct enlargement, if not actual violation, of the agreement under which the court obtained jurisdiction of the case and the fund. In view of the fact that Milliken was the prima facie owner of the judgment against Sullivan, and prima facie entitled to receive the money paid thereon, it is easy to see that Buck's position was that of actor, and it was proper to require him to plead according to the equity rules. Beyond this, the order was erroneous.

Martin and Milliken pleaded, but not under oath, taking issue with Buck's bill, and thereupon the court made an order for the taking of testimony, and after testimony was taken Buck desired to amend his petition so as to make it better conform to the case which he claimed had been established by the evidence, and he made application for leave to

file such amended petition. The court, without passing upon the application until after the argument and the consideration of the cause on final hearing, thereafter proceeded to a decree refusing Buck's leave to file his amended petition and adjudging that the \$22,000, the fund in court, belonged to Mason, and should be turned over to him, and further adjudged against Buck and his surety on the indemnity bond the costs of the proceeding and the further sum of \$782.18, amount of interest at the rate of 8 per cent. per annum upon the said \$22,000 from the 18th day of January, 1904, to the date of the decree.

Buck's contention, as set forth in his amended petition, is substantially as follows: In the month of April, A. D. 1900, Milliken assigned to Buck and one C. L. Rathborne a half interest in what he should become entitled to under the terms of the contract between him and Sullivan, in consideration of Buck and the said Rathborne aiding and assisting Milliken in the performance of said contract. Buck thereafter did aid and assist Milliken in such performance, and thereafter, in connection with such performance, Buck, at the request of Milliken, loaned him during the year 1900 \$175, to be used by Milliken in the prosecution of a suit by him against Sullivan for the recovery of money owed under the terms of the contract. That Milliken was indebted to Buck and Rathborne in the sum of \$12,000, in which Buck had a half interest. That Milliken was permitted to become indebted to Buck and Rathborne in said sum in consideration of Milliken's assignment to Buck and Rathborne, as collateral security for said indebtedness, of one-half of Milliken's interest in his claim against Sullivan. That on the 3d of April, 1900, in consideration of the money loaned by Buck as aforesaid, and of the indebtedness of Milliken to Buck and Rathborne as aforesaid, and of the interest which Buck then owned in Milliken's claim against Sullivan, Milliken agreed with Buck to pay him one-half of such sum as he might obtain from Sullivan. Prior to the time of making the agreement last mentioned between Buck and Milliken, the latter informed Buck that Rathborne had abandoned all claim to any interest, and that therefore Milliken made the interest of Buck one-half instead of one-fourth, as it would otherwise have been. Then the recovery of the judgment is set forth in accordance with the statements in the bill of interpleader, and the petition goes on to allege that, if Mason is entitled to any portion of the judgment, he is not entitled to as much as one-half thereof, and had before the filing of the petition been paid a great deal more than the actual consideration paid by him for the alleged assignment of the judgment, and, further, that, if any assignment was made by Milliken to Mason, it was for the purpose of constituting a collateral security for money advanced to Milliken by George Mason, deceased, upon whose estate Harry B. Mason was administrator, and that, after allowing to the said Harry B. Mason all of the money advanced by his intestate and by him, the said Harry B. Mason, and the legal interest thereon, and after allowing Milliken all of the expenses incurred by him in obtaining judgment against Sullivan, there still remained \$22,000, which Buck prayed should be turned over to him.

Mason set forth his claim in an unsworn answer substantially as follows: He states that the allegation that he had knowledge of Buck's claim is false, and that the assignment under which he claims is bona

fide and upon a valuable consideration, in pursuance of a written contract between Milliken and Mason's father, George Mason, now deceased, for money loaned by George Mason to Milliken, and for which he holds several promissory notes of Milliken, payable to George Mason, dated at different dates during the years 1900 and 1901, amounting to about \$10,000. These notes came to Mason's hands as administrator of his father's estate. After his father's death he continued to assist Milliken financially by lending him such sums of money as he called for, for most of which he took from Milliken promissory notes, amounting to about the sum of \$7,000. For the use of the various sums loaned by George Mason, Milliken agreed, by written contract of April 16, 1900, to assign one-third of his commissions owing by Martin H. Sullivan to George Mason. After the reversal of the first judgment against Sullivan by the Circuit Court of Appeals at New Orleans, in January, 1902, it became necessary to begin suit again in the lower court, and Milliken gave Mason a written agreement to assign him an interest of one-half of his recovery against Sullivan, to include the one-third interest due the estate of George Mason, deceased. After recovery of the second judgment against Sullivan, November 29, 1902, Milliken by written assignment, in pursuance of former contracts, as stated in the answer, in consideration of various sums of money loaned him by George Mason and by Harry B. Mason, transferred and assigned the whole judgment to Henry B. Mason, which was accepted in good faith, upon bona fide consideration, and without knowledge or information of Buck's claim. That Harry B. Mason, to aid Milliken in settling up claims brought against him, consented to the sum of \$5,000 being paid to Hattie B. Scales and the sum of \$1,500 to C. B. Leet out of the money paid in on the Sullivan judgment. The claim of Buck is denied.

Milliken filed an unsworn answer, in which he pronounces false Buck's claim that Milliken has assigned to him, as stated in Buck's petition. He denies that Buck had any connection with the sale of the lands. He denies that \$175 advanced by Buck was used by him in the prosecution of his suit against Sullivan. The material part of the answer is that in which Milliken says, referring to the assignment made by him to Harry B. Mason of the judgment against Sullivan, that:

"Said assignment was made in good faith by respondent upon a valuable consideration paid respondent by said Mason and his father, George Mason, now deceased."

It is not necessary, nor would it be profitable, to review in detail the evidence in the bulky record of the issues between the appellant and the appellees. The conflict is direct between Buck and Milliken, and we are unable to reconcile their statements as to facts in regard to matters where it does not seem possible that either, with the interests involved, can be mistaken. Among the letters of the parties and the written papers put in evidence, we find the following acknowledgment in favor of Buck:

"Sam'l H. Buck, Esq., City—Dear Sir: In case I succeed in making any compromise of my claim in Sullivan land matters, I will pay over to you one-half of the amount I settle for. Yours truly,

"[Signed]

W. A. Milliken."



As to this Milliken says.

"I agreed with Mr. Buck that, if he would lend me the money I would need to prosecute a suit against Sullivan to collect my commission for the sale of his timber lands, I would give him half of what I recovered. This agreement was verbal, and was made about the 8th or 9th of March, 1900. \* \* \* My only promise to give him an interest in said commission was based upon his promise to furnish me the money to carry on my suit against Sullivan, and this he wholly failed and refused to do. From the time Mr. Buck obtained from me the letter of April 8, 1900, up to this good day, he has never furnished, nor offered to furnish, me one dollar for any purpose. At my last meeting with him, about April 14, 1900, he said he could not then lend me any more money, nor could he furnish me money for my expenses, and he said I would have to make some other moneyed arrangement."

From this on there was correspondence between Buck and Milliken, in which Buck persistently asks for payment of personal loan of \$175, and seeks information as to Milliken's progress in collecting claim against Sullivan, and in which Milliken fences and avoids, neither admitting nor denying, Buck's interest. When Buck writes, in letter of September 27, 1900, "Please let me hear from you what you are doing with our claim against Mr. Sullivan," Milliken answers, on September 28, 1900:

"I have collected nothing on my claim against Sullivan, and do not expect ever to get a penny out of him, except at the end of a long and expensive lawsuit."

January 4, 1901, Buck writes:

"Please advise me what steps you have taken to collect claim against M. H. Sullivan, in which we are jointly interested."

Milliken answers, January 8, 1901:

"I have never received a penny from Sullivan, and never will, if he can possibly beat me out of it. I have sued him for damages, and hope to make him pay me at least for my services and expenses," etc.

In regard to this correspondence Milliken testifies:

"I recognized, from the insidious manner in which Mr. Buck referred to his interest in my claim for commissions in his various letters to me dunning me for the \$175 I owed him, that he was endeavoring to secure from me an admission of his claim in some way, which I refused to recognize. I ignored his claim, knowing it had no foundation to rest on, binding in law, equity, or good morals."

On the whole written evidence the preponderance seems in favor of Buck. The real difficulty is in regard to any consideration passing from Buck to support the assignment he claims. It does not appear that he ever rendered any substantial assistance in finding a purchaser for, or aided in disposing of, the Sullivan lands. His firm, Rathborne & Co., did write to an English correspondent, but it came to nothing. The \$175 loaned from time to time by Buck to Milliken was always treated by Buck as an independent debt, for which he dunned Milliken persistently and frequently for payment, as though having no reference to the Sullivan claim.

As to the indebtedness of Milliken to Rathborne & Co., growing out of speculations in stocks, which Rathborne swears passed to him—and he is corroborated by the writings—by the settlement of the affairs of that company, Buck had no interest in that; and it is proper to note

in this connection that in October, 1901, Buck endeavored to secure whatever interest Rathborne had in the Sullivan claim as growing out of the affairs of Rathborne & Co., for he proposed an assignment on terms, as shown by documents not disputed, to wit:

"Chas L. Rathborne,  
"Member N. Y. Stock Exchange.  
"R. W. Rathborne, Jr.

"Telephone, 2102 Cortlandt.  
"Cable, 'Glyborne.'

"Rathborne & Son, Bankers & Brokers, 7 Wall Street.

"New York, Oct. 14, 1901.

"I hereby agree to pay over in kind one-fifth of all I may receive from the claim of W. A. Milliken vs. H. M. Sullivan for commissions on sale of timber lands in Alabama and Florida for General R. A. Alger and his associates.

"[Signed]

S. H. Buck.

"Witness:

"W. S. Young,  
"30 Broad St., N. Y. City."

"Chas. L. Rathborne.  
"Member N. Y. Stock Exchange.  
"R. W. Rathborne, Jr.  
"Member N. Y. Stock Exchange.

"Telephone, 2102 Cortlandt.  
"Cable, 'Glyborne.'

"Rathborne & Son, Bankers & Brokers, 7 Wall Street.

"New York, Oct. 14, 1901.

"For one dollar paid in hand, the receipt of which I hereby acknowledge, and other valuable considerations, I hereby sell and transfer to Samuel H. Buck, of this city, all my rights and title in and to the claim of W. A. Milliken of Washington, D. C., against H. M. Sullivan, of Pensacola, Florida, for commissions, etc., on the sale or transfer of certain timber lands in Alabama and Florida to General R. A. Alger and his associates.

"Given under my hand in New York City, this 14th day of October, 1901.

"Witness:

"In handwriting of W. S. Young, 30 Broad St."

March 9, 1904, Buck wrote to Rathborne as follows:

"New York, March 9, 1904.

"Mr. C. L. Rathborne, Mt. Kisco, New York—Dear Sir: I have had several talks with Walter and he has doubtless explained the importance of my proving by you only two points: (1) That Milliken originally, before sale was effected, gave you and myself one-half interest in whatever commissions he collected for the sale of lands belonging to Sullivan lying in Alabama and Florida. (2) That my interest was not included in my assignment to you. This is very important to enable me to complete my case. If you will consent to give this testimony on Friday, about noon, I will be glad to meet you in Walter's office. Please let me know if you will consent to do so.

"Yours very truly,

Sam'l H. Buck."

It is not easy to reconcile these papers, taken in connection with the evidence of Rathborne, with the claim of Buck that he had an interest in Milliken's claim against Sullivan for commissions in selling the Florida lands, because and growing out of the transactions of Milliken with Rathborne & Co. The admissions of Milliken as to Buck's interest in the Sullivan claim, as proved by Mr. Nicoll, lose force, because at that time Rathborne & Co. held as collateral the note of Sullivan conditionally promising to pay commissions. The burden of

proof to establish his claim is properly on Buck. According to the decree of the lower court, he failed to satisfy the trial judge. In our judgment, on the whole evidence, the case is too close for this court, by a majority of judges, to decree that the lower court erred in its finding.

For the reasons herein, the decree of the Circuit Court is amended, by striking out all that part condemning Buck to pay interest, in the third paragraph thereof, and condemning Buck and the Ætna Indemnity Company, his surety, to pay interest and costs, as in the fourth paragraph thereof, and, as amended, the same is affirmed. The appellant to have and recover costs in this court, including costs of transcript.

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ROSNEY v. ERIE R. CO.

(Circuit Court of Appeals, Second Circuit. January 25, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS.

All of the employes of a railway company engaged in operating either of two colliding trains were fellow servants of a fireman on one of the trains.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 504, 506-509.]

2. SAME—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a locomotive fireman in a collision between his train and a train engaged in switching in a railroad yard, evidence held insufficient to require submission to the jury of defendant's alleged negligence in failing to provide sufficient help on the switching train, and in providing a yard crew incapacitated from overwork.

3. SAME—YARD RULES—SUFFICIENCY.

Where a railroad rule provided that yard limits at certain points were designated by signs, and that it would not be necessary for any engine or train occupying the main track inside of the yard limits to be protected by flagmen, except when in the time of a first-class train, it was explicit in meaning, and sufficient to protect a train on the main track within the yard limits of one of the places so designated against collision with a switching train in the yard.

4. SAME—AUTOMATIC COUPLERS—AIR BRAKES—STATUTES.

Act March 2, 1893, 27 Stat. 531, c. 106 [U. S. Comp. St. 1901, p. 3174], as amended by Act March 2, 1903, 32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1903, p. 367], requiring common carriers engaged in interstate commerce to use automatic couplers and air brakes on engines and cars used in interstate commerce, has no bearing in an action for injuries to a fireman by a collision in a railroad yard, where there was no proof that the engine and cars in collision were used in interstate commerce.

In Error to the Circuit Court of the United States for the Southern District of New York.

A. Delos Kneeland, for plaintiff in error.

Frederic B. Jennings and Winfred T. Denison, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The action was brought by the plaintiff, as widow of John H. Rosney, to recover damages for his death which

occurred at 6:40 o'clock on the morning of December 27, 1901, at East Honesdale, Pa., while he was in the employ of the defendant as fireman, by reason of a head-on collision between his engine and another engine belonging to the defendant. The engine on which Rosney was employed (No. 1,314) was engaged in hauling a train of 55 or 60 empty coal cars from Hawley to East Honesdale under orders directing that the engine "run extra" between these places. So far as mechanical means and appliances are concerned this train was in perfect condition. The engine and train were provided with air brakes properly connected and when the train started from Port Jervis, the evening before the accident, the headlight and two classification lights were burning brightly. The train was properly manned: in addition to the engineer and fireman there was a conductor, a flagman and two brakemen, six in all.

The switching train with which the extra freight train collided in the yard at East Honesdale consisted of 13 or 14 loaded cars drawn by engine No. 1,160. The engine was provided with air brakes but the air brakes on the cars were not connected. The crew consisted of an engineer, fireman and two brakemen. The extra freight had just pulled into the yard and had almost come to a standstill at the water tower, where the engineer intended to take water, when the collision occurred. That the engine had almost stopped is demonstrated conclusively by the photographs in evidence which show the engines in collision almost directly opposite the water tower. The switch engine was also moving slowly just before the collision, not exceeding from two to four miles an hour. The impact was not serious, the damage to the engines being comparatively slight and the damage to the cars infinitesimal. The yard rule was as follows:

"Yard Limit at the following named points are designated by Yard Limit Signs: Port Jervis, Lackawaxen, Hawley, East Honesdale and Deposit. It will not be necessary for any engine or train occupying the main track inside of the yard limits to be protected by Flagmen, except when in the time of a First Class Train. All trains must be governed accordingly."

We incline to agree with the statement of plaintiff's brief that "there is not a scintilla of proof that the crew on the train drawn by No. 1,314 were in any wise negligent." The only fault imputed to them is that the headlight was out immediately preceding the collision. On the proof this was a question of fact which, if at all relevant to the decision, should have been submitted to the jury, but in our view it is not material to the present issue. If the light were out it was due to the carelessness of the engineer of the road engine; if it were alight the engineer of the switch engine should have seen it. In neither event can any fault be imputed to the defendant. All of the employees of the defendant engaged in operating either of the colliding trains were co-servants with Rosney. *New England Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Northern Pacific Railroad v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Northern Pacific Railroad v. Poirier*, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72. Therefore, if the collision happened because of the negligence of one or more of these men without contributing fault on the part of the defendant it is manifest that the plaintiff cannot succeed. If, as we have seen, the collision were due to the light being out on engine No. 1,314 that was

the fault of the engineer. It was equally his fault if, after seeing the switch engine, he failed to stop promptly. If the collision were due to the absence of Murtha, the switchman, temporarily, from his post, or to the failure of the engineer or fireman of engine No. 1,160 to see the approaching train or to reverse the engine or apply the air brakes in time, the carelessness must be imputed to these men respectively.

But the plaintiff contends that it should have been submitted to the jury to say whether the defendant was not in fault,—First; in failing to provide sufficient help upon the switching train: second; in providing a yard crew incapacitated from overwork: third; in failing to provide sufficient rules and a proper system for the management of the yard.

In approaching the consideration of these questions, it is wise to bear in mind that in an action by a servant no presumption of negligence attaches from the happening of the accident and that the burden is upon the plaintiff to establish, as an affirmative fact, that the employer has been guilty of fault.

In *Patton v. Texas & Pacific R. Co.*, 179 U. S. 658, at page 663, 21 Sup. Ct. 275, at page 277 (45 L. Ed. 361), the court says:

"It is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

There is no evidence that the yard crew was insufficient to do the work required. There was an engineer, a fireman and two brakemen. The fact that but one brakeman was aboard at the time of the collision was not the fault of the defendant. The other brakeman had stopped at the depot for a moment but for what purpose is not disclosed. That such a crew was incompetent to do the work in a switching yard where trains are necessarily composed of comparatively few cars and where high speed is impossible, has nowhere been shown. Although the train in question had but 13 or 14 loaded cars it is argued that if there had been another brakeman on the front of the train "this accident would have been averted." The argument in effect concedes the point that two brakemen were sufficient, and two brakemen were provided by the defendant. Whether a second brakeman on the train would have prevented the accident is, of course, conjectural. The train was a short one; it was proceeding at a slow rate of speed and if the engineer had seen the road engine in time, he could, in all probability, by using the air brakes on the engine, have stopped in time, even had there been no brakeman at all on the train. A second brakeman might have assisted in stopping the train if he had seen the other engine in time, but whether he would have done so is wholly problematical. It is enough that there is no evidence that one brakeman was unable to do the work at the Honesdale yard and certainly there is no evidence that two brakemen could not have done the work.

The entire argument of the insufficiency of the crew is based upon the inferences of ingenious counsel unsupported by the evidence. The

same crew had been employed in the yard for a year prior to the accident and it is not pretended that they were incompetent or that there had been the least difficulty in handling the business with promptness, care and prudence.

The case of *Flike v. Boston & Albany Railroad*, 53 N. Y. 549, 13 Am. Rep. 545 and the similar case of *Booth* against the same defendant, 73 N. Y. 38, 29 Am. Rep. 97, are not in point. In these cases the defendant was held liable because it sent out regular freight trains inadequately supplied with brakemen on a road where the grades were heavy and where the trains were dispatched only five minutes apart. The trains broke in two, as they were liable to do; the brakemen were unable to control the rear portions and collisions occurred with engines which were following. In the case at bar all these elements are wanting. There is no proof of similar accidents occurring in the Honesdale yard; no proof that two brakemen were unable to control a train of 14 cars, and no proof that the accident was caused by any neglect of duty in this regard on the part of the defendant. Negligence cannot be supported by theories based upon the imagination of counsel.

The argument that the switching crew was incapacitated for performing their duties by long-continued overwork is also based upon inference. It is another instance where theory is opposed, irreconcilably, to fact. One of the witnesses testified that the crew had worked from 16 to 18 hours daily for a month preceding the accident, another, that the average was about 14 hours. But it also appears that, before beginning the trip on which they were engaged at the time of the accident they had been off duty for 12 hours and that they had been allowed an hour each for dinner, supper and at midnight. We are not here concerned with the question whether or not the hours were too long or the work too arduous; the only pertinent question is, were the men unable to discharge their duties; were they asleep, unconscious, dazed or incompetent? Were they incapacitated by overwork either mentally or physically? Not only is there a total absence of proof that they were in this condition, but, on the contrary, the evidence shows that they were all awake, watchful and alert. It may be conceded that 16 hours a day is too long a period for any human being to toil, but it does not follow that one who labors that length of time becomes, by reason thereof, an inefficient workman. In the present instance, so far as we can judge from the testimony, the work was not of a particularly engrossing character, it did not require great physical or mental exertion. It is, however, enough to say that where the undisputed fact appears that the men were wide awake there is no room to indulge in the inference that they were asleep. There is not, so far as the record discloses, the slightest evidence connecting the collision with the previous hours of employment.

Again, it is argued that the yard rule, heretofore quoted, was improper, ambiguous and insufficient. It is urged that it was incumbent on the defendant to provide a safe and intelligible system for the government of its yard and its failure to do so was negligence. The yard rule is clear and explicit: there is no mistaking its meaning. A train occupying the main track within the limits of the yard at Honesdale is not required to protect itself by flagmen except during the time that

a first class train is expected. The extra freight train, therefore, had no right to expect a flagman to give warning of the presence of the switching train on the main track. The absence of a flagman did not indicate a clear track through the yard and each train was required to take notice that another train might be approaching, and proceed with caution. In the absence of proof to the contrary the court cannot say that this rule was unsafe or improper. It had been in use for some time and no accident had occurred because of it, no railroad expert has condemned it, and it appears to be similar in language and identical in principle to rules upheld and commended by the courts in other cases. In making these rules the effort of the railroads unquestionably is to adopt the plan which will afford the surest and safest protection to life and property. The dictates of humanity and self-interest alike impel to this course and the courts are slow to substitute their judgment upon questions of railroad management for the judgment of practical men who have spent their lives in solving such problems. No one can read the rule in question without being impressed with the fact that its purpose was to enjoin the utmost caution upon all trains using the main track in the yard. A first-class train seeing no flag could run through at regulation speed but all other trains were required to slow down and proceed under perfect control. Some of the additions and amendments suggested by counsel are plainly impracticable and have been criticised and rejected by the courts. If the defendant had attempted to make a rule to cover all possible contingencies—such a condition, for instance, as existed on the morning in question, with falling snow and slippery tracks,—it would have resulted, as such attempts generally do, in lamentable failure. An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation.

In *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, the Supreme Court says:

"The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. . . . It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant."

To the same effect are *Maher v. Railway*, 106 Fed. 309, 45 C. C. A. 301; *Southern Railway v. Craig*, 113 Fed. 76, 51 C. C. A. 53; *Morgan v. Hudson River Railroad*, 133 N. Y. 666, 31 N. E. 234; *Berrigan v. N. Y., L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57; *Little Rock v. Barry*, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349.

Counsel for the plaintiff has shown great industry in collecting authorities bearing upon the duties of the master to his employes, but we think that none of them would have justified the trial court in holding that the yard rule was inadequate or improper, or in submitting the question of its inadequacy to the jury. There was nothing to show that the rule had been ineffectual in the past and no testimony that the

changes suggested in the brief would have improved it. The court in the Berrigan Case, *supra*, says:

"In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads or of persons possessing peculiar skill and experience in the management and operation of railroads to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury."

In *Larow v. N. Y., L. E. & W. R. R.*, 61 Hun, 11, 15 N. Y. Supp. 384, the court says:

"If the principle involved in this case is to be upheld, it would seem to follow that in every case of an injury to an employé ingenious counsel would be able to invent some rule and claim that it should have been adopted and promulgated by the company, and thus present a question as to the defendant's negligence. \* \* \* I am of the opinion that before a railroad company can be found guilty of negligence in not making and promulgating any certain rule, it must at least be shown that the rule is practicable, proper, and, if observed, would give reasonable protection to its employés."

No amount of care and caution on the part of the rule maker could have foreseen the unfortunate combination of circumstances which resulted in Rosney's death. The accident happened because of the mistake of the train crews, one or both, which no finite intelligence could have anticipated.

The act of Congress of March 2, 1893, 27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174], amended March 2, 1903, 32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1903, p. 367], requiring common carriers engaged in interstate commerce to use automatic couplers and air brakes on engines and cars used in interstate commerce has no bearing upon the present controversy. Assuming that the act applies to cars being shunted about in a switching yard where, from the nature of the business it would be impracticable, if not impossible, to connect up the air brakes, it cannot be invoked in the present instance for the reason that there is no proof that the engine and cars were used in interstate commerce. In *Johnson v. Southern Pacific Co.* (decided Dec. 19, 1904, by the Supreme Court) 25 Sup. Ct. 158, 49 L. Ed. —, the engine and car in question were both used in interstate commerce.

It is unnecessary to consider the exceptions to the admission and rejection of testimony as they have no appreciable bearing upon the principal question.

We are clearly of the opinion that the plaintiff has failed to prove any negligence on the part of the defendant.

The judgment is affirmed.



## In re 2,098 TONS OF COAL.\*

## THE IONIA.

(Circuit Court of Appeals, Seventh Circuit. January 8, 1905.)

No. 1,082.

**1. SHIPPING—DEMURRAGE—COMMENCEMENT OF LAY DAYS FOR DISCHARGING.**

Under a bill of lading requiring a vessel to deliver a cargo of coal at a specified dock, the voyage is not completed, and the lay days for discharging do not commence to run, until she reaches such dock and is in condition to discharge, unless she is prevented from reaching it through the active fault of the charterer or consignee.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 592.

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

**2. SAME—TIME FOR DISCHARGING—REASONABLE DISPATCH.**

Where a charter party or bill of lading contains no provision with respect to the lay days for discharging, an implied obligation arises on the part of the charterer or consignee to give the vessel reasonable dispatch, determined by the circumstances then existing; but in such case he is not an insurer against delay, nor liable because of delay caused by circumstances beyond his control, such as the presence of another vessel discharging at the dock where delivery is to be made, and which is the only one available, or by a temporary derangement of the dock machinery used for discharging, which he could neither anticipate nor prevent.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 580-582.]

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In Admiralty.

For opinion below, see 128 Fed. 514.

This is a libel in rem filed by the Ionia Transportation Company, the owner of the steamer Ionia, against her cargo of coal, for demurrage, for delay in unloading at the port of Racine. The second article of the libel charges that in October, 1903, the Kanawha Fuel Company shipped on board the steamer Ionia, lying at the port of Toledo, in the state of Ohio, a cargo of coal, to be therein carried from the port of Toledo to the port of Racine, Wis., and there delivered to the Weaver & Austin Coal Company, Clancy Dock, Racine, Wis., or its assigns. By the third article of the libel it is charged that on October 24, 1903, the steamer set sail from Toledo with the coal on board, for the port of Racine, and there safely arrived at noon of the 29th of October, 1903, ready to unload and discharge her cargo at Clancy Dock, and so notified Clancy & Co., the owners of and in charge of the dock, on the 30th of October; that Clancy & Co. disclaimed any interest in the coal, stating the owners of it to be the J. I. Case Threshing Machine Company, of Racine; that the latter company was by the master on the 30th day of October notified of the arrival of the steamer; that no immediate steps were taken to unload the vessel; and that the master made claim for \$150 per day for demurrage, the claim to take effect 24 hours after the arrival of the vessel. By the fourth article it is charged that the owners of the cargo were not ready to receive, but paid \$1,000 to apply on freight, leaving a balance for freight of \$259. The libellant claimed damages for detention in the sum of \$1,800. Upon seizure of the coal, the J. I. Case Threshing Machine Company, claimant, bonded the coal, and, intervening for its interest as owner of the cargo, answered, admitting the second and third articles of the libel, and alleged that J. F. Clancy & Co., of Racine, owned

\* Rehearing denied February 10, 1905.

and operated the coal dock at the port of Racine known as the "Clancy Dock," which was specially fitted with apparatus for unloading coal-laden vessels, and was the only obtainable dock at the port of Racine specially fitted for the unloading of coal laden vessels, or at which the steamer *Ionla* could be discharged; that it had not the capacity to discharge more than one vessel at a time; that Clancy & Co. for a long time had been engaged in the business of coal wharfingers, unloading coal-laden vessels at that dock, all of which was known or ought to have been known to the libellant at the time of the shipment of the coal; that prior to the shipment the respondent had made arrangements with Clancy & Co. to discharge the steamer *Ionla* at that dock; that, upon the arrival at the port of Racine of the steamer *Ionla* with the cargo of coal, the steamer *Marina*, also laden with a cargo of coal consigned to others than the respondent, was discharging her cargo at the Clancy Dock; that the capacity of the dock did not admit of the discharge of more than one steamer at a time; that the *Marina* was discharged on November 12, 1903, and thereupon the *Ionla* was at once given the dock, and was promptly discharged and unladen; that any delay caused to the steamer *Ionla* in obtaining a place at the dock was caused by reason of the prior arrival and presence at the dock of the steamer *Marina*, over which the respondent had no control, and not by any negligence, fault, or other cause attributable to, or under the control of, the respondent or the shippers of the coal; that, if the steamer *Marina* was not promptly discharged upon her arrival at the dock, the same was not caused by any negligence, fault, or other cause attributable to, or under the control of, the respondent or shippers of the coal; that the respondent, as owner of the cargo, was at all times after the arrival of the *Ionla* ready to receive and unload the cargo so soon as the steamer *Marina* had been discharged and was out of the way; and that the *Ionla* was given a berth and promptly discharged so soon as the steamer *Marina* was out of the way. The respondent admitted the balance on freight of \$259, which sum it tendered to the libellant, and deposited in the registry of the court for the use of the libellant.

The facts are as follows:

Long before the shipment, Clancy & Co. owned the dock in question, which was specially fitted with apparatus for unloading coal vessels, one at a time, and was the only obtainable dock at Racine at which vessels such as the *Ionla* could be discharged; the dock being located below the bridges across the river at Racine, and the *Ionla* being too large to pass the bridges. The only other coal dock below the bridges was that of the gaslight company, which was not available. The owners of the dock were accustomed to unload not only their own coal, but unloaded coal-laden vessels for others. The apparatus for unloading vessels at the dock consisted of the "bucket system." In October, 1903, Clancy & Co. changed the system to that of the "clam-shell system," which employs an iron bucket, opening like a clam shell, and, dipping into the cargo, closes and unloads automatically—it being thereby intended to do away with stevedores—and is supposed to operate much more rapidly than the bucket system. The clam-shell system had been for some time in use in the ports of Milwaukee, Chicago, Manitowoc, Sheboygan, and Escanaba. About October 19, 1903, while Clancy & Co. were engaged in changing the system, the owners of the steamer *Marina*, then lying coal-laden at the port of Milwaukee, which was blocked with coal-laden vessels waiting their turn to discharge, applied to Clancy & Co. to ascertain if they could discharge her at the port of Racine, to which they replied that they would if the vessel would wait until they had finished putting in the clam-shell system. This being agreed to, the *Marina* arrived in Racine October 19th. On October 28th, the day previous to the arrival of the *Ionla*, the discharge of the *Marina's* cargo of coal at the Clancy Dock commenced, working with one "clam-shell," and installing others from time to time as fast as they were furnished by the manufacturer, who guaranteed them to do the work. They were not, however, furnished promptly by the manufacturer, and, when put in, did not work satisfactorily, but now and then broke down. Clancy's Dock was lighted by an independent electric plant on the dock. During the unloading of the *Marina* this plant burned, neces-

sitating a new wiring of the dock before connection could be made with the city lighting plant, during which time a short day's work was done both on the Marina, and afterward on the Ionia, occasioning a delay of 1½ hours a day. No claim is made by the libellant for demurrage for any loss of time on account of the destruction of the electric light plant. By reason of the failure of the "clam shells" to work as guaranteed, the burning of the electric lighting plant, and some rainy weather for part of a day, the final discharge of the Marina was delayed until November 11th. Immediately after her discharge the Ionia was given a berth at the dock, the bucket system was restored, and she was completely discharged with good dispatch on November 16th at noon; being delayed for a part of a day by heavy rain.

The respondent had a coal dock near the Clancy Dock, but the depth of water was insufficient to accommodate large coal-laden vessels, like the Ionia. The respondent had contracted with Clancy & Co. that the latter should receive several carloads of coal at their dock, and transfer the same to the coalyard of the respondent. The steamer Ionia was chartered by one Gilchrist, of Cleveland, and the master got his orders from Chamberlain, in Detroit. The master states that in a conversation with Mr. Cowling, the representative of the respondent at Racine, he was told that the cargo had been shipped about six days ahead of their orders; and Cowling laid it to the Weaver & Austin Coal Company, who were the consignees. The bill of lading is dated at Toledo, October 24, 1903, and is as follows:

"Shipped in good order by K. F. Co. for account and risk of whom it may concern, on board the Str. Ionia, ..... whereof ..... is Master, now lying in Port of Toledo, Ohio, and bound for Racine, Wis., the following articles, to be delivered in like good order, at the Port of destination, (the dangers of navigation, fire, collisions and breakage of canals only excepted) unto the Consignee named in the margin or to ..... Assigns.

"In Witness Whereof, The Master of said Vessel hath affirmed ..... Bills of Lading of this tenor and date, one of which accomplished, the other to stand void.

"Weaver & Austin Coal Co.  
Clancy Dock,  
Racine,  
Wis.

1200-800 tons  
¾ Lump  
888-1900 tons  
ROM Coal

Total

2098-700

Rate 60 Cents.

R. J. MEFFORD."

The date of chartering does not definitely appear. It was probably about the 21st of October. There is no evidence that when the vessel was chartered either the representative of the vessel or of the cargo had knowledge of any fact that might cause detention of the boat upon her arrival at Racine.

Upon the hearing below, the court pronounced for the libellant for the balance of the freight money claimed, and pronounced for the respondent that the claim for demurrage be dismissed, from which decree the libellant appeals to this court.

John C. Richberg, for appellant.  
George D. Van Dyke, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

The obligation of the Ionia was to deliver her cargo at a particular dock. The voyage was not completed, nor was her obligation discharged, until she reached the designated place of discharge, ready to deliver her cargo. The ship must reach the place designated. *Murphy v. Coffin*, 12 Q. B. D. 87; *Dahl v. Nelson*, 6 App. Cas. 38, 44; *Basti-*

fell *v. Lloyd*, 31 L. J. Ex. 413. In the latter case, by the terms of the charter party, the ship was to proceed to Mr. Coles' Wharf, Rochester, or so near thereto as she might safely get. The vessel was detained for some days, waiting for better tides. Lord Chief Baron Pollock observed that:

"The master is bound to take his ship to Coles' Wharf, unless prevented by some permanent obstruction. This is a contract to proceed to a certain place, and if, in the ordinary course of navigation, the ship could get there, the master was bound to take her."

In *Strahan v. Gabriel*, cited by Lord Esher in *Dahl v. Nelson*, supra, the discharging place named was a quay. The ship on arrival found the only quay berth occupied by another vessel. The shipowner offered to discharge across the ship which occupied the quay berth if the charterer would pay for the stage and labor. The charterer refused, and the shipowner claimed demurrage. Lord Esher held that the lay days did not commence to run until the plaintiff's ship was alongside the quay, that being the place named whereat the voyage was to end. See, also, *The M. S. Bacon* (C. C.) 3 Fed. 344; *Finney v. Grand Trunk Ry. Co.* (D. C.) 14 Fed. 171; *Fish v. 150 Tons of Brown Stone* (D. C.) 20 Fed. 201; *The J. E. Owen* (D. C.) 54 Fed. 185; *The Viola* (D. C.) 90 Fed. 750; *The Cyrenian* (D. C.) 123 Fed. 169; *Weaver v. Walton*, 1 Flipp. 441, Fed. Cas. No. 5,488; *Burmester v. Hodgson*, 2 Camp. 488; *Ford v. Colesworth* (1868) L. R. 5 Q. B. 544; *Hick v. Raymond* (1893) App. Cas. 22; and *Huelthen v. Stewart & Co.*, 2 K. B. (1902) 199.

The rule would not be applicable if the delay in reaching the designated dock is attributable to the active fault of the charterer, or the owner of the cargo. No such fault is here shown. The record discloses no knowledge by the consignee, up to the time of the sailing of the *Ionian* from Toledo, of the installment of the "clam-shell" system on the Clancy Dock, if such change was then in progress. The statement of the master that the representative of the consignee said that the coal had been shipped ahead of the order of the consignee does not impute a fault to the consignee or to the charterer which was proximate to the delay of the vessel in reaching the dock.

The duty of the consignee, then, in the absence of active fault upon its part, began when the vessel reached the dock, ready to be delivered of her cargo. There being no stipulation in the bill of lading with respect to the time of unloading and discharge, the duty imposed was to give the vessel reasonable dispatch, determined by the circumstances then existing. *Corrigan v. Iroquois Furnace Co.*, 41 C. C. A. 102, 104, 100 Fed. 870. The consensus of the English and American cases is well stated by Judge Sanborn in the case of *The Empire Transportation Co. v. Philadelphia & Reading Coal & Iron Co.*, 23 C. C. A. 564, 571, 77 Fed. 919, 925, 35 L. R. A. 623:

"(1) Where the charter of a ship is silent as to the time of unloading and discharge, there is no implied agreement that the charterer will unload or discharge her in the customary time at the port of delivery, regardless of all extraordinary circumstances and unforeseen obstacles.

"(2) The implied contract is to unload and discharge her in such time as is reasonable, in view of all the existing facts and circumstances, ordinary and

extraordinary, legitimately bearing upon that question at the time of her arrival and discharge.

"(3) This implied contract to discharge the vessel in a reasonable time is, in effect, a contract to discharge her with reasonable diligence.

"(4) The burden is on him who seeks to recover damages for the delay of a vessel under such a contract to prove that the charterer did not exercise reasonable diligence to discharge her, under the actual circumstances of the particular case.

"(5) Proof that the vessel was delayed in unloading beyond the customary time for unloading such cargoes at the port of her delivery throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery, and his reasonable diligence thereunder."

See *Postalthwait v. Freeland* (H. of L.) 5 App. Cas. 599; *Lyle Shipping Co., Ltd., v. Corporation of Cardiff* (C. of A.) 2 Law Reports, Q. B. D. 638. In the former case it is declared that the duty of the consignee "is not absolute, but to do his best." In the latter case it is said that the test of reasonable dispatch is "not a hypothetical state of things"—not "an ordinary state of circumstances"—but "the actual state of things at the time of the discharge." Within this rule, we think, the consignee is absolved of fault. It had no control of the dock. The slight delay in discharging the cargo after the vessel was fast to the dock arose from the change from the clam-shell to the bucket system—it being found that the former did not work satisfactorily—and the change was in order to give the vessel quicker dispatch. After the vessel was berthed, the total delay from all causes did not exceed one day. For that the consignee was not responsible, and the delay so caused, in effect expedited the delivery of her cargo. Under the clam-shell system installed, and which, owing to the default of the contractor, was imperfect and operated poorly, the time of discharge would have been longer. We abate not one jot from the statement in the *Corrigan Case*, *supra*, that "a vessel should ordinarily have prompt dispatch, for such is essential to her profitable employment"; but, holding that the consignee is not responsible for the change of system inaugurated by the owner of the dock, or for the giving place to and discharging the *Marina* prior to the arrival of the *Ionian*, we see no circumstance of fault in the discharge of the latter vessel. The owners of vessels can readily protect themselves by the insertion in their contracts of a time limit for the release of the vessel after her arrival in port, in which case even unavoidable delay would not excuse the charterer.

The decree is affirmed.

**TENNESSEE PRODUCER MARBLE CO. v. GRANT et al**  
(Circuit Court of Appeals, Third Circuit. February 13, 1905.)

No. 20.

**BANKRUPTCY—COURTS—JURISDICTION—ATTACHMENTS—STAY.**

Bankr. Act July 1, 1898, c. 541, § 11, cl. a, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3428], provides that a suit which is founded on a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition, etc. *Held*, that such section did not give a bankruptcy court jurisdiction to stay a suit by a creditor of the bankrupt in a state court, and to restrain such creditor from proceeding to enforce an attachment lien under the state law, the state court having acquired jurisdiction of the parties and subject-matter, and taken possession of the property prior to the filing of the bankruptcy petition.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Pennsylvania, in Bankruptcy.

R. L. Ashhurst, for petitioner.

Humbert B. Powell, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is a petition of the Tennessee Marble Company, by which this court is asked to revise in matter of law an order made by the court below in a bankruptcy proceeding against Adolph Grant, trading as Adolph Grant & Co., as follows:

"And now, to wit, the second day of June, A. D. 1904, the foregoing petition having been presented and duly considered (and the proceedings and papers filed in this case in the District Court of the United States for the Eastern District of Pennsylvania having been examined, as the petition does not state all of the facts which should be set forth), it is, on motion of Charles F. Stitz, Esq., and Humbert B. Powell, Esq., attorneys for petitioner, ordered and decreed that the said Tennessee Producer Marble Company, and its attorneys, agents, servants, and employes, be and they are hereby restrained from in any manner further proceeding upon the attachment of the said Tennessee Producer Marble Company, mentioned in the foregoing petition, until the further order of this court, the lien of said attachment, if any, to remain. It is further ordered that notice of this restraining order be served upon the sheriff of Philadelphia county, upon the said Albert A. Reeves, Henry Reeves, Mark B. Reeves, and J. Herbert Schall, copartners trading as Stacy Reeves & Sons."

This order was made upon the petition of the Third National Bank of Philadelphia, styling itself "a creditor of Adolph Grant, trading as Adolph Grant & Co." The petition was filed in the bankruptcy proceeding, and the order was a summary one. There was no plenary suit. The learned judge filed no opinion, and therefore we have not the benefit of a statement by him of the provision of law which, in his judgment, vested in the District Court the jurisdiction it exercised. But counsel have here contended that it was given by section 11, clause a, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), which, they say, "gives bankruptcy courts jurisdiction to stay certain suits

therein specified, and the stay granted in the present instance was by virtue of that section." This position is untenable. That clause provides merely that "a suit which is founded upon a claim from which a discharge would be a release \* \* \* shall be stayed," and this obviously for the purpose of assuring to the court of bankruptcy exclusive authority to adjudicate the claims which, by their orders of discharge, they may release. It does not apply to a suit brought in a state court to enforce an asserted right in rem under the law of such state.

The proceeding which the order in question restrained the marble company from further prosecuting had been instituted in a court of Pennsylvania prior to the filing of the petition in bankruptcy. It was a hostile proceeding, and it attached a fund which the marble company claimed by adverse right. "The state court had jurisdiction over the parties and the subject-matter, and possession of the property; and it is well settled that, where property is in the actual possession of the court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control." *Metcalf v. Barker*, 187 U. S. 175, 23 Sup. Ct. 67, 47 L. Ed. 122. The state court had acquired jurisdiction of the res, and was fully empowered to pass upon any and all conflicting claims to it. It is not necessary, and might be indecorous, for us to express an opinion upon any question that may occur in the cause, for its determination is solely for that court. Its jurisdiction, and the right of the marble company to prosecute its suit in it, had attached before the bankruptcy proceedings were begun, and could not, in those proceedings, be arrested or taken away. *Peck v. Jenness*, 48 U. S. 624, 12 L. Ed. 84; *Bardes v. Haywarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; *In re Seebold*, 105 Fed. 910, 45 C. C. A. 117.

The restraining order to which this petition for revision relates is vacated and dissolved.

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**AMERICAN BRIDGE CO. OF NEW YORK v. CAMDEN INTERSTATE RY. CO.**

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 519.

**1. DAMAGES—BREACH OF CONTRACT—RECOUPMENT FOR DELAY IN PERFORMANCE.**

Plaintiff, having contracted to build two bridges for defendant, failed to complete the same by the dates specified in the contract. The bridges were required to connect extensions of certain lines of electric railway owned by defendant, which were to be consolidated and operated as a single system, of which purpose plaintiff was advised. Defendant entered upon the construction of its extensions, which could have been completed by the time the last bridge was to be finished, but were not because it became apparent that the bridge would not then be ready. *Held*, that the measure of the damages defendant was entitled to recover for breach of the contract by way of recoupment against the contract price was the interest at the legal rate on the money expended

by it upon the improvements and extensions which were reasonably within the view of the parties when the contracts were made from the date when the last bridge should have been completed, or from the times thereafter when such expenditures were made to the date of its completion.

**2. ERROR—REVIEW—ACTION TRIED TO COURT.**

Where a jury is waived by stipulation in an action at law in a federal court, its findings of fact are conclusive in the appellate court, and only the questions of law applicable thereto can be considered.

In Error to the Circuit Court of the United States for the Southern District of West Virginia.

Henry C. Duncan, Jr., and John H. Holt (Campbell, Holt & Duncan, on the brief), for plaintiff in error.

W. R. Thompson (Vinson & Thompson, on the brief), for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and PURNELL, District Judges.

GOFF, Circuit Judge. This writ of error was prosecuted from a judgment rendered by the Circuit Court of the United States for the Southern District of West Virginia in an action of assumpsit. The declaration contains the usual indebitatus assumpsit counts. The case is sufficiently stated by the facts as found by the court below. By stipulation in writing the parties waived a jury, and submitted all matters of law and fact involved in the issues to the court for its decision. The assignments of error relating to the action of the court below concerning the pleadings are without merit, and it will not be profitable to consider them here. In fact, they are not insisted upon by counsel for plaintiff in error. The facts found by the court below are as follows:

I find that the American Bridge Company, plaintiff, is the assignee of the Pittsburgh Bridge Company of a certain contract with the defendant dated May 26, 1900, for the erection of a bridge over Twelve Pole creek on or before August 1, 1900, for the sum of \$4,000, and was also the assignee of the American Bridge Company of New Jersey of a certain contract with the defendant dated September 25, 1900, providing for the erection of a steel bridge over the Big Sandy river on or before January 1, 1901, for the sum of \$24,500. Both of these contracts were made with the Ohio Valley Electric Railway Company, and said corporation afterwards changed its name to the Camden Interstate Railway Company, the present name of the defendant. I further find that the contract dated September 25, 1900, was signed by "J. N. Camden," but was made for and on behalf of the defendant corporation, and no question of authority to make such contract was raised at the trial.

I find from the evidence that the bridges over Twelve Pole creek and Big Sandy river were constructed in accordance with the plans and specifications set forth in the contracts therefor. I further find that the Twelve Pole Bridge was completed on or about March 1, 1901, and the Big Sandy Bridge on or about June 23, 1901, and that the cause of delay was not among those specified in the contract as excusing the contractor from liability for failure to complete said work at the time prescribed in its agreements.

I further find from the evidence that at and before the contract for the Big Sandy Bridge was entered into Mr. Broumbaugh, the agent of the American Bridge Company of New Jersey, assignor of the contract for said bridge to the plaintiff, was advised of the fact that it was the intention of the defendant to connect the Huntington, Ashland and Catlettsburg Street Rail



ways into a continuous system, and that it was the intention of the defendant to push their work on this construction, and that, in consequence, the contract for the erection of the Big Sandy Bridge would be a time contract. But I do not find from the evidence that Mr. Broumbaugh was advised of the fact that the Ironton Street Railway was to be a part of the contemplated connected system.

I find that one-half of the contract price of each bridge, to wit \$2,000 on the Twelve Pole Bridge and \$12,250 on the Big Sandy Bridge, was paid by the defendant when due, and that the balance upon each contract has not as yet been paid. I further find that the plaintiff did extra work on the Twelve Pole Bridge amounting to \$1,175, for which it is entitled to be paid, with interest from November 1, 1900; and that it also furnished piles, etc., to the value of \$127.95, to which it is entitled, with interest from August 1, 1901.

I further find that the plaintiff is entitled to recover the balance on the Twelve Pole Bridge, as aforesaid, of \$2,000, with interest from March 1, 1901, and the balance on the Big Sandy Bridge of \$12,250, with interest from June 23, 1901.

I find from the evidence that the set-off claimed by the defendant in its plea and statement of set-off, which amounts to \$644.42, was not authorized to be expended and incurred by plaintiff or its agent, and the same cannot be allowed.

I find from the evidence that the defendant, the Camden Interstate Railway Company, expended for construction upon its lines and plants the following sums:

#### Construction.

Previous to January 1, 1901.....	\$328,913 51
During January ".....	29,169 39
" February ".....	46,152 09
" March ".....	37,086 05
" April ".....	49,273 44
" May ".....	44,530 78

—And I further find that by reason of the failure of the plaintiff to complete the Big Sandy Bridge at the time specified in the contract (i. e., January 1, 1901) the defendant was deprived of the use of the aforesaid sums of money, and that they are entitled to recoupment by way of interest at 6 per cent. from the several dates to June 23, 1901, the date of the completion of the said bridge, as per the following statement:

#### Recoupment by Way of Interest.

Int. on \$328,913.51 from Jan. 1 to June 23, 1901.....	\$ 9,483 57
Int. on 29,169.39 from Feb. 1 to June 23, 1901.....	695 18
Int. on 46,152.09 from Mch. 1 to June 23, 1901.....	884 60
Int. on 37,086.05 from Apr. 1 to June 23, 1901.....	520 20
Int. on 49,273.44 from May 1 to June 23, 1901.....	443 45
Int. on 44,530.78 from Jun. 1 to June 23, 1901.....	170 68
<b>Total .....</b>	<b>\$12,197 68</b>

**Summary:** I therefore find that the plaintiff is entitled to recover of the defendant as follows:

\$1,175.00, with interest from Nov. 1, 1900, to June 23, 1901...	\$ 1,220 62
\$2,000 balance due on Twelve Pole Bridge, with interest from Mar. 1, 1901, to June 23, 1901.....	2,037 88
\$12,250, balance due on Big Sandy Bridge as of June 23, 1901..	12,250 00
<b>Total .....</b>	<b>\$15,507 95</b>

—And that the defendant is entitled to recoupment to the amount of \$12,197.68, being interest at 6 per cent. upon amounts invested as shown in finding above. I therefore find that the plaintiff is entitled to recover of the defendant the sum of \$3,310.27, balance due as of June 23, 1901, which, with interest from said June 23, 1901, to the date of this finding, April 10, 1903, amounts to \$3,667.22, and the further sum of \$127.95, the value of piles, etc.,

furnished defendants, with interest from August 1, 1901, to the date of this finding, April 10, 1903, amounting to \$140.94.

I therefore find that the plaintiff is entitled to recover of the defendant the sum of \$3,808.16, with interest thereon from this date, April 10, 1903, until paid, and its costs by it about its suit in this behalf expended, including an attorney's fee of \$10, as allowed by law. An order may go in accordance with this finding.

Note.—There was evidence of a documentary character, introduced by the defendant on the trial of this case, tending to show the expenditure of certain sums of money upon Clyffeside Park, Ironton Street Railway, engineering, and for ferry franchises, as sums upon which interest, by way of recoupment, should be allowed; but I am unable to find from the evidence that these items are proper ones, or that they can be connected with the main investment so clearly as to be properly charged, and they were disregarded in my finding.

That the Camden Interstate Railway Company expended for construction upon its lines and plants previous to January 1, 1901, the following sums, to wit:

Upon its Huntington line.....	\$ 37,713 74
Upon Kenova & Central City extension.....	130,429 62
Upon Big Sandy Bridge.....	34,607 62
Upon Hampton City extension.....	25,600 68
Upon Ashland & Catlettsburg Street Railway.....	25,396 71
Upon equipment .....	15,702 88
Upon power plant, substation and high transmission line....	60,402 26

Total ..... \$328,913 51

These are the details of the items in my finding, marked previous to January 1, 1901, and aggregating \$328,913.51.

During January, as follows:

Upon its Huntington line.....	\$ 3,266 70
Upon Kenova & Central City extension.....	5,998 89
Upon Big Sandy Bridge.....	93 53
Upon Hampton City extension.....	2,072 55
Upon Ashland & Catlettsburg Street Railway.....	455 02
Upon equipment .....	3,052 66
Upon power plant, substation and high transmission line....	14,230 04

Total ..... \$29,169 39

These are the details of my January finding, aggregating \$29,169.39.

During February, as follows:

Upon its Huntington line.....	\$ 2,855 72
Upon Kenova & Central City extension.....	5,127 04
Upon Big Sandy Bridge.....	6,354 73
Upon Hampton City extension.....	889 47
Upon Ashland & Catlettsburg Street Railway.....	9,111 86
Upon equipment .....	267 00
Upon power plant, substation and H. T. line.....	21,546 27

Total..... \$46,152 09

These are the details of my February finding, aggregating \$46,152.09.

During March, as follows:

Upon Huntington line.....	\$ 397 10
Upon Kenova & Central City extension.....	5,058 59
Upon Big Sandy Bridge.....	10,718 67
Upon Hampton City extension.....	602 70
Upon Ashland & Catlettsburg Street Railway.....	933 02
Upon equipment .....	8,052 00
Upon power plant, substation and H. T. line.....	11,323 97

Total..... \$37,086 05

These are the details of my March finding, aggregating \$37,086.05.

During April, as follows:

Upon Huntington line.....	\$ 1,292 75
Upon Kenova & Central City extension.....	9,415 13
Upon Big Sandy Bridge.....	12,968 03
Upon Hampton City extension.....	42 02
Upon Ashland & Catlettsburg Street Railway.....	1,896 00
Upon equipment .....	6,592 64
Upon power plant, substation and H. T. line.....	17,566 87

Total ..... \$40,273 44

These are the details of my April finding, aggregating \$49,273.44.

During May, as follows:

Upon Huntington line .....	\$ 1,904 97
Upon Kenova & Central City extension.....	8,958 80
Upon Big Sandy Bridge.....	1,895 95
Upon Hampton City extension.....	65 07
Upon Ashland & Catlettsburg Street Railway.....	845 84
Upon equipment .....	8,813 60
Upon power plant, substation and H. T. line.....	23,047 05

Total ..... \$44,530 78

These are the details of my May finding, aggregating \$44,530.78.

I find that at the time the contract was made for the construction and erection of the bridge across the Big Sandy river for the Ohio Valley Electric Railway Company, now the Camden Interstate Railway Company, and previous thereto, the said railway company owned and operated the following lines of street railway:

(a) A line extending from Guyandotte, West Virginia, a town having a population of from two to three thousand persons, west along third avenue, in Huntington, to Seventh street therein, a distance of three miles and a fraction; also a line extending from the corner of Tenth street and Third avenue, in the city of Huntington, south and east to the Chesapeake & Ohio shops, in the eastern part of said city, a distance of two and one-fourth miles; and a line extending from Ninth street, in Huntington, west along Fourth avenue to Central City, a town having four thousand population, a distance of two and three-fourths miles; and that the city of Huntington had at the time a population of twelve thousand persons.

(b) Also that said company owned and operated a line of railway extending from Division street, Catlettsburg, a town having a population of between thirty-five hundred and four thousand people, to Ashland, a city having a population of seven or eight thousand persons, a distance of six miles.

(c) Also a line of railway extending from Coal Grove, Ohio, a town immediately opposite Ashland, Kentucky, west through the city of Ironton, with a population of eleven or twelve thousand, to Hanging Rock, Ohio, a distance of seven miles.

And I further find that at the time of the making of the contract for the construction of said bridge, and for a long time previous thereto, and during the construction of said bridge, the said railway company had been operating the said several lines above mentioned for the carrying of passengers thereon for hire and reward.

The opinion of the court below, filed in and made a part of the record of this cause, reads as follows:

In this case the only question as to which there is a serious dispute between the parties is as to the proper measure of damages to be recovered by the defendant by way of recoupment on account of the delay of plaintiff in completing the two bridges mentioned in the pleadings, and particularly the bridge crossing Big Sandy river. I deem it unnecessary to make any statement of the case, as in my written findings, which are a part of the record, the main facts are fully stated. The eminent counsel on both sides of this case have submitted full and ably printed briefs, presenting most

admirably the opposite sides of the question here involved; and if I do not refer in extenso in this opinion to those briefs it is simply because the leading principle, as applied to the facts in this case, in my judgment, renders such analysis of the briefs unnecessary. There was no denial upon the part of the plaintiff that the defendant is entitled to recoup some damages growing out of its failure to complete these bridges within the time agreed upon, and the only question was, in what manner shall these damages be ascertained, and what is the proper amount? Recoupment is said in the law dictionaries to be the right of the defendant in the same action to claim damages from the plaintiff, either because he has not complied with some obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in making or performance of the contract. Bouv. L. Dict.; And. L. Dict. In *Sutherland on Damages* (2d Ed.) § 168, p. 329, it is said: "The defense which is allowed under the name of recoupment is not a keeping back a part of the plaintiff's *prima facie* damage on the case he seeks to establish by evidence of the character explained under the title 'mitigation of damages,' but a reduction of the plaintiff's recovery by the allowance against him in his action of damages due the defendant on a substantive cause of action in his favor, growing out of the same transaction on which the plaintiff's claim or demand arises." The same author, in section 81, p. 169, says: "Such losses may consist of expenditures made by one party to a contract and damages from his own acts done on the faith of its being performed by the other, in furtherance of the object for which the contract purports to be made, or the object which was in contemplation of the parties at the time of contracting;" citing *Dean v. White*, 5 Iowa, 266; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71, etc. In *Hadley v. Baxendale*, 9 Exch. 353, the leading English case, two propositions on the scope of recovery of damages for breach of contract were established. They were thus stated by Baron Alderson: "Where two parties have made a contract, which one of them has broken, the damage which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Where the special circumstances are known to the defendant, and where the damage is the natural result of his default, the special damage is held to have been in view of the parties to the contract, and is not too remote. 5 Am. and Eng. Ency. of Law (1st Ed.) p. 15; *Hadley v. Baxendale*, 9 Exch. 341. In *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129, the plaintiff was a butcher, and the defendant had agreed to furnish him with such quantity of ice as he might need for his ice box to keep fresh meat during the summer. The defendant had supplied the plaintiff before, and understood the use of the ice. At the last of July the defendant ceased to furnish ice, and in consequence a quantity of meat was spoiled, as no ice could be procured elsewhere. The defendant was held liable for the value of the spoiled meat. The circumstances made known at the making of the contract, and its intrinsic nature, must be considered in estimating the damages. *Winne v. Kelley*, 34 Iowa, 339; *Van Arsdale v. Rundell*, 82 Ill. 63; *Rogers v. Bemus*, 69 Pa. 432; *Hexter v. Knox*, 63 N. Y. 561; *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438. For cases in which recoupment of damages was allowed for failure to perform construction contracts within stipulated time, see *Front St., etc., R. Co. v. Butler*, 50 Cal. 574; *Korf v. Lull*, 70 Ill. 420; *Cooke v. Preble*, 80 Ill. 381; *Havana, etc., R. Co. v. Walsh*, 85 Ill. 58; *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; *Rockwell v. Daniels*, 4 Wis. 432. In *Blanchard v. Ely*, 21 Wend. 342, 34 Am. Dec. 250, it was held that, where the defense for the price of a steamboat was that part of the machinery was unsound and imperfect, occasioning considerable delay, the defendants could not recoup as damages the loss of the probable profits upon trips that might have been run during the time the vessel was delayed on account of the imperfections in its construction. In *Smeed v. Ford* (1859) 28 L. J. Q. B., 178, the defendants contracted to supply a threshing machine to the

plaintiff within three weeks from the 24th of July. The defendants, at the time of the contract, knew that the plaintiff was in the habit of threshing the corn in the field and sending it to market at once. The machine was not forthcoming in time, and the plaintiff was obliged to carry away and stack the corn. The corn was damaged by exposure to the weather, so that it was necessary to dry it in a kiln. The quality was much deteriorated, and before the corn could be sold the price had fallen. It was held, applying the rule in *Hadley v. Baxendale*, that the plaintiff was entitled to recover damages (1) in respect of the deterioration in the quality of the wheat, (2) in respect of the expense of carrying and stacking it, and (3) in respect of the expense of kiln-drying, but not in respect of the fall in prices. Where a landlord agreed in a case to repair the fences so as to secure a crop, and, failing to do so, cattle broke in and injured the crops, he was held for their value. *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134. On a breach of contract to sell and deliver furniture for a hotel by a fixed time, the loss of profits from renting the rooms to guests may be considered in the recovery. *Berkey, etc., Co. v. Hascall*, 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65. "A party is liable for all the direct damages which both parties to the contract would have contemplated as following from its breach, if at the time they entered into it they had bestowed proper attention upon the subject, and had been fully informed of the facts." *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446. In *Fletcher v. Tayleur* (1855) 17 C. B. 21, 25 L. J. C. P. 65, the action was for damages for nondelivery of a ship at the stipulated time. The rate of freight was high then, and had fallen when the ship was delivered. It was held that the plaintiff could recover the difference in amount between what he would have earned had the ship been delivered at the proper time, and what he would earn at the lower rate. In *Hydraulic Engineering Company v. McHaffie* (1879) 4 Q. B. D. 670, 27 W. R. 221, the plaintiffs in July, 1877, contracted with J. to make for him a machine, to be delivered at the end of August. The defendants contracted with the plaintiffs to make "as soon as possible part of the machine called a gun." The defendants were aware that the machine was wanted by J. at the end of August, but they did not finish their part till the latter end of September. J. then refused to accept the machine from the plaintiffs. It was held that the defendants had broken their contract, and were liable to pay as damages the loss of profits of the plaintiffs upon their contract with J., as well as the amount spent by them uselessly in making other parts of the machine. In *Elbinger Action-Gesellschaft, etc., v. Armstrong* (1874) 9 Q. B. 473, 43 L. J. Q. B. 211, 30 L. T. 871, 23 W. R. 127, the defendant, in January, 1872, agreed to furnish the plaintiff with a quantity of sets of wheels and axles, according to tracings, to be delivered on certain specified days, free on board at Hull. The plaintiffs were under a contract with a Russian railway company to deliver them 1,000 covered wagons, 500 on the 1st of May, 1872, and 500 on the first day of May, 1873, under a penalty of two roubles per wagon for each day's delay in delivery. In the course of the negotiations between the plaintiff and the defendant, the latter was informed of the plaintiff's contract with the railway company. The defendant failed to complete, and the plaintiffs had to pay a penalty of one rouble a day, amounting to about 100 pounds. It was held that the jury might reasonably assess the damages at the amount actually paid by the plaintiff.

The defendant in this case presented three propositions as to the correct measure of damages. First. The proposition that it was entitled to recover the profits it would have made from its investment had the bridges been completed in time; and it undertook to show what these profits would have been by comparing the profits made during a corresponding period in the next year (1902) with the same period in the year prior to the commencement of the work (1900). I ruled out the evidence on the ground that it was purely speculative, especially so as there was no way in which the increased profit properly attributable to the extension of the railway system, and growing out of the connections made by means of the bridges and links added, could with any degree of certainty be separated from the in-

crease of profits properly attributable to the operation of the old lines separately. This is not such a case as would have been made had this whole line been in operation, and the bridges in question been swept away or burned, and rebuilt by the plaintiff under a time contract, for in such a case the loss of profits might, with reasonable certainty, have been ascertained. And yet, in a case cited by both parties and decided by the Supreme Court of the United States, viz., *Howard v. Stillwell Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, it was held that: "Where a mill which is contracted to be constructed is not completed at the date specified in the contract, anticipated profits of the mill owner from grinding wheat into flour and selling the same, which he would have made had the mill been completed at the time agreed, cannot be recovered as damages for delay in completing the mill." (2d point of syllabus.) The foregoing case was, in my opinion, a stronger one for the allowance of profits as a measure of damages than is the present. In that case the contract was for the reconstruction of an existing mill with an established trade into a mill of the roller process type, with capacity of two hundred barrels per day. Defendants offered to prove by way of recoupment that they had good wheat on hand, out of which they could have made a profit of \$1 per barrel, or \$200 per day, for each day they were delayed, but the court said, after citing *Hadley v. Baxendale*, 9 Exch. 341; *Pennypacker v. Jones*, 106 Pa. 237, 242; *Callaway Min. & Mfg. Co. v. Clark*, 32 Mo. 305; *Blanchard v. Ely*, 21 Wend. 342, 34 Am. Dec. 250; and a number of other cases: "The principles announced by the above-cited authorities lead to the conclusion that the court did not err in striking out that part of defendant's plea which sought to recover \$12,000 as the profits expected to be derived from the sale of the flour which they would have manufactured, and in excluding the evidence offered in support of the claim therein set up. Tested by them, such losses were, in our opinion, rather remote and speculative than direct and immediate, resulting from the breach alleged." In the present case the reasons for disallowing the character of evidence tendered in support of the offer to prove loss of profits are, in my opinion, stronger than in the case of *Howard v. Stillwell Manufacturing Co.*, just cited.

The next proposition of the defendant was to prove the rental value of the structures for the time their construction was delayed; but, it appearing that the witness or witnesses called for this purpose proposed to testify as to such rental value from a calculation of the profits alleged to have been lost, this evidence was excluded, and the defendant then presented its third proposition, namely, that it was entitled to offset by way of recoupment interest on such sums of money as it had expended directly in connection with the building of these bridges (and which would not have been expended but for the consolidation of the lines of the defendant) from January 1, 1901 (when the last bridge should have been completed), or from such date thereafter as any such sum of money was actually expended, to June 23, 1901, the date when the last and more important bridge was actually completed. In connection with this offer, the defendant offered evidence to prove that Mr. Broumbaugh, the agent of the plaintiff's assignor at the time when the contract for the Big Sandy Bridge was entered into, was taken over the line from Huntington to Ashland, and was shown what connections were contemplated, and the reasons why the contract must be a time contract, were explained to him. The defendant also offered evidence tending to prove that all the work to be done by defendant could have been done by January 1, 1901, the date for the completion of the Big Sandy Bridge, but that after it became apparent that the bridge would not be completed by that time the contractors were allowed to go more slowly, as the necessity for hurry did not exist; and that the only reason that all of the work was not completed by January 1, 1901, was that it had become apparent that the bridge could not be finished by that time. Mr. Magoon, one of the witnesses for the defendant, presented and proved a schedule of the various sums of money expended on account of the improvements and constructions of connecting links, etc., of the several lines of street railway owned by the defendant. It is ingeniously argued by the able counsel

for plaintiff that interest upon the total investment upon a work of magnitude can never be the proper measure of damages whereby to charge a contractor for one unimportant link, for his delay in fulfilling his contract, and instances the case where a contractor has a time contract for a \$5,000 trestle upon a new railroad involving the total expenditure of \$70,000,000, claiming that it would be monstrous to attempt to collect interest on the total \$70,000,000 for the failure of the petty contractor to complete his \$5,000 contract on time. They base this contention upon the idea advanced in *Mayne on Damages* and other text-writers to the effect that the measure of damages for the breach of a contract must bear some relation to the reward the contractor would have been entitled to had he completed his contract to the letter. But counsel seem to misconceive the purpose of the defendant in this case. It is not to recover of the plaintiff a vast sum of money by an action against the contractor, but to recoup its damages from the contractor within the limit of the reward promised to the contractor for full and faithful performance of his contract. While it may be, and doubtless is, true that in the case instanced by plaintiff's counsel the railroad could not recover interest on its idle and useless \$70,000,000 (made idle by reason of the delay in the \$5,000 contract), to an amount in excess of \$5,000, yet can it be said that it might not recoup against the delinquent contractor damages to the extent of the emolument promised to the contractor for prompt and faithful performance, especially where the contractor was advised of all the circumstances?

I have concluded that the proper measure of damages in this case is interest at the legal rate upon such moneys as were spent by the defendant upon improvements and extensions reasonably within the view of the parties at the time the contract was entered into for the Big Sandy Bridge from January 1, 1901, or such time thereafter as such sums were expended, to June 23, 1901, the date of completion of said bridge. Having so concluded, the only remaining difficulty is in ascertaining what items in the schedule furnished by the witness Magoon are properly to be included, and what are not. In arriving at my conclusions in that respect I have taken into consideration that there is no evidence before me that plaintiff's agent was at all apprised that any improvements were contemplated at Clyffeside Park, or even that the park belonged to the defendant company, and that there is no evidence to support the idea that he knew of the ownership of the Ironton Line or its proposed connection with the other lines by means of a ferry across the Ohio river. I have therefore excluded interest upon these items from the account, and because there is no way for me to determine what proportion of the engineering charges embraced in Mr. Magoon's statement is applicable to the work in Ironton, Clyffeside, and the ferry, I have also excluded interest upon that item of expenditure. As to all the other items, I regard them as reasonably within the contemplation of the parties at the time.

The judgment of the court below was in favor of the plaintiff against the defendant for the sum of \$3,808.16, with interest from the 10th day of April, 1903, until paid, together with the cost of suit. From this judgment the writ of error now before us was sued out. The jury having been waived, and the case having been tried by the court, its findings upon questions of fact are conclusive in this court, and therefore we have only now to consider the questions of law applicable to such facts. *Stanley v. Supervisors of Albany*, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Hathaway v. First National Bank of Cambridge*, 134 U. S. 494, 498, 10 Sup. Ct. 608, 33 L. Ed. 1004; *St. Louis v. Rutz*, 138 U. S. 226, 241, 11 Sup. Ct. 337, 34 L. Ed. 941; *Runkle v. Burnham*, 153 U. S. 216, 235, 14 Sup. Ct. 837, 38 L. Ed. 694; *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457.

Judge Keller's opinion, herein quoted, is clear, able, and exhaustive of the points involved. In the judgment of this court the law applicable to said facts was correctly stated by him.

There is no error in the judgment complained of, and the same is affirmed.

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SAPERY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. January 11, 1905.)

CUSTOMS DUTIES—CLASSIFICATION—TYPE METAL—BROKEN STEREOTYPE PLATES—OLD TYPES.

The provision for "types, old," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 690, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1689], does not include an alloy, containing approximately 85 per cent. of lead, 12 per cent. of antimony, and 3 per cent. of tin and copper, made from the dross of type metal refined and melted with 15 to 20 per cent. of old movable types, and cast in the form of stereotype plates, which were never used as such, but broken into pieces and packed in barrels for importation. Such material is dutiable as "type metal," under paragraph 190 of said act (chapter 11, § 1, Schedule C, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1645]).

In Error to the District Court of the United States for the Eastern District of Michigan.

These proceedings were brought by Henry Sapery, survivor of himself and Sarah Sapery, deceased, copartners as the Syracuse Smelting Works, claimant of certain merchandise seized for violation of the customs laws.

Bernard B. Selling, for plaintiff in error.

Wm. D. Gordon, for the United States.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action, in the form of a libel, brought under section 9 of the customs administrative act of June 10, 1890 (26 Stat. 131), to forfeit 35,618 pounds of type metal, packed in 30 barrels, which was shipped into the United States at Detroit from Montreal, Canada, and, as charged by the government, was fraudulently invoiced and entered as "types, old, and fit only to be remanufactured," free of duty, under paragraph 690 of the act of July 24, 1897, c. 11, § 2, Free List, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1689], when, in point of fact, it should have been invoiced as "type metal," dutiable at "one and one-half cents per pound for the lead contained therein," under paragraph 190 of the same act (chapter 11, § 1, Schedule C, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1645]). An answer was filed by Henry Sapery, surviving partner of a firm doing business as the Syracuse Smelting Works, which shipped these goods from Montreal, consigned to itself at Chicago, as claimant, in which, not expressly denying that the goods thus imported consisted of type metal, he averred that they were invoiced as "old types" by an employé, Lalonde, who was but 17 years of age, of little experience in business, and not familiar



with the classification of metals, and that there had been no intent on the part of the shipper or any of its agents to defraud the government in thus invoicing and entering the goods.

The case was tried before a jury. At the close of the evidence the court instructed the jury that the imported material was not "old types," nor entitled to entry free as such, but "type metal," subject to duty as such at  $1\frac{1}{2}$  cents per pound for the lead contained therein, and left it to the jury to say whether it was fraudulently invoiced and entered as "old types" to escape duty. The jury found it was, and returned a verdict for the government. There are many assignments of error, but the real question is whether the court erred in instructing the jury that the material imported was "type metal," and not "old types."

The material imported was in the form of stereotype plates, broken in pieces and packed in barrels for shipment. The analysis made by the government chemist showed it contained 85.59 per cent. of lead, 11.59 per cent. of antimony,  $\frac{1}{2}$  per cent. of copper, and 2.32 per cent. of tin. That made by the chemist for the claimant showed that it contained 84.39 per cent. of lead, 11.66 per cent. of antimony, 1.55 per cent. of tin, and 1.97 per cent. of copper. In other words, speaking approximately, these analyses showed the alloy contained 85 per cent. of lead, 12 per cent. of antimony, and 3 per cent. of tin and copper. The witnesses for the government testified that such alloy constituted type metal. While some of the witnesses for the claimant conceded that the component parts of the material were those of type metal, they stated that, in their opinion, it could not be satisfactorily used to make stereotype plates, and therefore they would not purchase it as type metal, nor deem it such. Some based their opinion on the appearance of the material, saying it looked "dead," and needed an addition of new metal to give it "life." Others thought the proportions of lead, antimony, and tin were not the best—not such as they used—but they declined to give their own formula on the ground it was a trade secret. The witnesses for the claimant who thus testified were practical men, in charge of the work of making stereotype plates for the different newspapers of Detroit. They all admitted that type metal melted and cast into stereotype plates would, because of the use thus made of it, soon become what they called "dead," and would need, upon being remelted, to have added to it new metal in order to give it "life." During the course of the trial a stereotyper for a newspaper in Detroit used the material to cast a half-tone plate, and testified it worked all right for that plate. He regarded it as "poor stereotype metal."

The claimant was in court during the entire trial, but was not sworn as a witness. It was in evidence, however, uncontradicted, that upon the trial of a similar suit at Auburn, N. Y., to forfeit a like importation, the claimant was sworn, and testified that the imported material was type metal, and that he did not authorize anybody to ship it as "old types." The claimant's testimony tended to show that the Syracuse Smelting Works had a small factory in Montreal; that it purchased from newspaper foundries and junk

dealers throughout Canada the dross of type metal. This was put through a furnace, to refine it, and run into pigs. Then these pigs, with 15 or 20 per cent. of old movable types, were melted together in an ordinary kettle and cast into stereotype plates; a casting box and old matrices being purchased from the newspaper companies of Montreal. The stereotype plates thus produced were broken in pieces, packed in barrels, and shipped as "old types" to the United States.

It is conceded that type metal is an alloy made of lead, antimony, and tin, with sometimes a trace of copper. The principal ingredient is lead. Under our tariff laws, for many years type metal has been dutiable according to the lead contained in it, but at a lower rate than lead itself. This distinction is maintained in the Dingley act of July 24, 1897. Under it, lead dross, lead bullion, or base bullion, lead in pigs and bars, etc., old refuse lead run into blocks and bars, and old scrap lead, fit only to be remanufactured, is dutiable at  $2\frac{1}{8}$  cents per pound (paragraph 182, c. 11, § 1, Schedule C, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1644]), while type metal is dutiable at  $1\frac{1}{2}$  cents per pound for the lead contained therein (paragraph 190, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1645]). It necessarily long ago became a question before the Treasury Department as to what percentage of antimony should be required to permit an alloy containing lead as the chief ingredient to be invoiced and entered as type metal instead of pig lead; and on March 31, 1887, the Secretary of the Treasury, in a carefully considered decision, held that an alloy containing 90.25 per cent. of lead, 9 per cent. of antimony, and .71 per cent. of tin and copper, should be classified as type metal, instead of pig lead; this percentage of antimony being regarded as sufficient to render the material unfit for the ordinary purposes to which pig lead is applied. In his decision the Secretary called attention to the fact that the composition under consideration was only suitable for use as a low grade of type metal; that there was no well-defined standard of type metal, the lead, antimony, and tin being mixed by different manufacturers in different proportions, the proportion used by each being guarded as a trade secret. Thus certain grades of type metal contained as high as 25 per cent. of antimony, while others contained only 14 per cent., and stereotype metal and electrotpe metal contained only 13 per cent. and 5 per cent., respectively. (T. D. 8,147, March 31, 1887.) This ruling of the department was adhered to in the decision of January 31, 1890 (T. D. 9,831), in which it was held that an alloy containing 88.19 per cent. of lead, 4.01 per cent. of antimony, and .629 per cent. of tin (over 7 per cent. being left unaccounted for), should be classified as pig lead, and not type metal; the Secretary saying that it was not considered expedient at that time to admit as type metal any composition containing a lower percentage of antimony than 9 per cent. It is to be observed that it is conceded in the present case that the material in question contains nearly 12 per cent. of antimony.

In preparing his decision of March 31, 1887, which fixed a standard of type metal for purposes of classification under the tariff laws, the Secretary had recourse to all the sources of information open

to the government, and the comments he makes on the reports submitted to him apply to the testimony in this case. It was impossible to obtain from the witnesses for the defense any definition of a standard type metal. Each had his own formula, which he guarded as a trade secret. Those who testified that the imported material was not type metal, based their opinion upon the looks of it. From its appearance, they thought it would not make good stereotype plate. Through much melting, it had become "dead," and would need new metal to give it "life." But this, they conceded, was true of all type metal after being used for a time.

The testimony of the claimant shows that the stereotype plates, broken in pieces and imported in barrels, had been made out of what was once type metal. Type dross refined and cast in pigs and old types (15 to 20 per cent.) were melted together and cast in plates. The old types were added in order to give the material "life," so that it might better be cast into plates. Obviously the old types, when melted, cease to be old types. They had passed through one of the processes of being remanufactured. They did not again become old types, nor did the type dross become old types when cast into stereotype plates and then broken in pieces for shipment. Old stereotype plates—even those which have been used as stereotype plates—do not become, when broken in pieces, old types. The act of July 24, 1897, makes stereotype and electrotype plates for printing dutiable at 25 per centum ad valorem (paragraph 166, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1643]), and new types dutiable at 25 per centum ad valorem (paragraph 190), while "types, old, and fit only to be remanufactured," are on the free list (paragraph 690). The same distinction existed in prior tariff acts, and under the act of March 2, 1861 (12 Stat. 182, c. 68), and July 14, 1862 (12 Stat. 543, c. 163), it was held by the Treasury Department that "old stereotype plates broken in pieces" are dutiable under the special provisions for "type metal"; such plates not being in any proper sense "types," and not, therefore, entitled to free entry, as claimed, under the provision for "types, old, and fit only to be remanufactured." T. D. 1559.

The casting of the imported material into stereotype plates may be regarded as an admission that it was type metal intended for use in making stereotype plates. Indeed, the witnesses for the claimant testified it was run into plates in order to show that it could be so cast. Again, the shipment of these plates as "old types" was a further admission that the material of which they were composed was type metal. If, as held by the Treasury Department, old stereotype plates broken in pieces are not old types, but type metal, so was this material type metal.

The above facts being those relied on by the claimant, it became simply a question of law whether the imported material was dutiable under paragraph 190, as type metal, or free under paragraph 690, as old types. *Cadwalader v. Jessup & Moore*, 149 U. S. 350, 13 Sup. Ct. 875, 37 L. Ed. 764. The court correctly held that it was an inferior grade of type metal, dutiable under paragraph 190. The question whether the goods were invoiced as old types with intent to defraud was left to the jury. The charge on this

point was entirely fair to the claimant, and, since there was ample testimony to sustain the verdict, the judgment of the District Court must be affirmed.

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UNITED STATES, to Use of KINNEY, v. BELL et al.  
(Circuit Court of Appeals, Third Circuit. January 18, 1905.)

No. 23.

**1. OFFICERS—CIRCUIT COURT CLERK—BONDS—RIGHT TO SUE.**

Though the bond of a United States Circuit Court clerk is given to the United States as sole obligee, it is available to any private suitor to indemnify him for any loss he has sustained by reason of the clerk's delinquency.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Clerks of Courts, § 138.]

**2. SAME—ERROR—RECORD.**

Where, in a suit against a Circuit Court clerk for misconduct in refusing to file plaintiff's papers, etc., in a certain suit, plaintiff made profert of his statement of claim in his intended suit, and annexed a copy thereof as an exhibit to his assignments of error filed in the trial court, such exhibit was a part of the record on error.

**3. SAME—STATE JUDGES—JUDICIAL FUNCTIONS—CIVIL LIABILITY.**

Judges of the courts of common pleas of the state of Pennsylvania, having general jurisdiction, are exempt from civil liability for acts done by them in the exercise of their judicial functions.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, §§ 165-183.]

**4. SAME—PAPERS—REFUSAL TO FILE.**

Where a statement of plaintiff's claim offered for filing in the federal Circuit Court against certain state judges of general jurisdiction showed on its face that plaintiff had no lawful demand or good cause of action against the defendants whom he proposed so to sue, he was not injured by the refusal of the clerk of the Circuit Court to file the papers and issue summons.

**5. SAME—JURISDICTION.**

Where, in a suit by a private person against state judges of general jurisdiction, the statement of plaintiff's claim did not show diverse citizenship, or that the action involved a federal question, a mere allegation that defendants were liable under Rev. St. §§ 1979, 1980 [U. S. Comp. St. 1901, p. 1262], prohibiting the deprivation of rights, privileges, and immunities secured by the Constitution and laws, etc., was insufficient to establish federal jurisdiction, in the absence of an allegation of facts showing a substantial dispute as to the effect or construction of the Constitution, or of some law of the United States on the determination of which the recovery depended.

[Ed. Note.—Jurisdiction of federal courts in suits involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.]

**6. SAME—STATE LAWS—PROCEDURE—CONSTRUCTION.**

The Pennsylvania procedure act of May 25, 1887 (P. L. 271), authorizing the entry of default in case defendants fail to file an affidavit of defense, does not entitle plaintiff to a default in the absence of such affidavit, where his statement of claim was insufficient on its face, and was subject to attack by demurrer.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 127 Fed. 1002.

Robert D. Kinney, in pro. per.  
Wm. M. Stewart, Jr., for defendants in error.  
Before ACHESON and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action brought in the name of the United States by Robert D. Kinney to his own use. The action was against Samuel Bell, clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania, and his sureties, William F. Donaldson and Charles A. Porter, and was upon the official bond of the clerk, given to the United States, in the sum of \$20,000, conditioned that the said Samuel Bell "shall faithfully discharge the duties of his office and seasonably record the decrees, judgments and determinations of the said court and properly account for all moneys coming into his hands, as required by law."

Although the bond of a clerk of the United States Circuit Court (as in this instance) is given to the United States as sole obligee, yet, no doubt, such bond is available to any private suitor to indemnify him for any loss he has sustained by reason of the failure of the clerk to discharge any of the duties of his office. *Howard et al. v. United States*, 102 Fed. 77, 42 C. C. A. 169.

In the present case the declaration or statement of demand of the use plaintiff (Robert D. Kinney) set out as his ground of action that by his *præcipe* in writing he requested and ordered the said Samuel Bell, as such clerk, to issue a writ of summons out of said clerk's office, "in an action intended by him to be thereby commenced in this own behalf for hearing and determination in said Circuit Court for the purpose of obtaining redress, by due course of law, for the deprivation to him of certain rights and privileges secured to him by the Constitution and laws, and to which he had then recently been subjected to by the persons in the said *præcipe* named as defendants therein, the said persons having perpetrated said deprivations by means of certain acts done by them under color of the laws, custom, and usage of the state of Pennsylvania, whose duly commissioned and legally qualified officers of its judicial power they at the time of their so doing in fact were"; that he delivered to the clerk (Bell) his *præcipe*, together with his statement of claim in his intended action, but that said clerk "willfully refused and has utterly neglected to issue said writ of summons," and also refused to file the papers so presented to him. In his statement of demand in this case, the plaintiff made profert of his statement of claim in his intended action; and he has annexed a copy of that statement, marked "Exhibit A," to his assignments of error filed in the court below, which assignments, together with said annexed statement, are now before us for consideration. We agree with the plaintiff in error that said Exhibit A is part of the record in this case. Referring, then, to that paper (Exhibit A), we find that the persons against whom the plaintiff, by his *præcipe*, ordered a writ of summons to issue out of the office of the clerk of the Circuit Court, were Thomas K. Finletter, Charles B. McMichael, and Henry

J. McCarthy, judges of the court of common pleas No. 3 of Philadelphia county, and that the acts complained of were done by them while presiding and sitting as judges of said court; those acts consisting, first, in causing an action which the plaintiff, Kinney, had brought against one Hugg to be improperly docketed in the court of common pleas No. 3, whereas it should have been docketed in one of the other courts of common pleas of Philadelphia county, to wit, in court No. 4; second, in maliciously, and without justification therefor in law, discharging a rule for judgment against Hugg for want of an affidavit of defense in said action against him; and, third, in maliciously, and without justification therefor in law, discharging a rule on said Hugg to show cause why the statement of claim in said action should not be withdrawn, and an amended statement of claim filed, and why the defendant should not file his affidavit of defense thereto, or judgment sec. reg., the præcipe, summons, and record to be amended accordingly.

Although the United States is here the nominal plaintiff, the action was really brought and has been prosecuted by the use plaintiff, Kinney, to recover for an alleged injury sustained by him by reason of the clerk's refusal to issue a summons and file the papers aforementioned. The basis of the claim here declared on is the supposed right of action the use plaintiff had against the persons whom he proposed to sue in the Circuit Court. It becomes, then, important to inquire whether he had a right of action which was frustrated by the clerk's refusal. Now, it has long been the settled doctrine both in England and in this country that judges of courts of general authority are exempt from liability in a civil action for acts done by them in the exercise of their judicial functions. *Fray v. Blackburn*, 3 Best & Smith (Q. B.) 576, 577; *Scott v. Stansfield*, 3 Law Reports, Exchequer, 220; 14 English Ruling Cases, 42 et seq.; *Yates v. Lansing* (Opinion by Kent, C. J.) 5 Johns, 283; *Randall v. Brigham*, 7 Wall. 537, 19 L. Ed. 285; *Bradley v. Fisher*, 13 Wall. 335, 351, 20 L. Ed. 646.

In *Fray v. Blackburn*, supra, Crompton, J., said:

"It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly. Therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions."

In *Scott v. Stansfield*, supra, the Chief Baron said:

"This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

In *Bradley v. Fisher*, supra, the Supreme Court of the United States, speaking by Mr. Justice Field, quoted with approbation what was said by Crompton, J., in *Fray v. Blackburn*, supra, and further declared—

"That judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of

their jurisdiction, and are alleged to have been done maliciously or corruptly."

In the light of these authorities, it plainly appears on the face of his statement of claim that the use plaintiff, Kinney, had no lawful demand or good cause of action against the persons whom he proposed to sue in the Circuit Court. How, then, was he injured by the refusal of the clerk to issue a writ of summons or file his papers?

But the record discloses conclusive ground for affirming the judgment of the court below. The Circuit Court had no jurisdiction of the proposed action against the state judges. The plaintiff's statement of claim against them did not show diverse citizenship of parties. In fact, all the named parties to the proposed action were citizens of Pennsylvania. The proposed action did not involve any federal question. *Kiernan v. Multnomah County* (C. C.) 95 Fed. 849. The plaintiff's claim as set forth in his statement was founded upon alleged malicious and unlawful acts of the named defendants, committed by them when sitting and acting as judges of the court of common pleas, and while they were engaged in administering the laws of the state of Pennsylvania. Clearly, the statement of claim in the contemplated suit presented no controversy arising under the Constitution or laws of the United States to give jurisdiction to the Circuit Court. *McCain v. Des Moines*, 174 U. S. 168, 171, 181, 19 Sup. Ct. 644, 43 L. Ed. 936. It is true the præcipe read, "Issue summons in assumpsit as above, returnable according to law, under the provisions of the Rev. Statutes, Nos. 1979 and 1980 of the United States [U. S. Comp. St. 1901, p. 1262]," and the accompanying statement of claim alleged that the named defendants were liable "under and by virtue of the provisions of Sections Nos. 1979 and 1980 of the Revised Statutes of the United States." But such a bare allegation does not give jurisdiction to the Circuit Court of the United States. *McCain v. Des Moines*, supra. In that case the Supreme Court said:

"The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution or of some law of the United States, upon the determination of which the recovery depends."

Sections 1979 and 1980 of the Revised Statutes [U. S. Comp. St. 1901, p. 1262] do not confer any jurisdiction upon the United States courts. *Hemsley v. Myers* (C. C.) 45 Fed. 283, 290; *McCain v. Des Moines*, supra. In the latter case the Supreme Court said:

"The jurisdiction of the Circuit Court depends upon the act approved August 13, 1888, 25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508], a part of which reads as follows: 'That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, \* \* \* arising under the Constitution or laws of the United States. \* \* \*'"

The following remarks of the court in *Kiernan v. Multnomah County*, supra, are very apposite to the action which the plaintiff

in error proposed to bring in the Circuit Court against the state judges:

"The questions sought to be presented in this case relate to the interpretation to be given to a law of the state, and the complaint is that this law is being misinterpreted and misapplied, to the injury of the plaintiff in his rights of property. In all such cases, where there is not the requisite diverse citizenship and amount in controversy to give the court jurisdiction, the remedy for the injuries complained of is in the state courts."

As, then, the Circuit Court had no jurisdiction of the proposed action against the state judges, it follows that the use plaintiff, Kinney, sustained no legal injury whatever by the clerk's non-compliance with his *præcipe*, and failure to file his papers.

We have not overlooked the point made by the plaintiff in error that the defendants were bound to file an affidavit of defense, and in default thereof the plaintiff was entitled to judgment. We cannot, however, adopt the construction of the Pennsylvania procedure act of May 25, 1887 (P. L. 271), which the plaintiff in error presses upon us. Notwithstanding the provisions of that act, we think that if the plaintiff's statement of demand is bad in substance, or is insufficient to show a valid claim, the defendant need not reply by an affidavit, but may file a demurrer. That this is good practice is recognized by the Supreme Court of Pennsylvania in *Bradly v. Potts*, 155 Pa. 418, 427, 26 Atl. 734. Indeed, we understand the court in that case to declare that the established and only way to raise the objection that the statement of demand does not set forth a good cause of action is by demurrer.

The judgment of the Circuit Court is affirmed.

On Rehearing, April 19, 1905.

PER CURIAM. Since the reargument this case has again received our attentive consideration, with the result that we see no reason to depart from the views expressed in our opinion heretofore filed.

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In re KINNEY.

(Circuit Court of Appeals, Third Circuit. January 18, 1905.)

JUDGES—POWERS OUT OF COURT—IRREGULARITY IN PRESENTATION OF MOTION.

A judge of the Circuit Court cannot properly take action in a cause pending therein on a motion sent him through the mail, and not filed with the clerk as required by the rules of the court; and the delivery by him to the clerk of a motion and papers in support thereof so received by him, with directions to notify counsel of the rule, was a proper disposition of the same.

Petition for Writ of Mandamus or Writ of Certiorari. Sur rule to show cause.

Robert D. Kinney, in pro. per.

Before ACHESON and GRAY, Circuit Judges.

ACHESON, Circuit Judge. It appears from the answer of the Honorable George M. Dallas to the rule to show cause granted by this court, and also by original papers accompanying the answer, that on September 26, 1904, the responder t received by mail a let-



ter from the petitioner, Robert D. Kinney, inclosing the motions in writing and affidavits mentioned in his petition, and that soon after the receipt of the letter the respondent indorsed upon the envelope the following memorandum:

"Sep. 26, 1904, the within letter, motions and affidavits are placed in custody of the Clerk of the Circuit Court, who is directed to notify the plaintiff and counsel for the defendants that consideration and action upon such motions cannot be taken upon correspondence with a judge of the court. Rule 16 appears to be applicable. Geo. M. Dallas, Cir. Judge."

The envelope and its contents were then handed by the respondent to Henry B. Robb, deputy clerk of the Circuit Court.

Section 1 of the rule of the Circuit Court No. 16 is as follows:

"All motions made by counsel shall be in writing and be delivered to the clerk to be entered on the minutes and filed; the date of the filing to be endorsed by the clerk."

We think the course which Judge Dallas pursued in this matter was entirely right. It was irregular to send to him by mail motions for judgment and affidavits in a cause pending in the Circuit Court. He could not properly take judicial action upon motions sent to him by the plaintiff in a cause through the mail. He made, it seems to us, a most proper disposition of the papers by placing them in the hands of the deputy clerk of the Circuit Court, with the above-quoted direction indorsed upon the envelope containing the papers. The petitioner should have proceeded under rule 16, and should have called up his motions for judgment in open court, or before a judge sitting at chambers. We discover no ground whatever for granting a writ of mandamus or a writ of certiorari.

The rule to show cause heretofore granted is discharged, and the prayer of the petition is denied.

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RASCOVOR v. AMERICAN LINSEED CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1905.)

No. 47.

CORPORATIONS—POWERS OF DIRECTORS—VALIDITY OF CONTRACT.

The directors of a corporation under their general and ordinary powers have authority to incur expense in notifying the stockholders of a proposed scheme of consolidation, or for exchanging the stock of the corporation for that of another, as a matter of which it is their duty to promptly and fully advise all stockholders not only in their own interest, but in that of the corporation; and, having such authority, the manner of giving such notice and the expense to be incurred therefor is a matter within their discretion, and the corporation is bound by a contract made by them for the publication of notices to stockholders setting forth the scheme, whether it is consummated or not.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon a writ of error by plaintiff below to review a judgment in favor of defendant in error, who was defendant below. The cause was tried in the Circuit Court, Southern District of New York. The facts were stipulated, and at the con-

clusion of the trial the court directed a verdict for the defendant, to which exception was duly reserved. The facts sufficiently appear in the opinion.

Almon Goodwin, for plaintiff in error.

G. W. Murray, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The plaintiff sues as surviving partner of the firm of Albert Frank & Co. to recover the sum of \$20,792.19, with interest, on a contract for newspaper advertising performed by said firm. The contract was made with the firm by the president and vice president of the defendant company assuming to act on its behalf in pursuance of a resolution of its board of directors. The advertisement was published in the various newspapers of eight large cities. It consisted of a letter or circular authorized by said resolution to be published, and is as follows:

"American Linseed Company,

"New York, May 20th, 1901.

"To the Stockholders of the American Linseed Company: The Board of Directors are pleased to report to the stockholders that, after mature consideration and deliberation, a most desirable arrangement has been effected for an exchange of the stock of the American Linseed Company for the stock of the Union Lead and Oil Company.

"The capital stock of the Union Lead and Oil Company, including that necessary to acquire all the capital stock of the American Linseed Company on the terms hereinafter mentioned, to be seventeen million dollars (\$17,000,000), said stock being all of one class Common Capital Stock, one hundred and seventy thousand shares (170,000), of one hundred dollars (\$100) each.

"The stock of the American Linseed Company shall be deposited under the agreement—copies of which are on file with the depositaries hereinafter mentioned—to be exchanged for the stock of the Union Lead and Oil Company on the following basis or terms:

"Each share of the Preferred Stock of the American Linseed Company shall receive forty-eight dollars (\$48) in the stock of the Union Lead and Oil Company.

"Each share of the Common Stock of the American Linseed Company shall receive eighteen dollars (\$18) in the stock of the Union Lead and Oil Company.

"The Union Lead and Oil Company reserves the right to refuse to make such exchange unless there is deposited for such exchange two-thirds (2/3) of each class of stock of the American Linseed Company.

"The holders of large amounts of the stock of the American Linseed Company have already signified their approval of the arrangement, and your Board of Directors urge the prompt acceptance thereof by the balance of the stockholders.

"Certificates of stock, duly and regularly assigned and endorsed in blank, duly witnessed, with proper revenue stamps attached for transfer, should be deposited with the New York Security and Trust Company, No. 46 Wall Street, New York City, or the Illinois Trust and Savings Bank, City of Chicago, upon deposit of which transferable receipts will be issued, exchangeable for the stock of the Union Lead and Oil Company upon the consummation of the arrangement.

"Deposits must be made on or before the 5th day of June, 1901, after which date no deposits will be received except in the discretion of the Board of Directors of the Union Lead and Oil Company and on such terms as they may prescribe.

"By authority of the Board of Directors,

"Guy G. Major, President."

"New York, May 20th, 1901.

"To the Stockholders of the American Linseed Company: The undersigned stockholders of the American Linseed Company having carefully considered the proposed arrangement between the stockholders of the American Linseed Company and the Union Lead and Oil Company, have decided to exchange our stock as per said arrangement for the stock of the Union Lead and Oil Company.

"We believe that the consummation of the proposed arrangement will decrease expenses and lower the cost of manufacture, resulting in large net earnings applicable to dividends.

"Inasmuch as the Union Lead and Oil Company have reserved the right to refuse to make such exchange unless two-thirds (2/3) of each class of stock of the American Linseed Company is deposited, we urge the prompt deposit of your stock.

"Faithfully yours,

"[Here follow the names of 10 out of the 15 directors of the defendant corporation.]"

The scheme for exchange of stock turned out to be unsuccessful, its promoters not being able to secure the approval of the holders of the prescribed two-thirds of the stock of the defendant corporation. The Circuit Judge, in disposing of the cause by directing judgment for the defendant, stated his reasons as follows:

"The case turns upon the power of the directors to bind the corporation to the contract with the plaintiff into which they entered; in other words, whether the directors of a corporation have authority, when acting under their general and ordinary powers, to obligate the corporation for the expenses of a proposed exchange of stock by its stockholders for the stock of another corporation. Now, necessarily, such a scheme is not a corporate undertaking. It is one which wholly concerns the individual stockholders. The corporation has not received any benefit from the services which the plaintiff has performed. Individual stockholders may have received a benefit, because they have been notified of what was going on, and had an opportunity to acquiesce in it or reject it. As the proposed scheme was not one within the power of the directors, they could not bind the corporation for the expenses they incurred in carrying it out. The plaintiff had full notice of the character of the scheme when he contracted with the directors. The advertisements inserted upon their face gave him full notice; consequently he is not entitled to recover."

The case seems to be one of novel impression. The industry of counsel had failed to disclose any authority directly on the point, and we have not succeeded in finding any. The question here is not as to the expenses, generally, of a proposed exchange of stock, but only as to the cost of this particular advertisement; and as to that we are unable to concur with the Circuit Judge. It was a notification of what was going on, and, in our opinion, when it comes to the knowledge of a board of directors that some scheme is on foot to induce a majority of the stockholders to part with their stock to a rival corporation, the directors are not only authorized to advise all the stockholders thereof, but it is their duty so to do, and to give such notification promptly. The future career of the corporation itself, its increased or decreased activity—indeed, its very existence as a going concern—may depend upon whether such a scheme is or is not carried through. No one can tell in advance but what timely notice thus given to all may cause individual stockholders to bestir themselves, to get into communication with others, to procure and exchange information, and thus to organize

successful opposition to a scheme which, if it were carried on secretly with the aid of directors who favored it, and without exploitation except to such individual stockholders as lacked the knowledge or the force to organize an opposition, might result in shutting down every plant which the corporation operated, and paralyzing the very industry it was created to carry on, or at least might involve the corporation in expensive litigation to vindicate its right to continue in active business. Undoubtedly individual stockholders receive a benefit in being notified of what is going on, but, in our opinion, the corporation itself also receives a benefit in having its stockholders at all times fully advised as to everything which concerns its condition, or which may be expected to alter that condition. We would not hesitate to hold it a legitimate charge against a corporation if directors should send to every stockholder a printed copy of a report as to its condition, or even as to general conditions of the industry in which it operated, so that all might be advised as to what environment, favorable or adverse, surrounded it, in the hope that some of them might thereby be stimulated to thought and suggestion by which the corporation might itself be profited. The holding that notification of a proposed scheme such as we have here is one which the directors ought to give is determinative of this case. Whether the notice shall be long or short, in what form of words it shall be couched, whether it shall be sent by mail or advertised in newspapers are matters of detail, which should be left to the directors. Certainly the innocent party who undertakes to publish such a notice should not be mulcted because, besides giving notice of the proposed scheme, it also gives the names of individual directors who favor it, nor because it is unnecessarily verbose.

The judgment should be reversed, and the cause remanded for a new trial.

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#### THE STEINWAY.

CITY OF NEW YORK v. NEW YORK & E. R. FERRY CO.

(Circuit Court of Appeals, Second Circuit. January 6, 1905.)

**COLLISION—STEAMBOAT AND FERRYBOAT CROSSING—STEAMER TOO CLOSE IN-SHORE.**

A steamboat proceeding through Hell Gate toward New York held solely in fault for a collision with a ferryboat which had just left her slip at Astoria, on the ground that she was proceeding too close inshore as she rounded Hallett's Point, and also for not keeping her course under the starboard-hand rule, although the ferryboat gave the proper signal, and her course indicated that she intended to pass under the steamer's stern, as required by the rule.

Appeal from the District Court of the United States for the Southern District of New York.

Appeal from a final decree of the District Court for the Southern District of New York dismissing the libel of the city of New York, brought to recover damages for injuries received by the libellant's steamer Fidelity in a collision with the respondent's ferryboat Steinway, near

her slip at Astoria, East River. The testimony was all taken in the presence of the judge. The opinion below is reported in 130 Fed. 397.

E. Crosby Kindleberger, for appellant.  
La Roy S. Gove, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The collision occurred near the Astoria Ferry slip at half past 12 on the afternoon of October 22, 1902. The day was clear, the tide ebb, the wind fresh from the southwest. The Fidelity, bound down the river through the western channel between New York and Blackwell's Island, rounded Hallett's Point only 50 feet from the shore, proceeding at the rate of about 10 miles an hour. At this time the Steinway was emerging from her slip intending to make a trip to New York. Her speed was about 8 miles an hour. The rules applicable to this situation are as follows:

"Art. 10. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side (The Steinway) shall keep out of the way of the other." (The Fidelity.)

"Art. 21. Where by any of these rules one of two vessels is to keep out of the way, the other (The Fidelity) shall keep her course and speed.

"Art. 22. Every vessel (The Steinway) which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

Act June 7, 1897, c. 4, 30 Stat. 96, 101 [U. S. Comp. St. 1901, pp. 2875, 2883].

The inspectors' rule No. 2 provides that the steam vessel having the other on her starboard side shall indicate by one blast of her whistle her intention to direct her course to starboard and two blasts if directing her course to port, to which the other shall promptly respond.

It was the manifest duty of the Steinway to avoid crossing ahead of the Fidelity and to keep out of her way. It was equally the duty of the Fidelity to maintain her course and speed. This she did not do. The district judge has so found and, as he had the advantage of seeing and hearing the witnesses, his conclusions upon disputed facts should not be disturbed. That the Fidelity changed her course in direct violation of the rule seems manifest. From Hallett's Point her course was laid for a point 200 feet west of Blackwell's Island. The collision occurred opposite the marble yard from 100 to 200 feet from the Astoria shore, a point which it would have been impossible for the Fidelity to reach had she held her course. Instead of being 150 feet from the shore she would have been well out in the river. Her initial fault was rounding Hallett's Point within 50 feet of the shore. She knew that she was entering Hell Gate, the most dangerous bit of water surrounding New York Harbor; she knew that a few hundred feet below there was a ferry slip where it was quite likely a ferryboat was going out or coming in; she knew that these boats require, and are allowed, ample space in which to maneuver in the vicinity of their slips (The Breakwater, 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139) and yet she shaved the shore so closely that it was not possible to get an accurate view of the situation on her port hand until she had actually rounded the point. Had she come down in the center of the river she could have

obtained a wider view of the situation and, if danger threatened, would have had ample space in which to avoid it.

Her master testifies that he thought the first whistle from the Steinway was intended for the tug C. R. Stone and not for the Fidelity. The Stone was proceeding down the river with a tow on a hawser about 30 fathoms in length and was a little below the ferry slip, in a position where a one blast signal would seem to be supererogatory, but as the Stone also assumed that it was intended for her the mistake of the master of the Fidelity was excusable. There can be no doubt, however, that the signal conveyed to him the intelligence that the Steinway's wheel was aport and that she was swinging to starboard. Indeed, he so states explicitly—

"As she came out she blowed one whistle, then commenced to turn up stream, towards us under a port wheel, turning to starboard, her head turning to starboard. After she blew to the Stone, she was coming around—swinging around—then she blowed another whistle."

In such circumstances the duty of the master was plain; he should have kept his course and, if necessary, should have put his own wheel to port. Had he done this a collision would have been well-nigh impossible. The rule, the signal and the evidence of his own eyes alike admonished him to keep on the outside of the Steinway, but instead of doing so he attempted to crowd in between her and the Astoria shore.

It is argued that the Steinway should have kept on towards her New York landing and that her failure to do so was negligence. It may be that when the vessels first sighted each other the Steinway was farther out from the Astoria shore than the Fidelity, but it must be remembered that the latter's course was not parallel to the shore but was diagonal across the river and we agree with the district judge in thinking that at no time did the Steinway cross the Fidelity's original course. This being so her continuing on across the river, though it might have prevented the collision, would have been in direct violation of the rule requiring her to keep out of the Fidelity's way and also the rule requiring her not to cross ahead. The Steinway was navigating pursuant to her invariable custom with the tide as it was at the time in question, her signals were proper, her helm hard aport and, when the impact came, she had almost come to a standstill. We are unable to designate any act of hers which contributed to the disaster.

The decree of the district court is affirmed with interest and costs.

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HEIDE v. WALLACE & CO.

(Circuit Court of Appeals, Third Circuit. March 8, 1905.)

No. 83.

UNFAIR COMPETITION—MATTERS NOT SUBJECT TO MONOPOLY—NAME AND SHAPE OF CONFECTION.

A manufacturer of a confection composed chiefly of licorice, and formed in diamond shape, with his initials embossed thereon, and sold under the name of "licorice pastilles," has no exclusive right either in the name, which is purely descriptive, or in the losenge shape, which is

old in use and not indicative of origin; and another manufacturer of a similar article made in the same shape, but with a different letter embossed thereon, and sold under the same name, is not chargeable with unfair competition, where the boxes in which the confection is retailed, while of the same size and shape, are dissimilar in coloring and lettering, so that ordinary purchasers would not be deceived as to the origin of the goods.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 81.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper*, 80 C. C. A. 876.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

See 129 Fed. 649.

Stephen J. Cox, for appellant.

Louis C. Raegener, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The assignment of errors in this case comprises nine specifications, but, as is said in the appellant's brief, "they, however, may all be condensed into the statement that the court erred in not holding that a case of unfair competition had been made out."

In *Bickmore Gall Cure Co. v. Karns* (decided at this term) 134 Fed. 833, we said:

"Undoubtedly, where two persons are engaged in selling like goods, neither of them has, or can acquire, the exclusive privilege to aptly designate and describe them, or to attractively present them for sale, with appropriate directions for their use; but neither of them has the right to do any of these things in such manner as insidiously to mislead purchasers into the belief that his wares are those of his competitor."

This proposition is applicable to the present case, but the facts to which it is now to be applied are very different from those which were presented in the former one. The appellant makes a confection composed of licorice and gum, flavored with mint, which he calls a "licorice pastille." He forms it in diamond shape, and marks it with the embossed letters "H-H," the initial letters of his name. The appellees manufacture a similar article, of the same size and shape, which they mark with the embossed letter "W," the initial letter of their firm name, and this article they likewise denominate "licorice pastille." In doing this they invade no right of the appellant. The latter has no monopoly of the manufacture or sale of a comfit of licorice and gum, nor could he acquire the exclusive privilege to make it of a particular size or shape. These matters are characteristic of the article itself, and no dealer is entitled to impose restrictions upon his competitors with respect to them. They do not necessarily or naturally point to the source of origin of the goods, and if, by asserting appropriation for that purpose of an especially attractive size and shape, a manufacturer could obtain for himself alone the advantage to result from the superior attractiveness so attained, he might readily, not merely protect himself against unfair competition, but relieve himself from any competition

whatever. It is clear, too, that the fact that there is a raised device on the product of each party affords no ground for complaint by the appellant. If his symbol had been copied, or even simulated, by the appellees, a different case would have been presented; but the letter "W" on the appellees' pastilles is quite distinctly formed, and even upon the most casual observation, could not be mistaken for the letters "H-H" upon those of the appellant. So far, therefore, from having a misleading effect, the tendency of the appellees' device is to prevent misconception. The name "Licorice Pastilles," while it accurately denotes the things made, does not at all indicate by whom they are made. Licorice may be called "licorice" by any one, and "pastille"—a well-known word, though borrowed from the French—is a peculiarly appropriate designation for such an article as is here in question; and that it had been actually applied to the same character of goods prior to the appellant's application of it to his licorice confection, the opinion of the court below sufficiently shows. Consequently, the two words as joined in the term "licorice pastilles" constitute a descriptive appellation, which all persons may use, and which is not susceptible of exclusive appropriation by any person.

The small boxes in which the pastilles of the appellees are sold to consumers are of the same size and shape as those of the appellant, but such boxes are, and long have been, commonly used for packing similar wares, and even if the appellant had been the first to use them for packing licorice pastilles, he would not thereby have obtained a monopoly of their use for that purpose. The two boxes are strikingly different in their color and markings, and while, of course, purchasers desiring to buy pastilles of licorice, without caring by whom they had been made, would accept indifferently either those of Heide or of Wallace, yet it is not at all likely that a purchaser desiring to buy Heide's and not Wallace's, would be led, by any similarity of the respective packages, to accept the latter supposing them to be the former. *Van Camp Packing Co. v. Cruikshanks Bros. Co.*, 90 Fed. 814, 33 C. C. A. 280. As was said by the learned judge below, the box of the appellant "is in mixed red and blue, set off with gilt, with the diamond trade-mark prominently displayed; while the defendant's package is predominantly yellow, with an entirely different style of letter in red, shaded with white on a black background, with their name written below. There is nothing whatever to suggest an attempt to catch the unwary purchaser and inveigle him into taking the one when he was seeking the other, nor could the most careless be deceived, except as he was in reality unconcerned as to which he got."

The decree of the Circuit Court is affirmed.



## UNITED STATES v. HAHN.

(Circuit Court of Appeals, Second Circuit. December 8, 1904.)

No. 88.

## CUSTOMS DUTIES—CLASSIFICATION—HALF PEARLS.

Half pearls, consisting of the better part of the true pearl, from which blemishes or flaws have been removed by sawing or splitting, and which are not adapted for stringing, but are chiefly used for jewelry settings, are dutiable by similitude, under paragraph 436, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], covering pearls in their natural state, not strung or set.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 131 Fed. 1000.

Chas. D. Baker, for appellant.

Comstock & Washburn, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Affirmed in open court.

## UNITED STATES v. MILLER, SLOAN &amp; WRIGHT.

(Circuit Court of Appeals, Second Circuit. December 7, 1904.)

No. 69.

## 1. CUSTOMS DUTIES—CLASSIFICATION—PRINTING PAPER—HANDMADE PAPER.

Held, that handmade printing paper, suitable for books and newspapers, is more specifically provided for under paragraph 896, Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1671], as "printing paper \* \* \* suitable for books and newspapers," than as "handmade \* \* \* paper," under paragraph 401 of said act, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672].

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 128 Fed. 469.

Chas. D. Baker, for appellant.

Albert Comstock, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Affirmed in open court.

## UNITED STATES v. McCONNAUGHEY et al.

(Circuit Court of Appeals, Sixth Circuit. March 8, 1905.)

No. 1,365.

**RES JUDICATA—ACTION BY UNITED STATES.**

A judgment against the United States in an action brought by the administrator of a deceased volunteer soldier, who died while an inmate of a national soldiers' home, to recover the amount of certain pension money which had been paid to the treasurer of the home on account of such soldier, which judgment was paid by the government, renders all questions as to its right to such pension money *res judicata*, and it cannot maintain a second action against the administrator to recover the money back.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Sherman T. McPherson, U. S. Atty., and Thomas H. Darby, Asst. U. S. Atty.

Gottschall & Limbert, for defendant William S. McConnaughey.  
U. S. Martin and C. H. Kumler, for defendant State of Ohio.

Before LURTON and SEVERENS, Circuit Judges.

**PER CURIAM.** The plea of *res adjudicata* is good. The record of the former judgment shows that the same question was involved in the suit of McConnaughey, administrator of Hoffman, against the United States, which was attempted to be relitigated in this case. That judgment determined that the plaintiff in the former suit was, as the personal representative of Johann Hoffman, entitled to receive and hold the remainder of unexpended pension money paid to or on account of Hoffman. Having recovered the same from the United States, they are not now entitled to have same paid back again by reason of any new right or title asserted herein.

Judgment affirmed.

## WEST v. ROBERTS et al.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1905.)

No. 1,366.

**1. TRIAL—EFFECT OF MOTIONS BY BOTH PARTIES FOR DIRECTION OF VERDICT.**

Where both parties move for direction of a verdict, it is an affirmation on the part of each that there is no disputed question of fact which could operate to deflect or control the questions of law.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 400.]

**2. PUBLIC LANDS—LOUISIANA STATE SWAMP LANDS—PRE-EMPTION RIGHTS.**

Pre-emption rights cannot be acquired, under Act La. No. 21, p. 31, of 1886, in lands which have been granted to one of the levee boards of the state.

In Error to the Circuit Court of the United States for the Western District of Louisiana.

J. D. Wilkinson, for plaintiff in error.  
E. H. Randolph, E. W. Sutherlin, W. P. Hall, and A. J. Murff, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On the trial in the lower court each party requested the court to instruct the jury to return a verdict in his favor, and thereby each affirmed there was no disputed question of fact which could operate to deflect or control the question of law. See *Beuttell v. Magone*, 157 U. S. 157, 15 Sup. Ct. 566, 39 L. Ed. 654. The trial judge gave the peremptory instruction in favor of the defendant, and therein followed *McDade v. The Bossier Levee Board*, 109 La. 627, 33 South. 628, and *Hall v. Levee Board*, 111 La. 913, 35 South. 976.

The ruling of the trial judge was correct, and the judgment of the Circuit Court is affirmed.

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NATIONAL TUBE CO. v. SPANG et al.

(Circuit Court of Appeals, Third Circuit. Feb. 1, 1905.)

No. 7.

PATENTS—INVENTION—MANUFACTURE OF TUBING.

The Patterson patent, No. 581,251, for the manufacture of tubing, covering the method by charging the plates into the furnace from the rear and withdrawing them from the front by means of tongs or other suitable device, which also draws them through the welding bell, is void for lack of patentable invention. The advantages of back charging in the manufacture of such pipe, as was practiced in the making of lap-weld pipe, were previously known, and it was practiced by at least one method. The method of the patent was merely a part of the steady evolution and development of the art in mechanical means, not involving invention.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 125 Fed. 22.

James I. Kay and John R. Bennett, for appellant.  
Wm. L. Pierce and Frederic H. Betts, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This suit was brought by the appellant, the complainant below, for alleged infringement of letters patent No. 581,251, granted April 20, 1897, to Peter Patterson, for an improvement in the manufacture of tubing, and by him assigned to the appellant, the complainant below.

The state of the art to which the alleged invention applies, is thus described in the specifications of the patent in suit:

"My invention relates to the manufacture of butt-weld pipe or tubing from flat metal plates or strips, its object being to overcome certain existing defects and difficulties in this art and to facilitate the manufacture of the tubing, both as to the heating of the plates from which the tubing is formed

(including the time consumed for heating and the even heating of the same) and the ease of working, both for feeding the plates to the furnace and the withdrawal of the same therefrom. This class of tubing is formed of comparatively thin flat metal plates or strips, which are raised to a welding heat in a furnace and are then drawn through bell-shaped dies known as 'welding-bells,' in which the flat strips are bent into circular form and their edges butted together with sufficient force to cause them to weld. The bottom of the heating furnace has generally been formed of sand, gravel, or like loose material to withstand the high heat, receive the cinder produced by the melting and oxidation of the metal, and permit the plates to slide easily, and has been slightly inclined from front to rear to provide for the discharge of the cinder at the rear end of the furnace.

"The usual way of preparing the flat plates prior to heating and drawing them through the welding-bells has been to suitably trim the end to be introduced into the bell and thereby form a tongue thereon, and to bend up the edges of this tongued portion slightly to impart to it a tendency to turn in the bell in the direction in which the edges are bent, and either to secure to this tongued end a drawing-rod termed a 'tag' prior to heating the plate or to grasp the tongued end of the heated plate by tongs, and by the tag or the tongs draw it through the welding-bell. The regular method of heating the plate has been to introduce it with the square or untrimmed end foremost into the same end of the furnace from which the plate is to be withdrawn, and when the plate is heated to draw it out by means of the tag or tongs applied to the opposite or tongued end, so that the end of the plate which first enters the furnace is the last to be withdrawn therefrom. The plates or strips are thin and flexible and are generally from eighteen to twenty feet in length. They are difficult to handle, bending and sagging in the hands of the workmen, and are liable when pushed into the furnace to scrape over and tear up the loose gravel bottom, so that it is found necessary to turn up the square or untrimmed end of the plate which is first introduced to enable it to slide over the loose furnace-bottom.

"The foregoing method of manufacturing butt-weld pipe has several objections or defects, among which are the following: The heat of the furnace is so high that the time required to introduce the plates (which are generally of comparatively thin metal) and to withdraw them is a material part of the time required to bring them to the welding heat, and as the square end of the plate is the part first introduced into the furnace and the last part withdrawn therefrom the edges of that portion of the plate are often too highly heated before the edges of the opposite or tongued portion (which is connected to the drawing-tag or is to be grasped by the tongs) are at a sufficiently high heat for welding, and consequently if the plate be left in the furnace until the edges throughout its entire length are brought to the welding heat some portion or portions are very liable to become overheated, to become too soft, or to be burned, as above referred to.

"Another practical difficulty arising from the introduction of the plates into the same end of the furnace from which they are withdrawn is the interference between the gangs of men who handle and introduce the plates, known as the 'feeders,' and the 'welder,' who controls the heat of the furnace, determines the time of heating, and superintends the withdrawal of the plates, both of whom must be stationed and work at the same end of the furnace. This interference necessarily delays the work, especially where several plates are heated in the furnace at the same time, and as soon as one is withdrawn another is introduced. Furthermore, this charging of plates in at the same end of the furnace from which they are withdrawn renders it impracticable to employ mechanical charges for feeding the plates to the furnace.

"It is the object of my invention to overcome the objections, defects, and difficulties hereinbefore enumerated; and to this end the invention consists, generally stated, in the method of making butt-weld pipe or tubing from thin flat plates or strips of metal, hereinafter more fully described and claim-

ed, by introducing the strip or plate longitudinally through the rear end of the furnace into the furnace-chamber, raising its edges to substantially uniform welding heat throughout its length, and drawing it by the end first introduced from the furnace at the opposite end thereof and through a welding-bell or bells, and thereby forcing the opposite edges of the plate into abutting and welding contact."

The claims of the patent are as follows:

"(1) The herein-described method of forming butt-weld tubing from flat plates or strips of metal, which consists in introducing a flat plate longitudinally through the rear end of a furnace into a furnace-chamber, raising its edges to substantially a uniform welding heat throughout its length, and drawing it by the end first introduced through the opposite or front end of the furnace and through a welding-bell, and thereby forcing its edges together and welding it into tubing, substantially as set forth.

"(2) The herein-described method of forming butt-weld tubing from flat plates or strips of metal, which consists in trimming and bending one end of a plate so as to form a raised tongue thereon, inserting the plate with its raised tongue end foremost through the rear end of the furnace into the furnace-chamber, raising its edges to substantially a uniform welding heat throughout its length, and drawing it by the raised tongued end through the opposite or front end of the furnace and through a welding-bell, and thereby forcing its edges together and welding it into tubing, substantially as set forth.

"(3) The herein-described method of forming butt-weld tubing from flat plates or strips of metal, which consists in feeding a series of flat plates successively side by side through the rear end of a furnace into the furnace chamber, raising their edges to a welding heat therein in the respective positions in which they rest when so fed, and drawing them successively by the ends first introduced from the opposite or front end of the furnace and through a welding-bell, and feeding in a fresh or cold plate in line with the one being withdrawn, substantially as set forth.

"(4) The herein-described method of forming butt-weld tubing from flat plates or strips of metal, which consists in feeding a series of flat plates successively side by side through the rear end of a furnace into the furnace-chamber, raising their edges to a welding heat therein in the respective positions in which they rest when so fed, and drawing them successively by the ends first introduced from the opposite or front end of the furnace and through a welding-bell, and feeding in a fresh or cold plate in line with the one being withdrawn, and before it has been entirely withdrawn, from the furnace, substantially as set forth.

"(5) The herein-described method of forming butt-weld tubing from flat plates or strips of metal, which consists in trimming and bending one end of the plate so as to form a raised tongue thereon, inserting the plate with its raised tongue end foremost through the rear end of the furnace into the furnace chamber, raising its edges to substantially a uniform welding heat throughout its length, grasping the raised tongued end by means of tongs or similar devices, and drawing the plate thereby through the opposite or front end of the furnace and through a welding-bell, and thereby forcing its edges together and welding it into tubing substantially as set forth."

The defenses were nonpatentability, by reason of lack of invention, and noninfringement. The court below sustained the first defense, and the second defense of noninfringement was, therefore, not considered. The opinion of the learned judge in support of his conclusion is elaborate, and covers the case so completely, that we adopt the same as the opinion of this court. It is as follows:

"Buffington, J. This is a bill filed against Spang, Chalfant & Co. by the National Tube Co., assignee of patent No. 581,251 granted April 20, 1897, to Peter Patterson for manufacturing tubing. Infringement of all claims is charged. The defenses are invalidity of the patent and noninfringement.

The patent concerns pipe making. In that art long strips of wrought iron or steel of suitable width are brought to a proper welding heat. In one method the strips are drawn through a flared or bell-mouthed ring which gradually rounds the strip into diminishing circular form as it passes through its lessening diameter and the bell at the outer and smallest opening forces the edges to abut and weld. This method is called butt-welding; its product butt-weld pipe. In the other method the sides of the strip are first skived or beveled and then passed over a mandrel and through rolls whereby the edges are made to overlap and weld. This is called lap-welding; and the product lap-weld pipe. Butt-weld pipes were successively made prior to the patent in suit, which was for an improvement in one step of the process and did not, it will be observed, create a new article of manufacture. The product of the patented as well as the former process continues to be styled butt-weld pipe. In the art antedating the patent the high heat required to bring the strips to a butt-welding point was secured by the use of reverberable reverberatory furnaces which ran approximately 3,000°. Under such high heat the strips required rapid handling, since if not withdrawn at the melting point the iron was burned. As these strips were fed in at the front of the furnace and the ends first subjected to heat were last withdrawn it was manifest that when a welding heat was reached at the end last introduced the other end might by the time it was withdrawn be burned. This danger was lessened by furnace construction, by which through graduated valves the heat was in a measure, if not indeed wholly controlled, for as Mr. Converse, complainant's president, said: 'My own impression is that the different exposure—that the difference of time of exposure of front charging was compensated by heat distributed in the furnace.' It was also known that to successfully weld a strip its center should not reach as high heat as the edges, for a stiff center maintained the form or contour of the pipe under the strain of welding the abutting edges. In securing this result it was recognized that it was preferable to allow the strips to remain in the position in which they were originally charged and withdraw them from that point rather than to shift them to the common withdrawing one. The advantage of this stationary or quiescent position of charging is due to the fact that when the cold strip is introduced it speedily absorbs heat from beneath, and as this absorbed heat is added to by the heat from the furnace arch or body above it the strip soon becomes superheated and returns its heat to the strip of the furnace floor beneath it. This absorption of heat from the strip by the floor tends to keep the central line of the strip relatively cooler and give it that stiff body which aids in welding the abutting edges. If, however, the strip were moved from its original position to one which was and had been subjected to the heat radiating from the furnace arch, the strip instead of losing heat to the floor at this point of the process would absorb more from it. The advantage of quiescent heating was known and appreciated and its advantages sought for through the agency of a shifting or movable working bench. An example of this is seen in the table of Patterson himself shown in patent No. 416,374, whereby he sought to 'overcome the necessity of handling the plates after they are placed in the furnace and so provide for the more regular and even heating of the plates,' through the agency of a movable work bench. Another practice in the prior art which deserves careful consideration in forming a just estimate of the patent in suit was the means used to draw the strips from the furnace and through the welding-bell. The prior practice until a short time before the patent in suit was by means of a draw bench and a 'tang' or drawing rod and is described by Patterson in his patent No. 416,374, before referred to, as follows: "The most approved method of making this butt-weld tubing heretofore practiced has been to weld a rod to the end of the plate from which the tube is to be formed and bringing this plate to a welding heat in a suitable furnace and draw the plate by means of said rod through a bell shaped die, generally termed a "bell," the sides of the plate being turned over so as to bring it to tubular form, and the edges of the plate being butted and compressed together within the die and so welded. In welding tubing in this manner a long draw bench has heretofore been employed, the draw bench being mounted stationary before the mouth of the welding furnace, and the draw

bench having at its forward end a holder to support the welding die or bell, and a chain traveling in said draw bench, and a buggy running on a track on the draw bench and acting to draw the blank through the die by first engaging with the "tang" or drawing rod secured to the tube-blank, and then engaging with the traveling chain and so drawing the blank through the welding die or bell.' Moreover, prior to the patent in suit the general principles and advantages of charging metal at the rear of a furnace were known and appreciated. It was seen that it prevented congestion at the furnace front and that the general benefits naturally incident to a continuous straight-away process followed. Front charging of billets and slabs was the common practice, but about 1870, when the use of Siemen's regenerative furnaces in pipe-making eliminated coal smoke from such furnaces rear charging was and has since been followed in heating skelp for lap-welding. With the exception, however, of the Crane practice referred to later no step toward rear charging was taken in butt-weld furnaces. The reason for this seems apparent in the limitations imposed by the use of tangs, since it was impracticable, if not indeed, impossible to charge a strip from the rear of a furnace with a tang welded to its nose. In the first place the tang end could not be slid along the furnace floor, and even if it could have been it would have been so hot it could not be handled to shift the strip or to pass it through the welding bell and attach it to the draw buggy. Not only was the tang an impediment to back charging, but it was an expensive factor in that it required a preliminary heating and the labor of welding it on and shearing it off. The desirability of using tongs instead of tangs was appreciated, but the conditions under which tongs had to be used were such that it was a difficult thing to devise them. In the first place they had to operate at long range; second, their size must be such that the gripping end could pass through the welding-bell, and third their grip must be such that they could stand the jerk or strain of instantaneous engagement to a chain moving at the rate of several hundred feet a minute and at that rate grip and start a strip of iron twenty-five feet long and draw it at a rapid rate through the welding-bell. From these conditions and difficulties it will be apparent that the use of tangs and the lack of tongs would completely prevent any attempt at back charging. This is clearly and forcibly shown in the affidavit of Saunders filed in the Patent Office in the application for the present patent and the testimony of Simpson in the present case. Saunders' affidavit was: 'Up until within a short time of the invention made by Mr. Patterson, the almost universal custom in making butt-weld tubing or drawn tubing was to employ what were termed "drawing tags," which were secured to the front end of flat plates, the plates being pushed into the furnace from the same end as that from which they were withdrawn. \* \* \* It would have been impracticable to introduce them from the other end for two or three good reasons, the principal one being that the tag would have become heated in passing through the furnace, so that the welder could not grasp the tag and so manipulate the plate in the furnace, and furthermore, that the tag would be liable to catch on the bottom of the furnace and tear up the bottom, or direct the plate out of its proper course. I have never known it to be attempted. \* \* \* The use of tongs for drawing the plate from the furnace was practically only experimental up until within a short time of Mr. Patterson's making the invention, as it was difficult to provide tongs which would hold sufficiently well to the plate, and yet pass through the welding-bell.' The testimony of Simpson was: 'Q. 12. How long did you continue to use the bell and the tag-welded plate as a means of handling the plate and drawing it through the bell as the principal way of making your pipe? A. Up to about 1893; that is, up to the time I left in 1893. Q. 13. Up to that time had you known of any better way in practical use of making butt-weld pipe than by welding the tag onto it, as you have described? A. No.' The difficulty in devising such tongs is stated by Doyle: 'The difficulty in devising such tongs lies in the fact that they must be slender enough to allow their passage through the bell, and at the same time have sufficient strength for the required drawing of the plate through the bell.' A careful examination of the proofs in this case, and in that aspect we may say they are practically unquestioned, satisfies us that the absence of such tongs was

a prohibitive step to the use of back charging methods and in our judgment the conclusions drawn by Dr. Sellers, an expert, and Henderson, a practical superintendent, are justified by the proofs in this case. The former says: 'A. The chief, and I might almost say the only, impediment in the way of back-charging was the non-invention of any means of drawing the plate out of and through the bell except by means of a tag welded to the bar ready for the operation of passing this tag and the pipe through the bell, and is now done by the ingenious tongs that have been gradually evolved to take the place of the welded or otherwise attached tag, the use of which necessitated the front-charging method.' The latter says: 'A. The reason for not charging skelp into the rear end of butt-welding furnaces was the absence of a suitable device with which to withdraw the flat sheet from the front end of the furnace; in other words, we were unable to secure a pair of tongs over which we could slip the welding-bell and which would be at the same time slender enough and having sufficient tenacity when gripping the sheet of iron to pull the same through the welding-bell without slipping off and allowing the sheet to remain in the furnace, thus causing what we would term a "cobble." The whole question of back-charging hinged on the question of a suitable appliance for withdrawing the sheet from the front end of the furnace, and until this was accomplished we used what is commonly known as the "tang method" of making butt-weld pipe.' Indeed, the fact that no tong has yet been devised for handling small-sized pipe, say an eighth to a quarter of an inch, and that they continue to be made by the front-charge method is illustrative of what for a time restricted the larger sized pipes to front-charge furnaces. And that the tongs were the lacking factor is shown by the practice in lap-weld furnaces. There tongs had been devised by which the skelp could be satisfactorily gripped, and back-charging was therefore practiced. But the tongs that were suited to that practice and to the relatively moderate cherry-red heat there employed, would not meet the requirement of grasping strip raised to the melting point required in butt-welding. The difference is set forth by the witness Henderson, who says: 'A. The condition of the flat sheet or strip of metal when drawn through the skelping box from the front end of the skelping furnace, was what was commonly known as "cherry-red heat." The skelping tongs which grasped this plate had an entirely different work to perform as compared with a pair of tongs suitable for grasping a flat sheet or strip of metal heated to high welding heat which were to be drawn through a small welding-bell. In the first instance the tongs were quite short and were mounted on a buggy. Sufficient pressure could be put on these tongs by the use of a pulley hook, which would make them grasp the plates tenaciously enough to allow them to be drawn through the skelping die while in the welding tongs, which of necessity had to be long and slender. Great trouble was experienced in securing tongs which would retain its hold on the plate when pulled through the welding-bell.' But in spite of this drawback the art was not without its development in back charging of strips for butt-welding. What is known as the 'Crane method' was in use previous to the patent and is still used as a successful method of butt-welding by back charging. In this practice the furnace was open at the front, the welder and front slider worked from that point and together moved the plate from the second position forward to the final working point. At one side it had a stationary work bench provided with bell, buggy and movable chain and the strips were charged by a stationary mechanical charger placed at the diagonal corner from the work bench. Instead of a reversible furnace, one in which the heat was generated on one side and the exit flue on the other was used. A picker man or rear slider was stationed at the rear opening who moved the plate from its first to its second position, from which point they were moved to the third and fourth position by the front slider and to the fifth or final position by the welder. This device showed the application of the general principle of back charging to the butt-weld art; as an incident to that method it showed the uniformity of heating obtained by opening the rear end and thus avoiding the heat non-uniformity which necessarily came from a closed rear furnace section; it also incidentally showed equality of time of heat subjection. Not only was the end of the strip first introduced first withdrawn, but the whole



strip as it was shifting toward the hotter working side was uniformly subjected to the higher heat zones horizontally.

"In this state of the art the idea occurred to Patterson, the patentee, to dispense with tongs, charge the strips at the back of a butt-weld furnace, allow them to remain in such initial position, grip them with tongs and withdraw them therefrom at the front of the furnace by means of his shifting draw bench. This constitutes his process. It was embodied in a furnace built at McKeesport in October, 1894. That furnace differs from the Crane method in this that the plates are initially charged in the position from which they are finally drawn. In that respect Patterson himself says: 'My understanding of the Crane apparatus is that a flat plate or strip of metal is charged in between a plate and the bridge wall, and when so charged into the furnace they are moved laterally to the place of withdrawal. With this exception the Crane apparatus is practically the same as the apparatus at McKeesport.' Subsequently, to wit, on March 18, 1896, the National Tube Works Company, as assignee of Patterson, made application for the patent in suit which was granted April 20, 1897. Did this device involve patentable novelty? In considering that question we naturally inquire of the steps or means through which an invention is reached. A long series of futile experimental efforts resulting in a solution in some unthought of way sometimes serves to aid in showing inventive character. The present case is singularly free from any effort of that kind. The plan of rear charging simply occurred to Patterson several years before he reduced it to practice. It seems to have come to him and been suggested by the use of his movable draw bench as a means of increasing production. He says: 'A. On December 3, 1889, I was granted a patent No. 416,374, for an apparatus for welding. This invention covers the movable draw bench, and it was when we put this draw bench in operation and were experimenting with it to increase our production in butt-weld tubing, that the thought of charging the plates into the rear of the furnace occurred to me. It was not more than a thought at the time, and as time went on it would return to my mind, especially when we were struggling with the difficulties of getting uniform heat on the plates for the making of butt-weld tubing. I have a distinct recollection of telling Mr. Pierce in 1893, who was the manager of the pipe mills of our company at that time, of my idea of making pipe by charging the plates from the rear of the furnaces, but Mr. Pierce did not give me very much encouragement and time went on, and it was not until the fall of 1894 that I was permitted to have a furnace built in which to carry out my idea of back charging.' Referring to his talk with Pierce he says: 'A. My conception was to charge the plates into the furnace on certain lines, and I so disclosed it to Mr. Pierce. I also stated that if allowed to build a furnace of that kind that I would use my movable draw bench, so as not to move the plates in the furnace, as was the custom in front charging.' The conception, whatever its character, was then complete. There were reasons why it remained unused so long. The tang method prevented its use, and Mr. Converse objected to the heavy expenditure involved in furnace reconstruction and in the adoption of a process which involved dividing the responsibility for furnace control between the charger and the welder. This latter objection proved unfounded, and when permission was received to construct a back-charging furnace complete plans were drawn, the furnace constructed according to them and at once put in operation without any experimental work. Mr. Converse says: 'I remember ordering the change of this furnace and seeing the work done and afterwards hearing from Patterson other ideas he had which included this back charging. I do not recall any other objection than our heavy expenditure which would be incurred by such a radical change other than the taking away from the old welder to a great extent the control of charging his furnace. I refer more particularly not to means of charging, but to the quantities and time.' In view of these facts and statements it seems to us that the idea of back charging simply and naturally occurred to Patterson as a means of using his patented movable draw bench and thereby increasing production. This is strengthened by Mr. Converse's estimate of the invention. He says: 'My own impression is that \* \* \* the great advantage derived from the back-charging methods as against front-charging methods were far better facilities

for charging without interrupting the welder or interfering with his work—continuity of presentation, and as I have before stated, the enormous increase in production for heat and labor unit.' As confirmatory of the view that the improvement in method here involved was mechanical and commercial and did not call into exercise inventive genius, it will be noted that near this same time other persons had thought of back charging for butt-welding and that they were seeking to devise tongs as a means of securing it. The difficulty was not in the lack of conception of back charging, but in the lack of tongs to make its adoption possible. These facts are to be regarded not as anticipations or prior conception to Patterson, but simply as evidencing the fact that the back charging of a butt-weld furnace was a mechanical conception which naturally occurred to other persons near the same time and without knowledge of the others' actions. Thus Doyle, the manager of the respondent's works, says: 'When I went to Spang, Chalfant & Co. the condition of their butt-weld pipe making was so very far behind the method used in other mills, we started in at once to make improvements in the method of manufacture. I reduced the number of heatings required to make a complete tube from 7 to 5; again from 5 to 3, still making the tube by the old common tang-welding process, it being still unsatisfactory; in 1894 we put in a bell-welding furnace. It being found unsatisfactory, on account of the expense of making and welding on the tangs, I began work on devising suitable tongs to take the place of the tang, knowing that when we were able to get satisfactory tongs we would then have to charge from the rear of the furnace, as that would be a more convenient way of working. Along in 1895 I succeeded in devising satisfactory tongs; showed the tongs in operation to Mr. George A. Chalfant, general manager of the works, and explained the advantages of the tongs in charging from the rear over the tang method then in use.' George A. Chalfant, one of the respondents, testified as follows: 'Q. 22. In April, 1896, when you began to charge your butt-weld furnace at the rear, had you ever heard of the Patterson patent in suit, or of its introduction at the complainant's works at McKeesport, or elsewhere? A. I most certainly did not. \* \* \* Q. 7. When did you first hear of charging butt-weld furnaces at the rear and drawing them at the front? A. It was in the fall of 1888. Mr. Doyle said to me we ought to make pipe by charging the skelp or plates in at the back of the furnace and drawing them out welded pipe at the front of the furnace. The only thing that would be necessary would be suitable tongs to draw out the hot skelp. \* \* \* Mr. Doyle came to the office one day in the fall of 1895 and asked me to come up to the mill, that he had something he wanted to show me. I went up to the mill. He showed me a pair of tongs that he had made for drawing skelp out of the front of the furnace. He had made an opening in the back of the welding furnace and charged some plates in the back of the furnace for making inch and a quarter pipe. When they were heated to a welding heat he drew them through the bell at the front of the furnace with these tongs that he had shown me and made inch and a quarter pipe. I said, "You have succeeded, get ready to make pipe by back charging." The significance of facts of like general character was referred to in *Haslem v. Pittsburg Plate Glass Co.* (C. C.) 68 Fed. 481, where it was said, citing *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438: 'As confirmatory of the view that this improvement did not call into exercise inventive genius, reference may be made to the fact that even, if priority of conception could be accorded, to Haslem at or about the same time three skillful mechanics—namely, Haslem, Sleeper and Edward Ford—acting independently of each other, suggested the duplication of the orbicular beam in the Belgian machine at the Jeffersonville Works, and the application of the reverse crank movement to the beam. This circumstance furnishes persuasive evidence that the change was obvious to the skillful mechanic.' A vast amount of testimony has been taken to show the value of the back-charging practice and of its advantage over former methods. We so regard it. It is a natural continuous straight-away method and like all such improved methods of continuous handling it avoids congestion of workmen, allows steady, as compared with intermittent work, it utilizes the same heat and labor to produce a larger product. We are also satisfied that by a quiescent charging better heat results are obtained

and less scrap made. We are also satisfied that further use of the practice has developed advantages additional to the two which alone the patentee had in mind and referred to in the application, viz., even longitudinal heating and separation of the working force. But conceding such difference and progress the fact still remains that the step here made was one of gradual and to be expected progress which marks every great and therefore progressive industry. In that advance the tongs and movable draw bench afforded scope for inventive genius and presumably have procured protection to those who devised them. The principle of back charging was not Patterson's invention. Now why should the general principle and practice of back charging which tongs have made available for butt-weld heating be monopolized to prevent their use for that purpose? Nor was the principle of quiescent charging his. He simply utilized these principles by employing them in the only way they could be used by means of improved tongs and shifting draw bench and in a way the draw bench naturally suggested. That this use disclosed new and unexpected advantages may be conceded but it is not everything that is novel and useful that is patentable. Many processes and methods have proved exceedingly valuable in manufacturing that have not been patentable. To use, with some change, the language of another (*Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438), we may say that the development of this, as of every great industry develops a constant demand for new methods, which the ordinary skill of those versed in such branch has generally been adequate to devise, and which devising is the natural outgrowth of such development. Each forward step prepares the way for another, and to burden a great industry with a monopoly to each improver for every step thus made, except where marked by an advance greater than mere progressive skill, is unjust in principle and hostile to progress. In reaching the conclusion of the invalidity of this patent we are not unmindful of the *prima facies* to which its issue entitles it. But the *prima facies* is necessarily affected by the fact that the record discloses neither in the specification of the patent or in the action of the examiner any reference to the Crane practice. Indeed the proofs show it was not known to Patterson. His specification contains no reference to it. Indeed it is conceded that if literally construed and not restricted to the specific method disclosed Crane's method would infringe at least one claim.

"In concluding we remark that while the testimony of the experts in this case shows the thermal and operative advantage of back charging, a conclusion to which we agree, and while the process is simple, effective and economic, we are nevertheless satisfied it involved no invention. In our judgment it was but the steady evolution and development of advance incident to an industry where competition pushes progress to constant change. In this advance the movable bench and the successful tongs were material factors. Back charging was the natural step in advance when these factors were provided. So holding we are of opinion the patent is invalid and the bill must be dismissed."

The decree of the court below is affirmed.

CLEVELAND FOUNDRY CO. et al. v. KAUFFMAN et al.  
(Circuit Court of Appeals, Third Circuit. February 21, 1905.)

No. 27.

1. PATENTS—INVENTION—RESOLVING DOUBT IN FAVOR OF PATENT.

Where the question of the validity of a patent is in doubt, the doubt should rather be resolved in favor of than against the patent.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 35, 53, 62.]

2. SAME—OIL BURNERS.

The Jeavons patent, No. 702,560, for an oil burner, the important feature of which is the making of the stem of the needle valve which controls the oil supply to the burner of such size as to about fill the bore of its enveloping sleeve, so that it may be unthreaded from the valve body and used as a plunger in such sleeve to remove any obstruction in the valve orifice, shows a modification of prior forms of construction, which adds a new and useful function and discloses invention. Also held infringed as to claims 1 to 6.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 126 Fed. 658.

Thomas W. Bakewell and John R. Bennett, for appellants.  
Stephen J. Cox, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

\* DALLAS, Circuit Judge. The Circuit Court held that the first six claims of the patent now before us were void for lack of patentable novelty, and upon that ground dismissed the bill of the complainants, the appellants here. The learned judge did not deal with the question of infringement, and all that need now be said upon that subject is that our examination of the record has left us in no doubt that the charge of infringement, separately considered, was clearly sustained.

Letters Patent No. 702,560, dated June 17, 1902, were granted to William R. Jeavons, for "oil burner," and the claims thereof with which this suit is concerned are as follows:

"(1) In an oil-stove, the combination of an oil-supply tank provided with means for the maintenance of a substantially constant level of oil therein, a burner-trough with its upper edge above the plane of the maintained oil-level in said tank, a supply-pipe between said tank and trough, and a valve and stem to control the outflow therefrom, and a sleeve for said valve-stem extending upwardly to a plane above the maintained level of oil in said tank and open at its top, the said valve-stem adapted to be reciprocated in said sleeve, whereby the contents of the oil-passages may be forcibly ejected and the said passages cleansed with the head of oil open to the burner-trough, substantially as described.

"(2) In an oil-stove, the combination of an oil supply tank provided with means for the maintenance of a constant level of oil therein, a burner-trough in position with its top edges above the level of oil in said tank, an oil-feed pipe projecting downwardly from said trough and a valve below said feed-pipe controlling the flow of oil to the burner-trough, a supply-pipe for the said

trough below said valve, and a sleeve for the said valve extending upwardly to a point above the level of oil in the said tank, said valve adapted to be reciprocated and to serve as a piston to force oil through the oil-passages leading to the burner-trough, substantially as described.

"(3) The combination of an oil-supply tank and means for the maintenance of a substantially constant level of oil therein, a burner-trough and a valve-body and oil-supply connections from the tank to said body and thence to the burner-trough, a sleeve projecting from said valve-body having its upper end above the maintained oil-level in the tank and a plunger in said sleeve adapted to force oil forward through the oil-passages, substantially as described.

"(4) The combination of an oil-supply tank and means for the maintenance of a substantially constant level of oil therein, a burner-trough with its top edges above the maintained level of the oil in said tank and a valve-body and oil-supply connections from the tank to said body and thence to the burner-trough, a sleeve projecting from said body having its upper end above the maintained oil-level in the tank and a plunger in said sleeve adapted to force oil forward through the oil-passages, substantially as described.

"(5) In an oil-stove, the combination of an oil-supply tank and means for the maintenance of a substantially constant level of oil therein, a burner-trough with its top edges above the level of the oil in said tank, and an oil supply passage from the tank to the said burner, a tubular sleeve open to said passage and having its upper end above the maintained level of the oil in the supply-tank, and means adapted to be reciprocated in said sleeve and to force oil to the burner-trough, substantially as described.

"(6) In an oil-stove, the combination of an oil-supply tank and means for the maintenance of a substantially constant level of oil therein, a burner-trough with its top edges above the plane of the constant oil-level of said oil-supply, a valve-body below said trough and in open connection therewith, through an upwardly-extending part, a tube for the valve-stem extending outwardly and upwardly from said valve-body with its top end above the plane of the said constant oil-level, and a valve-stem supported in said tube, said parts constructed and arranged to allow the reciprocation of the valve-stem in the said tube, substantially as described."

It is not necessary to discuss these claims in detail. The decision of the court below was based upon its finding that the patentee's "needle valve in an enveloping sleeve" was old, and that he merely "found a new way in which such mechanism could be employed"; that what he did was not the "devising new means, but rather the discovery of new uses to which an old mechanism could be put"; and the only substantial question is as to whether this finding was correct. The learned judge said: "The case is a close one. We have not arrived at our conclusion without hesitation, and there are grounds for strongly urging a different one." But we think that the doubt which he seems to have entertained should have been resolved in support of the patent. *R. R. Co. v. Stimpson*, 14 Pet. 459, 10 L. Ed. 535; *Lehnbeuter v. Holthaus*, 105 U. S. 96, 26 L. Ed. 939; *Cantrell v. Wallick*, 117 U. S. 695, 9 Sup. Ct. 970, 29 L. Ed. 1017. The ultimate finding of fact by which, as we have said, his decision was determined, is not, in our opinion, deducible from the primary facts. Jeavon's device for removing obstructions from the oil passages of the stoves to which the patent relates is the especially important feature of the organization which its specification describes. The court below said that it "consists of a threaded needle valve located in the lower end of an enveloping sleeve, the upper end of which is higher than the maintained level in the sup-

ply tank. This valve controls the oil supply to the burner, and in case the valve or burner becomes clogged, the valve-stem may be unthreaded and used as a plunger to agitate the oil, and so remove the clogging or objectionable substances." Now, it may be conceded that a threaded needle valve was old, but it is quite certain that the conversion of the stem into a plunger was new. The patentee did more than suggest a new use for an old device. By providing that the valve-stem should be "of such diameter as to about fill the bore of the sleeve," and for the disengagement of "its threaded portion from the body of the valve," he adapted it to the discharge of a distinctly new and highly useful service. As he said in his specification:

"The valve-stem, M, is threaded at n to engage with threads in the valve-body at this point, and is of such diameter as to about fill the bore of the sleeve or casing, N. When the said stem is revolved sufficiently to disengage its threaded portion from the body of the valve, it may be moved to and fro in the casing, N, and will act to agitate the oil somewhat after the manner of a pump-plunger, alternately drawing and forcing it through the valve-orifice and through passage, d, in the plug, D, and in this way the said passages may be flushed, and any dirt or water that may have accumulated therein will be dislodged."

This dislodgment was not to be accomplished by an unaltered valve-stem, but by a plunger produced by materially modifying it. By the means Jeavons devised the plunger was evolved, and, as it performs a beneficial function for which the valve-stem of the prior art was not designed, adapted, or used, we are of opinion that its creation involved invention. *Topliff v. Topliff*, 145 U. S. 161, 12 Sup. Ct. 825, 36 L. Ed. 658; *Clough v. Barker*, 106 U. S. 176, 1 Sup. Ct. 188, 27 L. Ed. 134; *Wickelman v. Dick*, 88 Fed. 266, 31 C. C. A. 530; *Boyer v. Keller Tool Co.*, 127 Fed. 130, 62 C. C. A. 244.

The decree of the Circuit Court is reversed, and the cause will be remanded to that court for further proceedings in conformity with this opinion.

## ROWLEY v. KOEBER.

(Circuit Court, N. D. Illinois, Northern Division. March 27, 1900.)

No. 26,092.

## PATENTS—INVENTION—ARTIFICIAL LIMBS.

The Rowley patent No. 644,464, for an artificial limb suspender, while greatly narrowed by the prior art, is for a combination which makes some advance thereon, and discloses invention; also *held* infringed.

In Equity. Suit for infringement of letters patent No. 644,464, for an artificial limb suspender, granted to James F. Rowley February 27, 1900. On final hearing.

William R. Rummler, for complainant.  
Raymond & Barnett, for defendant.

KOHLSAAT, District Judge. Complainant files his bill herein for an injunction to restrain infringement of letters patent No. 644,464, for an artificial limb suspender, and for an accounting. Defendant denies infringement and the validity of complainant's patent under the prior art, and cites a large number of alleged anticipating patents. The patent in suit has four claims. In brief, it covers a device whereby an artificial limb, consisting of a thigh and leg section, having a knee joint, may be supported and operated by the same suspender in such manner as to enable the wearer to control the action of the two sections by body or shoulder movements, without causing the suspender to saw back and forth upon the shoulder to any objectionable extent. The fact that 23 patents are cited in the prior art tends to show that artificial limbs have been the subject of much consideration by those engaged in useful invention. The cases cited cover all the principles claimed for the patent in suit in detail. The patent is for a combination.

The intense desire of maimed persons to supply the loss of a limb, and the keen satisfaction with which every approach to nature in the operation of an artificial leg, however slight, is received by those unfortunate enough to require such aid, will warrant the court in taking into account very slight advances on the prior art. An examination of a few of the patents cited by defendant will suffice to show what has been done in this art, so far as is decisive of the questions now presented. In the Bly patent, No. 23,656, the leg is supported and adapted by one suspender in such a manner as to permit of the raising of the leg by means of a shoulder movement. This is accomplished by means of an elastic webbing attached to the thigh section. The suspender is so constructed as not to yield to the movements of the strain upon the elastic webbing. There is no sliding movement of the supporting and controlling strap. Its only similarity to complainant's device is the "one suspender" and its response to shoulder movements. Its methods of operation are very different from those in the patent in suit. The Reichenbach patent, No. 41,238, covers a device for an artificial leg, in which the operating cord is fixed to a waist belt held in place by a shoulder strap. The cord passes around the pulley, which is located in the kneecap.

This device relieves the sliding strain upon the shoulders by use of a pulley, but is radically different in structure from that of the patent in suit. The only use of the shoulder strap is to support the belt. The J. Condell patent, No. 48,660, covers a device for a suspender in connection with an artificial limb, which is rigid upon the shoulders and does not yield to the tension of the spring, and which gives the wearer some control over the artificial leg by shoulder action. There is a serious shoulder strain, but the suspender, being rigid, does not respond by sliding. The Legran patent, No. 52,057, covers a device for an artificial leg in connection with a suspender which enables the wearer to use the chest and shoulders in operating the lower section of the leg by a device shown. The suspenders move back and forth over the shoulder in a sawing manner in response to the strain upon the controlling cord. The Monroe patent, No. 58,351, calls for an artificial leg in connection with a suspender which is not specifically described, but which supports the leg and operates by direct spring strain. The Collins patent, No. 295,675, calls for an artificial leg in connection with a suspender which operates and supports the lower part of the leg by means of a cord which provides a compensating action by passing through and moving upon a pulley at the knee joint. The adjustment of the suspender is not shown. The Frees patent, No. 401,426, covers a device for an artificial leg in which the controlling cord operates upon a lever of limited play, with a view to the regulation of the strain upon the shoulders. The Winkley patent, No. 371,239, calls for an artificial limb in connection with a suspender so contrived and connected as to enable it properly to support the limb, and at the same time permit the greatest freedom of motion of the limb without displacement of the straps or suspender. The operating cord has a double sliding motion, one through loops in the suspender proper, and the other and lower one through loops fastened to the upper section of the leg, thus preventing any serious sliding movement upon the shoulder, as in the patent in suit. The manner of moving the lower section is not shown. The Tullis patent, No. 598,452, provides for a single strap for the support and operation of the leg. The L. Riebel, Jr., patent, No. 623,741, covers a device for an artificial leg in connection with a suspender which is passed over the shoulder, and which has a sliding movement over front and rear pulleys fastened to the leg.

Thus it will be seen that the combination of a leg holder and controller in one suspender is not new. It is also evident that the use of loops and pulleys in connection with the operation of the suspender, and the operating cord to effect the control of the lower section of the leg, is old. It is also apparent that devices calculated to enable the wearer to direct the movement of the lower section of the leg by shoulder or chest action have been long before the public. The only change brought about by Rowley consists in the adjustment of the suspender to the lower section of the leg, and the arrangement of certain guides placed on the upper section. His patent is called "an artificial limb suspender." His claims include the two leg sections as well. The defendant's device is almost iden-



tical with complainant's. It lacks the guide link "12," but this, complainant insists, is not essential to his device. There is some difference in the arrangement of the flexible straps connecting the operating cord and the lower section, as shown by the drawings, but that feature is not in question.

The defendant relies mainly upon the prior art as a defense. While the patent in suit is greatly narrowed by anticipation, I am of the opinion that in the combination of the operating cord with the sliding loop, and the sliding connection of the flexible straps which move the lower section with the operating cord, and the arrangement of the guides upon the upper section of the leg, complainant has made a slight advance upon the prior art, and the patent in suit is therefore sustained. The pulleys of defendant's device are the equivalents of complainant's sliding loop. There can be no doubt that, if the patent in suit is valid, defendant infringes.

Solicitor for complainant may prepare a decree in accordance herewith.

**WESTINGHOUSE ELECTRIC & MFG. CO. v. JEFFERSON ELECTRIC LIGHT, HEAT & POWER CO.**

(Circuit Court, W. D. Pennsylvania. February 24, 1905.)

No. 18.

**1. RES JUDICATA—MUTUALITY OF ESTOPPEL—REFUSAL TO DISCLOSE CONNECTION WITH SUIT.**

A defendant cannot plead in bar to a suit for infringement a prior judgment, to which it was not nominally a party, on the ground that it in fact defended the action, where during its pendency, and until after the decision of the appellate court in favor of the defendant therein, it persistently refused to admit its connection therewith, and also during such time in another suit filed a sworn answer denying such connection.

**2. PATENTS—INJUNCTION AGAINST INFRINGEMENT—ELECTRIC MOTORS.**

A preliminary injunction granted restraining infringement of the Tesla patents, Nos. 511,559 and 511,560, for a method of transmitting electrical power and an electric motor, on prior adjudications sustaining such patents and admitted infringement by defendant.

In Equity. Suit for infringement of letters patent Nos. 511,559 and 511,560 for a method of transmitting electrical power and for an electric motor, granted to Nikola Tesla December 26, 1893. On plea and motion for preliminary injunction.

Kerr, Page & Cooper and Bakewell & Byrnes, for plaintiff.

Keithley & Arthur, for respondent.

**BUFFINGTON**, District Judge. This case was before us on an application for a preliminary injunction, which the court granted, filing an opinion reported at 128 Fed. 751. On removal to the Circuit Court of Appeals this order was reversed in an opinion reported at 134 Fed. 392, that court saying:

"Under the circumstances, then, we think that the court should have forbore to act until full proofs were before it. Without intending to intimate any opinion upon the merits of the case, we will reverse the order granting a preliminary injunction."

Thereafter proofs were taken, and the cause is before us for final hearing. By consent of counsel the motion for a preliminary injunction is here renewed, based on the affidavits on file and on the proofs taken on the plea of *res adjudicata*. A study of the proofs satisfies us the plea must be overruled and an injunction issued. These proofs show that during the pendency of the Catskill Case there was an earnest effort on the part of the complainant to connect the Diamond Meter Company with that litigation, in order to have the patent litigated in an eastern circuit. The declination of the complainants to sue the company in the western circuit suggested by the counsel for the Diamond Meter Company was based on the supposed theory that patents were more favorably regarded by the eastern courts. Whether groundless or otherwise, it is clear that such views were held, and in accordance therewith the complainants were anxious to draw the Meter Company into the litigation in the Catskill Case. There were many surface indications which pointed toward the theory that the Diamond Meter Company was the real defendant in that case, and counsel for complainant frankly say they were convinced such was the case, although they were not able to prove it. All efforts on their part to procure from counsel for the respondent in that cause an admission that they really represented the Diamond Meter Company were, in our view, met by studied silence when an opportunity was given counsel who really represented the Diamond Meter Company to define their relation to that litigation. No blame can attach to them for so doing, but their then action was wholly at variance with the position the company now takes of availing itself of an alleged relation to that litigation which they then failed to take when requested to do so. Their failure to give any information on the subject naturally excited the suspicion of the counsel of the other side, who became convinced, if a bill were filed against the Diamond Meter Company, it would, by its answer, be forced to concede it was defending the Catskill Case. Accordingly, after the decision of Judge Lacombe, complainant filed a bill in the Northern District of Illinois, alleging the connection of the Diamond Meter Company with the Catskill Case. To this bill the Diamond Meter Company made answer that:

"This defendant is not informed, save by the allegations in said bill of complaint, whether the alleged suit against the Catskill Illuminating & Power Company was begun, prosecuted, and decided as alleged in said bill of complaint. It therefore denies, on information and belief, that any such proceedings in manner and form alleged were had, and denies that it was formally agreed and undertaken to secure the said Catskill Company not only against the expense of all legal proceedings in the said alleged suit, but also all loss by reason of any judgment for damages and profits which may be entered against said defendant in said alleged suit. And this defendant therefore denies that it was privy to said alleged suit against said Catskill Company, and that all questions alleged to have been passed upon in said suit are *res adjudicata* as between the parties hereto."

Just how this answer could be truthfully made in view of the now conceded fact the Diamond Meter Company had undertaken the defense of that case, had employed counsel, and was expending large sums of money in contesting it, we are not called upon to discuss. It suffices to say that it was an explicit denial of the participation of the

company in that litigation. The litigation in the Catskill Case was then pending, and the case had not been reviewed by the appellate court. Here was an unequivocal opportunity for the meter company to disclose its connection with the case "openly and to the knowledge of the other party, and this in order that the estoppel be mutual." *Lacroix v. Lyons* (C. C.) 33 Fed. 439; *Herman on Estoppels*, 157; *Bigelow on Estoppel*, 99; *Cramer v. Singer Manufacturing Company*, 93 Fed. 636, 35 C. C. A. 508; *Lane v. Welds*, 99 Fed. 286, 39 C. C. A. 528; *Walker on Patents*, 358; *Litchfield v. Goodnow*, 123 U. S. 550, 8 Sup. Ct. 211, 31 L. Ed. 235. Not only did it fail to do so, but it denied in fact that it was privy thereto. To say that the complainant was in equal fault in making an allegation to the contrary in its bill, and that its averment therein is also at variance with its present contention, does not affect the force and significance of the meter company's answer. The complainant's bill would, of necessity, be based on expected proof, and in point of fact it seemed to have been based on a well-grounded suspicion, and on deductions which, had it been able to establish by proof of facts, would have connected the meter company with the Catskill Case. However, its allegation of that fact did not conclude the meter company, or determine its relation. But the answer of the meter company was based on facts within its own knowledge, and on acts which it either had or had not done. When, therefore, it denied any knowledge of the suit—"This defendant is not informed save by the allegations in said bill of complaint whether the alleged suit against the Catskill Illuminating & Power Company was begun, prosecuted, and decided as alleged in said bill of complaint," is its averment—the contention of the complainant is that it regarded the effort to connect the meter company with the Catskill Case futile. Certainly it does not lie in the mouth of the meter company to complain if the court adopts this sworn statement of its attitude toward the then pending litigation, as showing it was not avowing its connection therewith, and as evidencing its unwillingness to be bound as a party or privy thereto. And that status is permitted to stand unchanged during the ensuing 15 months, and while the litigation proceeded. After the reversal of Judge Lacombe's decision, and when it became its interest to avail itself of its concealed and denied connection with the litigation which was then over (for it only lacked the entering of a formal decree), such disclosure was made in a letter to one of the judges. To our mind it is clear that its action at that late date could not avail to affect the character of the prior litigation, and, inasmuch as this was the first time its defense of the case was openly avowed, and in point of fact really known to the other party, the case was not *res adjudicata* as between them, and the respondent's plea fails for lack of adequate proof.

An order will therefore be made overruling the plea and granting an injunction.

**CLEVELAND ELECTRIC RY. CO. v. CITY OF CLEVELAND et al**

(Circuit Court, N. D. Ohio, E. D. January 30, 1905.)

No. 6,728.

**CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACT — STREET RAILWAY FRANCHISES.**

By a city ordinance duly passed under legislative authority, two separate railroad companies, theretofore operating independent lines, were authorized to consolidate, subject to the conditions therein imposed, which required the consolidated company to run through cars, and to carry passengers between any two points on the consolidated lines for a single fare. The franchise of one of the constituent companies expired by its terms in 1904, and that of the other in 1908. By a subsequent ordinance the consolidated company was authorized to use electric power on all of its lines, and by others to build and operate various extensions in connection with its main line; such extension ordinances severally providing that "the right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908." All of such ordinances were required to be, and were, accepted by the company and complied with. *Held*, that they created contracts which bound the company to operate all of its lines as a unitary system until February, 1908, and conferred upon it the corresponding right to do so, and that an ordinance passed in 1904 granting a renewal of the franchise of the constituent company, which expired in that year, to a new company, to the exclusion of the consolidated company, was unconstitutional and void, as impairing the obligation of such contracts.

In Equity.

Squire, Sanders & Dempsey, for complainant.

Newton D. Baker, City Sol., and Garfield, Howe & Westenhaver, for defendants.

WING, District Judge. This cause comes on for hearing, on the motion of the complainant for a decree as prayed for in the bill of complaint, upon the pleadings herein. The pleadings consist of the bill and answer; the replication heretofore filed herein having been withdrawn, by leave of court, upon proper showing.

The general nature of the bill is to the effect that the complainant is a corporation owning and operating various lines of street railway in the city of Cleveland and vicinity; that the defendant the city of Cleveland is a municipal corporation organized under the laws of Ohio, and, acting under delegated power from the Legislature of the state of Ohio, has, by legislative enactment, made sundry contracts with the complainant and its predecessors in interest, under which the complainant is operating its lines of railway in the city of Cleveland; that the defendant the Forest City Railway Company is a corporation organized under the laws of Ohio for the purpose of constructing, maintaining, and operating lines of street railway in the city of Cleveland; that the controversy is one arising under the Constitution of the United States, in this: that the complainant seeks relief against the defendants in the bill by reason of an attempt on the part of the defendants to enforce against the complainant a law of the state of Ohio impairing the contract rights of the complainant, in contravention of and in violation of the Constitution of the United States, and especially contrary to and in

violation of section 10, art. 1, thereof; and that the controversy involves an amount in excess of \$5,000. The bill further shows that the complainant is a consolidated company, organized in the year 1893, and was formed by the consolidation of certain street railway companies which prior to the consolidation owned and operated street railways in the city of Cleveland under ordinances duly passed by the municipality and accepted by said companies. The names of the constituent companies are given in the bill at large, and are the East Cleveland Railroad Company, the Broadway & Newburgh Street Railroad Company, the Brooklyn Street Railroad Company, and the South Side Street Railroad Company. The bill avers that the complainant is the owner, by purchase, of all and singular the lines of railway, rights, and franchises of the Cleveland City Railway Company; that the Cleveland City Railway Company was a consolidated company formed by the consolidation of the Woodland Avenue & West Side Street Railroad Company and the Cleveland City Cable Railway Company, each of which was a corporation organized under the laws of the state of Ohio for the purpose of operating lines of street railway in the city of Cleveland, and at the time of such consolidation the Woodland Avenue & West Side Street Railroad Company was operating lines of railway described generally as the Woodland avenue lines and the West Side lines, and the Cleveland City Cable Railway Company was operating lines from the Public Square out Superior and St. Clair streets to the easterly limits of the city; that the total mileage of single track operated by the complainant, as successor in interest of all of the constituent companies, is about 236 miles; that the contract between the complainant and the city of Cleveland, growing out of the various consolidations, with the obligations imposed by the various ordinances set forth in the bill, required it (the complainant) to operate the entire system, and, as a part thereof, to operate through cars over different portions of said lines, and to give transfers from one line to another, as defined in the ordinances of the city of Cleveland, and that such obligations were continuing obligations; that the Woodland Avenue & West Side Street Railroad Company was organized in 1885, and was a consolidated company, formed by the consolidation of the West Side Street Railroad Company and the Woodland Avenue Railway Company, and the said the Woodland Avenue Railway Company was the successor, by purchase, of the Kinsman Street Railroad Company, and all and singular its rights, property, and franchises, having become such about the year 1880; that by the terms of the consolidation, in 1885, of the West Side Street Railroad Company and the Woodland Avenue Railway Company, the Woodland Avenue & West Side Street Railroad Company became vested with all and singular the property rights, privileges, and franchises of said constituent companies, including the rights, privileges, and franchises theretofore owned by the Kinsman Street Railroad Company; that prior to the year 1885, when the Woodland Avenue & West Side Street Railroad Company was organized by the consolidation, the two constituent companies forming such consolidation were independent lines of street railroad, one operating lines chiefly upon the west side of the Cuyahoga river, and the other upon the east side of said river, and

running to the southeasterly portion of the city, and each of them was acting under independent franchises. The bill further avers that, on February 1, 1885, there was duly passed an ordinance, a portion of which is in the words and figures following, to wit:

"An ordinance to fix the terms and conditions upon which the railway tracks of the West Side Street Railroad Company and the tracks of the Woodland Avenue Railway Company and said companies may be consolidated.

"Section 1. Be it ordained by the city council of the city of Cleveland, that the consent of the city is hereby given to the consolidation of the West Side Street Railroad Company and the Woodland Avenue Railway Company, upon the following conditions: The said consolidated company is to carry passengers through, without change of cars, by running of the cars through from the workhouse on the line of the Woodland Avenue Railway Company to the point on the West Side Railroad where Gordon avenue crosses Lorain street; and, when practicable in the judgment of the council, to do likewise on the branches of the consolidated lines; and that for a single fare from any point to any point on the lines and branches of the consolidated road no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents or twenty-two for one dollar shall at all times be kept for sale on cars by conductors."

The bill further avers that the Woodland Avenue & West Side Street Railroad Company, thus formed, duly accepted the conditions and terms of said ordinance, and since that time has observed the same.

The answer of the city of Cleveland admits the allegations with respect to the corporate existence of the complainant and of the defendant, and admits the amount involved in the controversy; that the complainant is a consolidated company organized in the year 1893, and formed by the consolidation of certain constituent companies, which at the time, and prior to such consolidation, owned and operated street railways in the city of Cleveland, and that by the terms of such consolidation, and the force and effect thereof, as provided by the statute of Ohio, the complainant became and is possessed of all the rights, privileges, and franchises possessed by said constituent companies. The defendant also admits that the constituent companies, and the lines owned and operated by them, which were acquired by the complainant by virtue of such consolidation, are substantially as set forth in the bill; that the complainant is the owner, by purchase made some time on or about July 1, 1903, of all of the lines of railway, rights, privileges, and franchises then owned by the Cleveland City Railway Company, and that the Cleveland City Railway Company was a consolidated company formed by the consolidation of the Woodland Avenue & West Side Street Railroad Company and the Cleveland City Cable Railway Company; that the total mileage of single tracks operated by the complainant, as the successor in interest of all the various constituent companies, is about 236 miles. The defendant admits that the Woodland Avenue & West Side Street Railroad Company was organized in 1885; that it was formed by the consolidation of two companies, each of which had, prior to the date of such consolidation, owned, and was then operating, lines of street railway in the city of Cleveland; that the two constituent companies were known as the West Side Street Railroad Company and the Woodland Avenue Railway Company; that the Woodland Avenue Railway Company was the suc-

cessor, by purchase made some time about the year 1880, of the Kinsman Street Railroad Company, and all of its rights, property and franchises; and that by the terms of such consolidation the Woodland Avenue & West Side Street Railroad Company became vested with all the property rights, privileges, and franchises of each of said constituent companies, including the rights, privileges, and franchises formerly owned by the Kinsman Street Railroad Company. The defendant admits that on the 16th day of February, 1885, an ordinance was duly passed by the council of the city of Cleveland, consenting to the consolidation proposed to be made pursuant to the statute law of the state of Ohio of the West Side Street Railroad Company and the Woodland Avenue Railway Company, and that the title and first section thereof are correctly quoted and set forth in the bill of complaint, and avers that section 2 of said ordinance is as follows:

"Said consolidated company shall be subject to all the liabilities, conditions and penalties to which said several companies are liable, and said consolidated company and its tracks shall at all times be subject to the control, regulation and supervision of the said council to the same extent that the several companies and their tracks are now liable."

The defendant admits that prior to such consolidation the West Side Street Railroad Company was an independent line of street railroad, operating chiefly upon the west side of the Cuyahoga river, and that the Woodland Avenue Railway Company was an independent line operating on the east side of said river, and running to the southeasterly portion of said city, and that each of them was operating under independent franchises from this defendant or from the village of West Cleveland; that there was no interchange of traffic between the two companies, by way of transfer, and that passengers patronizing said roads and desiring to take a trip compelling them to use a part of each road were compelled to pay one fare to each company, irrespective of the distance they wished to travel; also that the West Side Street Railroad Company was at that time operating under a franchise which was granted on the 10th day of February, 1883, and was to continue for a period of 25 years from said date. The defendant admits that it was a part of the plan of the two constituent companies to run through cars from the easterly termination of the Woodland Avenue Company's lines at the workhouse, in the southeasterly portion of the city, to the westerly terminus of the West Side Company, on the west side of the river, a distance of seven or eight miles, and also, whenever it might become practicable, to institute other car service on the branch lines. The defendant admits that after the passage and legal publication of the ordinance the Woodland Avenue & West Side Street Railroad Company filed with the city its written acceptance of the terms thereof, and that the Woodland Avenue & West Side Street Railroad Company and the Cleveland City Railway Company, and the complainant as their successor, have carried passengers in accordance with the terms thereof, and have run through cars over the entire distance at the rate of fare therein fixed, and have sold and accepted tickets for such passage as therein provided. The defendant admits that in an ordinance passed April 8, 1887, at the request and upon the application of the

Woodland Avenue & West Side Street Railroad Company, authorizing and permitting additional track extension, there was contained the following language:

"And the right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908."

The defendant further admits that on the 12th day of August, 1887, the council of the city of Cleveland passed another ordinance, whereby it granted permission to the Woodland Avenue & West Side Street Railroad Company to make an extension of its tracks in Franklin avenue, from Kentucky street to Waverly avenue, which was on the west side of the city, and that there is a provision in said ordinance as follows:

"The right hereby granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908."

The defendant admits that on the 22d day of March, 1888, the city council of Cleveland passed an ordinance authorizing the Woodland Avenue & West Side Street Railroad Company to use electricity in the operation of its street railroad, and that said ordinance is in the words and figures set forth in the bill of complaint, and that the said street railroad company accepted the same in writing; that, after its passage and acceptance, the said company expended a large sum of money in equipping its said railroad with electric power, but, as the exact amount of such expenditure is unknown to this defendant, it neither denies nor admits that the amount was so large as \$700,000. From the bill, it appears that this ordinance was as follows:

"An ordinance granting the Woodland Avenue & West Side Street Railroad Company the right to use electricity in operating its street railroad.

"Section 1. Be it ordained by the city council of the city of Cleveland, that the Woodland Avenue & West Side Street Railroad Company is granted permission to operate its entire line of street railroad, as the same now exists, with any and all extensions that may hereafter be made thereto, by electricity as a motive power, using such electric plant in the public streets as shall be acceptable to the board of improvements, and, for such purpose, said company shall have the right to erect and maintain poles, wires, fixtures or conduits, and all other appliances or appurtenances that, in the opinion of said board, shall be found necessary to successfully operate its street railroad by electricity.

"Sec. 2. In the erection of poles and the placing of wires or conduits, and in the use of any and all other appliances or appurtenances that may be found necessary to operate its line by electricity, before the improvement shall be made upon any or all of its lines for the purpose of using electricity, a plan for the same, showing all poles, wires and other appliances or appurtenances that said company shall desire to use, shall be submitted to and approved by the board of improvements, said board having the right to fix the distance at which poles shall be apart, the height of all poles and wires, and the size and location of all conduits, and to regulate the places within the streets where any and all appliances or appurtenances shall be located, and to establish such regulations with reference to the public safety, protection, painting and sightliness of the poles and appurtenances, as the board of improvements shall determine.

"Sec. 3. The running of cars on any part of the lines of such company may be suspended by the board of improvements for such reasonable time as may at any time be necessary on account of the construction or repairs of streets or sewers or other public improvements, and whenever it may be necessary to have any track taken up for the purpose aforesaid, the same shall be taken



up and relaid at the expense of said railroad company whenever required by said board.

"Sec. 4. Said railroad company shall at all times hereafter defend, keep harmless and indemnify the city of Cleveland from any and all damages, lawful claims and demands for injuries to persons or property, costs and expenses to which said city may be subjected or made liable by any proceeding at law or in equity or otherwise growing out of the grant of the privileges in this ordinance granted, or out of the exercise and enjoyment of the same by said company.

"Sec. 5. Said company shall at all times conform to such rules and regulations as may from time to time be made by the council and approved by the board of improvements, as to the rate of speed it may run its cars, and while the cars of said company are in motion or about to start, warning shall be given by bell or otherwise, to notify persons of any immediate or approaching danger.

"Sec. 6. That the city reserves to itself the right to grant any other person or persons, company or corporation, a joint use for street railroad purposes of the tracks, poles, wires, electric currents and other appliances herein provided for upon such portion of said Woodland Avenue & West Side Street Railroad Company's lines from the intersection of Pearl and Lorain streets, northerly along Pearl street to the Superior Street Viaduct; thence along the Superior Street Viaduct to Water Street; thence along Superior street to Ontario street; thence along Ontario street to the southerly line of Factory street, as is free territory under existing grants, upon such terms and conditions as to occupation and compensation as the city council may deem just and reasonable in case such companies should fail to come to such agreement by and between themselves.

"Sec. 7. The grant herein made shall be in force from and after the date of the passage and legal publication of this ordinance and the written acceptance of the same by said company, and said company shall have the right to maintain and operate its present line and any and all extensions until the expiration of the present grant of said company, to wit, the 10th day of February, 1908.

"Sec. 8. Nothing contained in this ordinance shall in any wise release or relieve said company from compliance with all other ordinances relating to street railroads now in force or which may hereafter be adopted by the city council, including all amendments hereto and thereto.

"Sec. 9. Said railroad company shall in writing accept the permission and privileges hereby granted, and agrees to comply therewith.

"Sec. 10. This ordinance shall take effect and be in force from and after its passage and legal publication and the payment to the city auditor by said company of the expense of publication.

"Passed March 22, 1889."

The defendant admits that on the 20th day of June, 1892, the city council of Cleveland duly passed an ordinance, which was duly accepted by the Woodland Avenue & West Side Railroad Company, whereby said company was authorized to lay an additional track in Kinsman street from the intersection of Woodland and Willson avenues southeasterly along Kinsman street to the city limits, thereby making a double-track street railway through said district, and that in such ordinance there is a provision as follows:

"Provided that the right herein granted shall terminate with the present grant of the main line of said company, to wit, on the 10th day of February, 1908."

The defendant further admits that on the 1st day of August, 1892, the city council of Cleveland passed an ordinance which authorized the Woodland Avenue & West Side Street Railroad Company to make an extension of its tracks in Lorain street from Henley street westerly to

the city limits; that said ordinance was duly accepted by the grantee; and that it contained the provisions quoted in the bill, to wit:

"And this grant shall terminate and expire at the expiration of the present grant to the said company, to wit, February 10, 1908, and shall be subject to the provisions thereof."

The defendant admits that on the 22d day of August, 1892, the city council passed an ordinance authorizing the Woodland Avenue & West Side Street Railroad Company to construct and maintain a suitable line of feed wires on certain streets of the city, all of which were on what is known as the "West Side"; that the said company accepted said ordinance, as it was required to do therein; and that section 3 of said ordinance is as quoted in the complainant's bill, as follows:

"The permission herein granted shall expire with the main grant to said company on the 10th day of February, 1908, and shall at all times be subject to the provisions of the ordinance of the city passed March 22nd, 1889, entitled: 'An ordinance granting to the Woodland Avenue & West Side Street Railroad Company the right to use electricity in operating its street railroad' (Revised Ordinances, pp. 879 to 881); also subject to the provisions of chapters 28 and 72 of the Revised Ordinances of the city, and all amendments thereto and hereto which may hereafter be passed by the council."

The defendant admits that on the 17th day of July, 1893, the council of the city of Cleveland passed an ordinance authorizing the Cleveland City Railway Company to lay an additional track upon South Woodland avenue, between Southern avenue and Corwin avenue, and a double track on said South Woodland avenue from Corwin avenue to Woodland Hills avenue; that said ordinance was duly accepted by the grantee. The defendant admits that by section 5 of said ordinance the city had the right at any time to require the said Cleveland City Railway Company to operate its cars over the entire length of any of its lines or branches of said constituent companies in the same manner and between the same termini as the cars were operated prior to the consolidation of said constituent companies, under the name of the Cleveland City Railway Company. The defendant admits that on the 19th day of February, 1894, the council of the city of Cleveland passed an ordinance entitled "An ordinance granting permission to the Cleveland Electric Railway Company and the Cleveland City Railway Company to extend their tracks in Willson Avenue"; that said ordinance was duly accepted by said company; that the provisions of said ordinance as to the construction of said railway, the giving of transfers, and the paving and keeping in repair of streets, and the widening of the roadway of Willson avenue between Euclid avenue and Scovill avenue, and the provisions of section 10 for the expiration thereof, are correctly set forth in the bill of complaint; and that Willson avenue, and the lines of road constructed thereon, are intersected both by Kinsman street and Woodland avenue. By the bill it appears that in section 10 of said ordinance it is provided: "This grant shall be in force until the first day of July, 1914." The defendant admits that the complainant is the successor, by purchase, of all of the companies forming the consolidated company known as the Cleveland City Railway Company. The defendant admits that on the 11th day of January, 1904, the city council of Cleveland granted to the Forest City Railway Company the

renewal right to maintain and operate certain existing single and double tracks, by an ordinance, a copy of which is set forth in the bill. This ordinance is one which permits the Forest City Railway Company, the codefendant of the city, to operate a line of street railway throughout the territory designated, to the exclusion of the complainant. There is provision made for the payment to the complainant by the Forest City Railway Company of either an agreed valuation or a determined valuation. The enforcement of the ordinance, if the complainant's franchise is not terminated, will be a violation, by legislative enactment, of the rights of contract of the complainant. It is necessary, then, to determine whether, under the admission of the answer of the city of Cleveland, the rights of the complainant to occupy the streets as a street railway company have terminated.

It is urged by the complainant that a contract relation was entered into between the city of Cleveland and the Woodland Avenue & West Side Street Railroad Company by the ordinance passed February 1, 1885. It is conceded by the parties litigant that the original franchise was granted to the Kinsman Street Railroad Company in August, 1879, for the period of 25 years; that the franchise to the West Side Street Railroad Company extends from February, 1883, for a period of 25 years; that, if unchanged in any way, the right to operate street railways over the Kinsman street line terminated in August, 1904; and that the franchise of the West Side Street Railroad Company would not terminate until February, 1908. The ordinance of February 1, 1885, which provided for the consolidation of the Woodland Avenue Railway Company (the successor by purchase of the Kinsman Street Railroad Company, as before stated) and the West Side Street Railroad Company, has been held by the Supreme Court of the United States, in the case of *Cleveland v. Cleveland City Railway Company*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, to be a contract between the city of Cleveland and the railway company. On page 536, 194 U. S., page 763, 24 Sup. Ct. (48 L. Ed. 1102), it is said:

"In reason, the conclusion that the contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time, and no reservation was made of a right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might thereafter be charged. Taking all the circumstances as above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates."

Before the passage of the ordinance there were in existence two street railroad corporations, to wit, the Woodland Avenue Railway Company and the West Side Street Railroad Company, each having substantial rights which might be yielded, and which, under the name of the consolidated company, would enjoy the benefits of the joint use of such properties and rights. By the part of the ordinance quoted and admitted, it is shown that these two railroad companies and the

consolidated company agreed that over the lines of railway of the two companies mentioned there should be carried for one fare a passenger who before that time had been lawfully required to pay two fares for the same service. In the contemplation of the parties to this contract, did the time during which the mutual obligations therein assumed were to continue end in August, 1904, or in February, 1908? So far as the West Side Street Railroad Company was a party to the contract, it became obligated to carry passengers from Gordon avenue to the eastern terminus of the Woodland avenue line throughout the term of its franchise. The consolidated company assumed this obligation. It follows that there was necessarily granted to the consolidated company a right to do the thing which it had obligated itself to do.

The ordinance of April 8, 1887, admitted in the answer to have been passed, by which the Woodland Avenue & West Side Street Railroad Company extended its lines of railroad in Franklin avenue, which ordinance was accepted by the company, has the provision, "and the right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908"; and the various other ordinances, of August 12, 1887, June 20, 1892, August 1, 1892, August 22, 1892, all containing substantially the same language, may be regarded also as contracts which in terms provide that the franchise shall not end until the date therein mentioned. If treated as recitals, merely, they are conclusive of the intention of the parties in the original contract of consolidation. These ordinances related not only to the line of railway formerly operated by the West Side Street Railroad Company, but also to the extensions of the line of railway operated before the consolidation by the Woodland Avenue Railway Company.

It is admitted by the answer that on the 22d day of March, 1889, the city council of the city of Cleveland passed an ordinance authorizing the Woodland Avenue & West Side Street Railroad Company to use electricity in the operation of its street railroad, in the words and figures set out in the bill, and hereinbefore fully quoted. By the first section of this ordinance it is provided that the Woodland Avenue & West Side Street Railroad Company is granted permission to operate its entire line of street railroad, as the same now exists, with any and all extensions that may hereafter be made thereto, by electricity as a motive power, using such electric plant in the public streets as shall be acceptable to the board of improvements, and for such purpose said company shall have the right to erect and maintain poles, wires, fixtures, and conduits, and all other appliances or appurtenances that, in the opinion of said board, shall be found necessary to successfully operate its street railroad by electricity. By the ninth section it is provided that said railroad company shall, in writing, accept the permission and privilege granted, and agree to comply therewith. By the seventh section it is provided that the grant "herein made" shall be in force from and after the date of the passage and legal publication of the ordinance, and the written acceptance of the same by said company, and said company shall have the right to maintain and operate its present line, and any and all extensions, until the expiration of the present grant of said company, to wit, on the 10th day of February, 1908.

This is a contract between the city of Cleveland and the Woodland

Avenue & West Side Street Railroad Company, which, in express language, fixes the termination of its then existing rights on the 10th day of February, 1908. Upon the faith of the contract, and in pursuance of its agreement, the consolidated company spent a large amount of money. The city of Cleveland, under the statutes of the state of Ohio regulating its authority, undoubtedly had the power to enter into this contract. By section 3443 of the Revised Statutes of Ohio it is provided:

"Council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such street railways may be constructed, operated, extended and consolidated."

After quoting this statute, the Supreme Court of the United States, in *Cleveland v. Cleveland City Railway Company*, hereinbefore referred to, says:

"The statutes show that there was lodged by the Legislatures of Ohio in the municipal council at Cleveland comprehensive power to contract with street railway companies with respect to the terms and conditions upon which such roads might be constructed, operated, or consolidated; the only limitation upon that power being that, in case of an extension or consolidation, no increase in the rate of fare should be allowed."

By section 2501 of the Ohio Statutes, which relates to the granting of franchises, it is provided that "the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest." By the decision of the Supreme Court of Ohio in *State v. East Cleveland Railroad Company*, 27 Wkly. Law Bul. 64, it was decided that the renewal of a grant could be made prior to the expiration of the original grant.

That all of the ordinances which have been referred to in this opinion were authorized contracts between the city of Cleveland and this street railway company, or some one of its predecessors in interest, has been decided by the Supreme Court of the United States in the cause referred to. This appears from the quotations from that decision hereinbefore made. In all of these ordinances or contracts it is expressly provided that the expiration of the right of the street railway company shall be on the 10th day of February, 1908. The performance of the obligations assumed by the railroad company by its acceptance of these ordinances required that the grant should be extended to that date. That the ordinance, the passage and threatened enforcement of which is complained of, is adapted to impair these contracts, is plain, since the enforcement of the ordinance would put into the possession of the Forest City Railway Company the tracks and lines mentioned in the ordinance, over which the complainant has been given a right to operate at least until the year 1908.

Because it is unnecessary, the court refrains from interpreting the effect upon the complainant of the ordinance of February 19, 1894, providing for the establishment of a cross-town line upon Willson avenue, to be operated in connection with the other systems of railway then in operation.

The other defendant, the Forest City Railway Company, depends for its rights upon the validity of the ordinance attacked in this suit. If the ordinance complained of impairs the obligation of a contract, it

is because it attempted to vest the Forest City Railway Company with the rights which by contract belong to the complainant.

For the above reasons, I conclude that the ordinance of January 11, 1904, was passed in violation of the Constitution of the United States, and is and was a nullity. Final decree may be drawn in accordance with this opinion.

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Ex parte NG QUONG MING.

(District Court, S. D. New York. February 9, 1905.)

**CHINESE EXCLUSION—SCOPE OF TREATIES AND LEGISLATION—CHINESE PERSON OTHER THAN LABORER PREVIOUSLY DOMICILED IN UNITED STATES.**

Neither the Chinese treaty of 1880, nor subsequent legislation relating to Chinese exclusion, has any relation to Chinese persons, not of the laboring class, who were at the time of the adoption of that treaty domiciled in the United States, and who have since continued to reside therein; and such a person who temporarily leaves the country, with the intention of returning, cannot be excluded on his return because he is not included in one of the classes expressly excepted from the operation of the exclusion acts, and who alone are permitted to enter the United States by rules 1 and 2 of the regulations adopted by the Department of Commerce and Labor; such rules being applicable only to persons seeking to enter for the first time.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Aliens, § 85.

Citizenship of the Chinese, see note to *Gee Fook Sing v. United States*, 1 O. C. A. 212; *Lee Sing Far v. United States*, 35 O. C. A. 332.]

Max J. Kohler, for petitioner.

William Michael Byrne, Asst. U. S. Atty.

HOLT, District Judge. These are writs of habeas corpus and certiorari to test the legality of the detention at Malone, N. Y., of the petitioner, a Chinaman applying to return to this country. The petitioner came to this country 46 years ago, and has had a domicile of residence at San Francisco ever since. He is a grand master of the lodge of Freemasons for California, and has been for some time deputized by that organization to travel throughout the United States and Canada, organizing societies of his countrymen in the Masonic order. In May, 1894, the petitioner obtained a certificate of residence from the collector of internal revenue for the First District of California. The certificate stated upon its face that it was issued to a person other than a laborer, giving his occupation as a "Chinese Masonic organizer." Some months ago he went to Canada to organize Masonic lodges among the Chinese there; and, on attempting to return to this country, was detained at Malone, and refused admission by the Chinese exclusion inspector, whose decision was affirmed on appeal by the Secretary of Commerce and Labor. The inspector states in his opinion that "it is probable \* \* \* that this person is what he claims to be. However, he is not a merchant, a teacher, a student, or a traveler for curiosity and pleasure"—and that therefore he comes under the provisions in rule 2 of the regulations promulgated by the Secretary of Commerce and Labor in regard to Chinese immigration, which provide that "only those Chinese persons who are expressly declared by the laws and treaty regulating the exclusion of Chinese to be admissible shall be

allowed to enter the United States." This decision was affirmed by the Secretary of Commerce and Labor on the same ground, namely, that rule 2 governed the case.

When this matter was first submitted, the petitioner was not produced in court, and no proof was furnished that there had been any agreement between counsel waiving his production. The writs were therefore dismissed on the ground that the courts in the Northern District, and not this court, had jurisdiction. A motion for a reargument was made, and it was shown upon such motion that there had been an agreement between counsel which practically admitted that the respondent had the petitioner in his custody and control, and which agreed to waive his production in this court. In my opinion, such a stipulation conferred jurisdiction of the case upon this court in the same manner as though the petitioner had been produced in court, as was recently held in the Case of Fong Yim, 134 Fed. 938. As this petitioner had been domiciled in this country for a great many years, and had a domicile of residence here before any Chinese exclusion laws were adopted, I think that the decision of the inspection officers is not final, and that he had a right to test the legality of the decision upon habeas corpus, on the grounds stated in my opinion in the Case of Fong Yim.

The question on the merits in this case is whether rules 1 and 2 of the Chinese regulations prescribed by the Secretary of Commerce and Labor are valid as to a Chinaman domiciled in this country, not of the laboring class, who, having left the country temporarily, without any intention of abandoning his domicile, desires to return, and who is not included in one of the classes of persons declared to be entitled to enter under rule 1.

The sixth article of the treaty of 1868 provides that:

"Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nations."

When this treaty was ratified the petitioner had lived in this country about 10 years, and then had a domicile of residence at San Francisco. The treaty of 1868 is still in full force, except as it may have been modified by subsequent treaties or acts of Congress.

The Chinese treaty of 1880 states, in its preamble, that:

"The government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration, desires to negotiate a modification of the existing treaties."

The first article provides that:

"Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, \* \* \* the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence."

The second article provides that:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be ac-

corded all the rights, privileges, immunities, and exceptions which are accorded to the citizens and subjects of the most favored nations."

It will be observed that the whole object of this treaty was substantially to exclude Chinese laborers; that it expressly permitted Chinese subjects who were teachers, students, merchants, or traveling for curiosity, to go and come of their own free will; and that no reference is expressly made to those Chinese persons, not of the laboring class, who were at the time of the adoption of the treaty, domiciled in the United States. This treaty, it seems to me, has sole reference to persons thereafter coming into the United States. The history of the negotiations between the commissioners of the two countries which resulted in the adoption of this treaty, a full account of which is given in the case of *United States v. Ah Fawn* (D. C.) 57 Fed. 591, establishes, in my opinion, that under its provisions Congress had the right to exclude all Chinese subjects thereafter coming to this country, except the classes mentioned in the treaty; that is to say, teachers, students, merchants, or persons traveling for curiosity, together with their body and household servants. The first exclusion act, passed in 1882 (Act May 6, 1882, c. 126, 22 Stat. 58 [U. S. Comp. St. 1901, p. 1305]), after the adoption of the treaty of 1880, provided that thereafter it should not be lawful for any Chinese laborer to come into the United States, but contained no provision in reference to what Chinese subjects, other than laborers, might come in, except the thirteenth section (22 Stat. 61 [U. S. Comp. St. 1901, p. 1311]), providing that the act should not apply to diplomatic and other officers of the Chinese government traveling upon the business of that government; but the amendatory act of 1884 (Act July 5, 1884, c. 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307]) provides, in section 6, that "every Chinese person, other than a laborer, who may be entitled by the said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government," to be evidenced by a certificate to be issued by the government, stating various particulars. The Supreme Court held in the case of *Lau Ow Bew*, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340, that this section did not apply to Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to re-enter it on their return to their business and their homes, and that they have a legal right to enter without any certificate.

The act of September 13, 1888, c. 1015, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1312], entitled "An act to prohibit the coming of Chinese laborers to the United States," provides, in the first section, that:

"From and after the date of the exchange of ratifications of the pending treaty between the United States of America and the Emperor of China, signed March 12, 1888, it shall be unlawful for any Chinese person, whether a subject of China or of any other power, to enter the United States, except as herein after provided."

The second section provides that "Chinese officials, teachers, students, merchants, or travelers for pleasure or curiosity, shall be permitted to enter the United States" under certain conditions. These sections of the act of 1888, if they had ever taken effect, would, I think, have au-



thorized the exclusion of all Chinese persons coming to this country, after the passage of the act, who were not included in the categories in the second section. But the treaty of 1888 was never ratified (*Li Sing v. United States*, 180 U. S. 486, 21 Sup. Ct. 449, 45 L. Ed. 634), and therefore those provisions of the act of September 13, 1888, which were to take effect after the ratification of the treaty never went into effect. There was considerable discussion whether any part of the act ever went into effect; some holding that the entire act was dependent upon the ratification of the treaty, and others that certain sections—from 5 to 14, inclusive—were independent legislation, which went at once into effect irrespective of the ratification of the treaty. Apparently to settle doubts on this question, by the act of April 29, 1902, c. 641, 32 Stat. 176, sections 5 to 14 of the act, with the exception of section 12, were re-enacted; but I am not aware that any one has ever claimed that sections 1 and 2 of that act [*U. S. Comp. St. Supp.* 1903, p. 189] ever became operative, and I think that it is clear that they never did.

The act of 1892 provided that all Chinese laborers within the United States should apply for a certificate of residence, and the sixth section provided that:

"Any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge."

This provision obviously does not compel any person other than a Chinese laborer, having a right to remain in the United States, to take out such a certificate. The only object of taking out such a certificate by a Chinese nonlaborer domiciled in this country is for him to have a convenient means of proof of his right to remain here. This act of 1892 was the one under which the petitioner took out his certificate, which stated upon its face that he was a person other than a laborer, and which described him as a "Chinese Masonic organizer."

No other act of Congress has been called to my attention which enumerates any class of persons, other than laborers, who shall be permitted to enter the United States. The Chinese treaty of 1894, however, which recites that "the government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States," provides, in the first section, that "for a period of ten years, \* \* \* the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited." The third section provides that "the provisions of this convention shall not affect the right at present enjoyed by Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein." This treaty of 1894, however, has recently been abrogated.

In 1903, the Secretary of Commerce and Labor promulgated certain Chinese regulations. Rule 1 provides that:

"Under the provisions of the laws and treaties in relation to the exclusion of Chinese persons, only such persons as are registered Chinese laborers, off-

dials of the Chinese government, teachers, students, travelers for curiosity or pleasure, merchants and their lawful wives and minor children, laborers seeking in good faith to pass through the country to foreign territory, seamen as provided in rules 15 and 16, and persons whose physical condition necessitates immediate hospital treatment shall be permitted to land at any port of the United States."

Rule 2 provides that:

"Only those Chinese persons who are expressly declared by the laws and treaty relating to the exclusion of Chinese to be admissible shall be allowed to enter the United States, and those only upon compliance with the requirements of said laws and treaty and of regulations issued thereunder. See Op. Atty. Genl., vol. xxii, p. 132."

The opinion of the Attorney General referred to in this rule was given in respect to an application of certain Chinese persons who sought admission to the United States for the first time. In the course of that opinion, the Attorney General says that in respect to Chinese legislation—

"It may be stated comprehensively that the result of the whole body of these laws, and decisions thereon, is to determine that the true theory is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed."

It is not necessary to determine in this case whether no Chinese persons except those affirmatively designated as being entitled to enter by the existing treaties, and who are comprehensively enumerated in rule 1, have a right to enter. The question in this case is whether a Chinese person who has had a domicile of residence in this country from a period before any treaties or laws relating to the exclusion of Chinese existed, and who has temporarily left the country, without any intention of abandoning his domicile, and with the intention of returning, can be excluded from returning because he is not included in one of the classes designated in rule 1. The petitioner in this case is not a laborer, or an official, a teacher, a student, a traveler, or a merchant. He is described in the certificate as a "Chinese Masonic organizer." The proof shows that he is a man of high standing in that order, and is employed by that organization in promoting its interests. I am not a Mason, but I believe that that great and ancient order is one whose objects are praiseworthy, and whose influence is beneficent; and I think that it may be assumed that a man who occupies a high position in it, and who is employed by it to work in its interests, is a man of character, capacity, and intelligence. I can see no reason to doubt that he had, under the treaties between this country and China, which were concluded after he had adopted this country as his place of residence, a right to continue his residence in this country, and the certificate issued to him in 1894 officially admits it. I can see nothing in the treaties or the laws in relation to Chinese exclusion, which were avowedly passed to prevent the evil of the immigration of Chinese laborers, which applies to such a case as this. If this petitioner had a right of domicile in this country, protected by the treaties, I cannot believe that the fact that he took a temporary journey across the line into Canada, with the intention of returning, has abrogated that right. Suppose that a Chinese merchant, domiciled for years in this country,

having acquired a fortune, should retire from business, and conclude to adopt this country as his permanent residence, or that a Chinese minister, sent to this country as a representative of his government, should determine, after the close of his official service, to establish his residence in this country, and continue to reside here for the rest of his life, which admittedly he would have a right to do under the treaties existing between this country and China. Such a person, by the supposition, would be no longer a merchant or an official, or within any of the classes designated in any of the treaties or laws as being entitled to enter. Can it be claimed that, if he ventured to take a temporary trip to Canada for a few days or weeks, or to Europe for a few months, he would thereby lose the right to return to his adopted home and to continue to reside in this country? I think that there is a radical distinction between the case of aliens domiciled in this country, and that of those seeking for the first time to enter this country. The United States Supreme Court, in the case of *Lau Ow Bew v. United States*, 144 U. S. 47, 61, 12 Sup. Ct. 517, 36 L. Ed. 340, states that:

"Chinese merchants domiciled in the United States, and in China only for temporary purposes, *animo revertendi*, do not appear to us to occupy the predicament of persons 'who shall be about to come to the United States,' when they start on their return to the country of their residence and business. The general terms used should be limited to those persons to whom Congress manifestly intended to apply them, and they would evidently be those who are about to come to the United States for the first time."

In my opinion, this language is equally applicable to persons other than merchants who have a right of domicile in this country under existing treaties and laws. See, also, *United States v. Mrs. Gue Lim*, 176 U. S. 459, 468, 20 Sup. Ct. 415, 44 L. Ed. 544.

It was held in *United States v. Chin Fee* (D. C.) 94 Fed. 828, that a Chinese physician, not a laborer, who resided in this country for several years, registered as permitted by the statute, and afterwards went to China temporarily, intending to return, was entitled to remain in the United States after his entry, although his occupation is not one of those stated, in terms, in the treaties or the rules.

The cases of *United States v. Ah Fawn* (D. C.) 57 Fed. 591, and *Lee Ah Yin v. United States*, 116 Fed. 614, 54 C. C. A. 70, cited in the decision of the Secretary of Commerce and Labor, do not seem to me to be applicable to this case. The case of *United States v. Ah Fawn* simply held that a Chinaman, who is described as a gambler and a criminal commonly called a "highbinder," although not technically a laborer, was included in the general term of "laborer," as employed in the treaties and acts of Congress. The case of *Lee Ah Yin v. United States* held that an immoral woman, although not technically a laborer, was included in the same class. Any general expressions in the opinions in those cases are to be construed in the light of the actual questions presented for determination.

I think that the existing treaties and laws did not authorize the establishment of rules preventing the return to this country of a Chinese person, not a laborer, who has a right of domicile in this country, and who has left it temporarily, with the intention of returning, and that the provisions of rules 1 and 2 of the Chinese regulations, which provide that

only Chinese persons of certain designated classes have a right to enter this country, are not applicable to the petitioner.

My conclusion is that the petitioner should be discharged from detention and permitted to enter this country.

### O'REILLY DE CAMARA v. BROOKE

(District Court, E. D. New York. February 27, 1905.)

#### 1. OFFICERS OF UNITED STATES—CIVIL LIABILITY FOR TORTS—MILITARY GOVERNOR OF CUBA.

The military governor of Cuba, appointed by and representing the United States during its temporary occupation of the island after the conclusion of peace, pursuant to the treaty of Paris, is not exempt from personal liability for a tort committed in his official capacity against an individual in the course of the civil administration of the affairs of the country.

#### 2. SPANISH TREATY OF 1899 — MILITARY OCCUPATION OF CUBA — PROPERTY RIGHTS OF RESIDENTS.

As alleged in her complaint, plaintiff, a Spanish subject, and resident of the city of Havana, through purchase by her ancestors was the owner of a hereditary alienable office created by the Spanish crown known as the "Alguacil Mayor of Havana," pertaining to which as a personal or property right was the exclusive franchise or right to conduct the slaughter of cattle in the city of Havana, which franchise had always been recognized by the Spanish government as a valuable property right, of which the owner could not be deprived without compensation. Defendant, while military governor of Cuba in 1899, during its occupancy by the United States, and in time of peace, by an executive order abolished the office, and transferred the appurtenant franchise to the city of Havana. Such order did not purport on its face to have been made in the interest of the public health or in the exercise of any police power, but, so far as appeared, the transfer was purely arbitrary. The treaty of Paris, pursuant to which the American occupation was held, provided that "the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property," and, further, that "the relinquishment of Spanish sovereignty shall not be held to impair the property or rights which by law belong to the peaceful possession of property of all kinds of private individuals of whatsoever nationality such individuals may be." *Held*, on demurrer, that plaintiff's franchise was private property within the protection of the treaty, and of which she could not lawfully be deprived without compensation; that the fact that such franchise was a monopoly, which would be void under the laws of the United States or by the common law, was immaterial, it being valid and protected by the law of Spain.

#### 3. OFFICERS OF UNITED STATES—LIABILITY FOR PRIVATE PROPERTY TAKEN.

If an officer of the United States takes the property of a private person for public use without compensation, he is liable in tort for the trespass, although the government may also be liable on an implied contract.

On Demurrer to Complaint.

Coudert Bros. (Paul Fuller and Frederick R. Coudert, of counsel), for plaintiff.

Charles W. Russell, Special Asst. Atty. Gen., for defendant.

HOLT, District Judge. This is a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a

cause of action. The action is brought by the Countess of Buena Vista, a subject of the King of Spain, and a resident of the city of Havana, against Maj. Gen. John R. Brooke, who was, in the year 1899, military governor of the Island of Cuba, to recover damages caused to the plaintiff by an order of Gen. Brooke abolishing a right or franchise to slaughter cattle in the city of Havana, owned by the plaintiff. The action is brought in this court under the provisions of subdivision 16 of section 563 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 459], which confers jurisdiction upon the United States District Courts of all suits brought by an alien for a tort in violation of the law of nations or of a treaty of the United States. The substantial facts alleged in the complaint are: That in 1728 an ancestor of the plaintiff purchased, with the consent and approval of the Spanish crown, an hereditary and alienable office known as the "Alguacil Mayor," or "High Sheriff," of the city of Havana, an office to which pertained certain purely official functions, such as the perpetual right of sitting as a member of the municipal council of Havana, and a certain personal and property right, consisting of the exclusive franchise or right to manage and conduct the slaughter of cattle in the city of Havana, and to charge for each head of cattle so slaughtered for use in said city at certain specified rates. That said office descended by inheritance to the plaintiff. That in 1859 the Spanish government promulgated a law or decree relating to municipalities in the Island of Cuba, which provided, in substance, for the extinction of the political functions of said office, and their transfer to a municipal council, to be elected, but which also provided that the emoluments or profits of the office should be valued and paid for, and that until such payment the holders of the office should continue in the receipt of its emoluments. That in 1878 the Governor General of Cuba published a decree, having the force of law, providing that the perpetual councilors should cease to perform any duties, and that their offices should no longer be counted among the offices of the municipal council, the members of which thereafter should be elected, but which also provided that the provisions of the law of 1859, directing that the perpetual councilors should not be deprived of any emoluments to which they were entitled until the proper indemnification therefor should be paid to them, should remain in force. That proceedings were taken for the condemnation of the property rights appurtenant to said office, but were never completed, and that the property rights remained in force and were exercised by the plaintiff down to the time of the Spanish War. That in performing such service the plaintiff employed some 70 workmen, 50 oxen, and more than 20 carts, and incurred great expense in the maintenance of the necessary instrumentalities. That on and prior to May 20, 1899, the whole Island of Cuba was under the military jurisdiction of the United States, in pursuance of the treaty of Paris of December 10, 1898, providing for the relinquishment of the Island of Cuba by the Spanish government, and its temporary occupation by the United States. That the said treaty contained the declaration that "the United States will so long as such occupation

shall last assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property," and, further, that "the relinquishment of Spanish sovereignty shall not be held to impair the property or rights which by law belong to the peaceful possession of property of all kinds of private individuals of whatsoever nationality such individuals may be"; that on said May 20, 1899, Brig. Gen. William Ludlow was governor of Havana, and that on that day, the said city of Havana and Island of Cuba being in profound peace, and completely subject to the dominion, authority, and administration of the United States under its pledge in said treaty for the protection of property and of all rights which by law belong to the peaceful possession of property by private individuals, Gen. Ludlow, without notice to the plaintiff, or affording her any opportunity to be heard, and without any complaint of the manner in which she was exercising her said rights and duties and conducting the slaughter of animals in Havana, issued an order by which he declared that the hereditary grant or privilege in connection with the service of the city slaughter house, of which the O'Reilly family, its grantees or lessees, were the beneficiaries by inheritance or purchase from the original grantee, was thereby terminated and declared null and void. That the city of Havana, through its authorized agents, should make provision for the execution of such services as should be necessary in connection with the care of the slaughter house, the killing of animals for food, and the delivery of meat to the local dealers in the city, and to that end should, by hire or purchase, procure such wagons, carts, and draft animals and engage such services as might be necessary for the purpose in question; and that the present owners of the abrogated privilege might seek in the courts the establishment and valuation of such equities or legal rights as they might believe themselves to possess. That the plaintiff appealed from this order to the defendant, Maj. Gen. Brooke, the military governor of Cuba. That the defendant thereupon, on August 17, 1899, issued an order affirming the order of Gen. Ludlow, abolishing the old alienated office known as "Alguacil Mayor of Havana," together with all rights, duties, and privileges pertaining thereto, denying the right of the claimants to receive any of the emoluments thereof, and providing that the municipal corporation of Havana might adopt proper measures to provide the necessary means of performing the municipal services theretofore discharged by the claimants to the ownership of said office. That by said orders the plaintiff was deprived of the rights and franchises granted to her by law, and was thereafter prevented from receiving the emoluments thereof. That the said act of the defendant was in violation of the said treaty, and contrary to an order of the President of the United States issued July 13, 1898, which provided as follows:

"Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are consid-

ered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent, and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by ordinary tribunals, substantially as they were before the occupation. \* \* \* One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property. \* \* \* Private property, whether belonging to individuals or corporations, is to be respected and can be confiscated only for cause."

That the act of the defendant in issuing said order was contrary to the Constitution and laws of the United States, and in violation of the provisions of the treaty of Paris, and of the said instructions of the President of the United States; that it was a confiscation of the plaintiff's property, and was wholly unlawful, tortious, and unauthorized on the part of the defendant; and that it was also in contravention of the said Spanish laws of 1859, and of said decree of 1878. Judgment is demanded for damages alleged to amount to \$250,000.

The questions involved in this case are novel, and I have reached a conclusion with hesitation. The counsel for the defendant claims that the action of Gen. Brooke was a governmental act; that he, as Governor General, exercised in trust either the sovereignty of the people of Cuba or sovereignty as representative of the sovereignty of this country; that in him was the entire legislative, executive, and judicial power; and that for any act done by him in that capacity he is exempt from suit, under the general principle that any sovereign is exempt from private suit for a governmental act. There are undoubtedly cases in which persons exercising substantially sovereign authority in subordination to a sovereign power have been held exempt from liability.

Thus it was held that the East India Company was exempt from private suit in respect to the exercise of that portion of its power in India which consisted in the right to acquire, retain, and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India. *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Moore, P. C. 22, and cases there cited. So the Lord Lieutenant of Ireland has been held to be exempt from liability to private suit for acts done in his official capacity. *Sullivan v. Spencer*, Ir. R. 6 C. L. 173. But the general rule in England is well established that the governor of an English colony, in time of peace, is liable for any tort committed by him, unauthorized by law. *Mostyn v. Fabrigas*, 1 Cowp. 161. In *Phillip v. Eyre*, L. R. 6 Q. B. 1, the Governor of Jamaica was held exempt from liability because the colonial Legislature had passed an act of indemnity; but it was substantially admitted that but for such act he would have been liable to an action for torts alleged to have been committed in violation of law, although in that case the defendant asserted that the acts were done for the suppression of a mutiny, or a threatened mutiny. So it is well established that officers of the United States are personally liable for torts in violation of law, although done in good faith, and in supposed obedience to acts of Congress or the orders of superior officers. *Little v. Barreme*, 2 Cranch, 170, 2 L. Ed. 243; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471.

Similarly, public officers of any kind are liable personally in suits in tort to recover damages for illegal acts done in their official capacity. This rule has been applied to tax officers enforcing taxes under an unconstitutional state law. *The Virginia Coupon Cases*, 114 U. S., 5 Sup. Ct., 29 L. Ed., particularly *Chaffin v. Taylor*, 114 U. S. 309, 5 Sup. Ct. 924, 962, 29 L. Ed. 198; *Carter v. Greenhow*, 114 U. S. 317, 5 Sup. Ct. 928, 962, 29 L. Ed. 202. So actions in ejectment and detinue may be brought to recover property held without legal authority by officers of the United States, although held in behalf of the United States. *Grisar v. McDowell*, 6 Wall. 363, 18 L. Ed. 863; *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171. So a suit for the infringement of a patent may be maintained against an officer of the United States, personally, who infringes a patent while doing work in behalf of the United States. *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599.

I think, under these decisions, that the defendant is not exempt from personal liability in this action on the ground that his order was an exercise of sovereign power. His act was not an act done by a military commander in time of war. He is described in the complaint as the military governor of the Island of Cuba, but it is also alleged in the complaint that the city of Havana and Island of Cuba were in profound peace, and completely subject to the dominion, authority, and administration of the United States. The annulment by Gen. Brooke of the plaintiff's right to carry on the slaughtering business, and its transfer to the city of Havana, was not in its nature a military act, but was essentially an act done in the course of civil administration. The defendant's counsel claims that the plaintiff's right or franchise in the slaughtering business was a kind of private property, the protection of which, after the transfer of Cuba to this country, was not contemplated by the treaty. It was, in my opinion, clearly property. It was a grant from the crown of Spain, from which a valuable income was derived, and it was just as genuine property as if it had been a grant of land from which rents were derived. It was undoubtedly a kind of property which does not exist in this country. It was a pure monopoly. Every student of English history is familiar with the great controversies about monopolies between the crown and the English nation in the reigns of Elizabeth and James I, resulting in the decisions of the courts that they were void at common law, and the statute of monopolies declaring them illegal by act of Parliament. They have ever since been held, in England and this country, to be void at common law, and are now prohibited in this country by the fourteenth amendment to the Constitution. In the *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394, the state of Louisiana had incorporated a company, to which it gave the exclusive right to maintain stockyards and places for slaughtering cattle in a certain part of the city of New Orleans. The validity of that legislation was attacked, and the minority of the court were of the opinion that it was void, as creating a monopoly. The majority of the court, however, held that it was valid as an exercise of the police power, and that it did not create a monopoly, because any butcher who wished to carry on his trade was authorized to



do it at the company's establishment. But it was practically admitted in the opinion of the majority in that case that the trade of a butcher is a trade which, by the common law, any man is free to enter upon and to follow, and that an act of the Legislature conferring upon any particular person or company the right to carry on the trade of a butcher in any community, to the exclusion of all other butchers, would be void. But in many countries monopolies granted by the crown are a perfectly valid species of property. The complaint in this case alleges, and the demurrer admits, that the plaintiff's right or franchise always was and always has been recognized as private property by the Spanish law, and therefore, in the interpretation of the treaty, the plaintiff's right or franchise must be held to have been private property.

But it is claimed that, being a kind of property which is not recognized in this country, it could not have been within the contemplation of the parties to the treaty that it should be protected by this government after the relinquishment of sovereignty over Cuba and the transfer of possession to the United States. It is undoubtedly a kind of property which, by the law of this country, could be at any time abolished by the sovereign power. If such a franchise had been created in this country, it would have been void from the beginning as a monopoly. But it is well settled that the regulation of slaughter houses in thickly settled communities is a part of the police power (2 Kent's Com. 340; Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394); and if any part of such a grant, or any grant of a somewhat similar nature, under certain circumstances, might be upheld as a valid exercise of the police power, as occurred in the Slaughter House Cases, it is well settled that such a grant is not, in this country, protected by the constitutional provision rendering invalid any law impairing the obligation of contracts, and that any state which has granted any privilege in the nature of a monopoly under the police power has a perfect right to terminate such a grant at its option at any time. No state can grant or bargain away its right to exercise the police power. *Butchers', etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585. It is clear, therefore, that, if such a right or franchise as that of the plaintiff had been originally granted in this country in the exercise of the police power, it would have been in the power of the government to annul the grant in the exercise of the same power, and that is what the defendant's counsel claims was done in this case. But, in my opinion, there is nothing alleged in the complaint which justifies the inference that Gen. Brooke, in annulling this grant, was acting under the police power. It is true that his order recites as follows:

"It being considered prejudicial to the lawful interests and general welfare of the municipality of Havana, and as a measure demanded by public policy and in harmony with preceding orders of the military government, in view of the condition of affairs created in this island by the cessation of Spanish sovereignty, the old alienated office known as 'Alguacil Mayor de la Habana,' together with all rights, duties, and privileges pertaining thereto, or derived therefrom, are hereby abolished."

But this recital is entirely consistent with the view that there was nothing in the manner in which the business was conducted by

the plaintiff which called for the interference of the government for the protection of the public health, or for any of the objects for which the police power can justly be exercised. There was nothing in the order which provided for any change in the method of doing the business. The right or franchise was transferred, as it stood, to the city of Havana. So far as appears in the case, the reasons why it was considered prejudicial to the lawful interests and general welfare of the municipality of Havana, and why its transfer to the city of Havana was thought to be a measure demanded by public policy, may have been the fact that it was considered a valuable franchise, the profits of which it was deemed desirable that the city should receive. The complaint alleges that there was no complaint in respect to the management of the slaughter house, and that there existed no immediate or impending danger, or urgent necessity for the transfer. The demurrer admits these facts, and although, upon a trial, a contrary state of facts may appear, I think, upon the face of this complaint, it must be assumed that this transfer was not made in the interests of the public health or in the exercise of any police power, but was simply an arbitrary transfer of a valuable property from one person to another, without compensation.

The defendant's counsel also suggests that the defendant is not liable in this action, because the transaction gave rise to an action upon contract against the government either of Cuba or of the United States. It is well settled in this country that if the government, in violation of the provision of the Constitution, takes private property for a public use, without compensation, a cause of action arises against the government upon an implied contract to pay for it. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; *United States v. Lynah*, 188 U. S. 446, 23 Sup. Ct. 349, 47 L. Ed. 539. If the only liability in such a case were one upon contract, obviously this court would have no jurisdiction of this case, for this court has no jurisdiction at common law of an ordinary claim on contract against an individual under any circumstances, or against the United States, except under the Tucker act, when the claim is less than \$1,000. But if an officer of the United States takes the property of a private person for public use without compensation, I think he is liable in tort for the trespass, even if the government is also liable on contract. *Hill v. United States*, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010.

But, in my opinion, all the reasoning in this case based on the law and authorities governing the rights and obligations of parties to transactions taking place in the United States is more or less fallacious. The plaintiff's rights in this case are governed by the treaty with Spain, which, like all treaties, constitutes a part of the supreme law. That treaty provided that:

"The United States will so long as its occupation shall last assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property."

International law, as stated in the case of *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137, provides that, in the case of the military conquest of a country—

"The conqueror does no more than displace the sovereign, and assume dominion over the country. A cession of territory is never understood to be a cession of the property of the inhabitants. The king cedes only that which belongs to him. Lands he had previously granted were not his to cede. \* \* \* No construction of a treaty which would impair that security to private property which the laws and usages of nations would, without express stipulation, have conferred, would seem to be admissible further than its positive words require."

So in *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067, 32 L. Ed. 51, it is said:

"By the cession of California to the United States the rights of the inhabitants to their property were not affected. They remained as before. Political jurisdiction and sovereignty over the territory and public property alone passed to the United States."

The provision in the treaty, therefore, that "the relinquishment of Spanish sovereignty shall not be held to impair the property or rights which by law belong to the peaceful possession of property of all kinds of private individuals of whatsoever nationality such individuals may be," applies to the property and rights of Spanish subjects in Cuba under Spanish law at the time. The relinquishment of sovereignty over the island must be deemed to have been in consideration of the provisions of the treaty by which the United States guaranteed the protection of the private rights of property as they existed in Cuba. The question is not whether the plaintiff's right or franchise was property under the laws of the United States, which, under those laws, could be interfered with or abolished under the police power or any other power. The question is, was it property under the law of Spain? The complaint alleges that it was, and the Spanish acts and decrees set forth in the complaint show that the government fully admitted that, until the plaintiff was compensated for the value of her franchise, her right and property in it was valid and indefeasible. The Spanish Civil Code, as set forth in the complaint, provides as follows:

"Art. 849. No one shall be deprived of his property, unless it be by competent authority, and with justified cause for public utility, and never until he has previously been properly indemnified.

"If this requirement has not been complied with, the judges shall protect, and, in proper cases, replace the condemned party in possession."

"Art. 336. As personal property, are also considered rents or pensions, either for life or hereditary, in favor of a person or family; also purchased public offices, contracts for public services," etc.

I think it clear from these provisions that under the Spanish law, before the plaintiff could be deprived of her rights in this franchise, its value must have been determined and paid to her.

My conclusion is that the demurrer should be overruled, with leave to the defendant to answer within 20 days upon payment of costs.

## UNITED STATES v. STONE et al.

(District Court, D. New Jersey. March 2, 1905.)

**1. INDICTMENT—SUFFICIENCY—FAILURE TO NEGATIVE EXCEPTION IN STATUTE.**

An indictment based on Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], charging a conspiracy to defraud the United States by causing the violation of another statute subsequently enacted, need not negative an exception found in the later statute, which, being entirely separable from the section upon which the indictment is founded, is matter of defense.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 295-298.]

**2. CONSPIRACY TO DEFAUD UNITED STATES—INDICTMENT—AVERMENT OF INTENT.**

An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for conspiracy to defraud the United States, which sets out the unlawful agreement, need not aver an intent upon the part of the accused to defraud the United States.

**3. SAME—DESCRIPTION OF OFFENSE.**

An indictment for conspiracy to defraud the United States, which charged that defendants secretly inserted a piece of iron weighing half a pound in the center of each of a large number of cork blocks made by them, intending that such blocks should be used in making life preservers for the equipment of steamers navigating the ocean and lakes, bays and sounds of the United States, *held* to sufficiently show that life preservers so made would not fulfill the law and regulations of the United States, which require that every such life preserver shall be made of good, sound cork blocks, and shall contain at least six pounds of good cork, which shall have a buoyancy of at least four pounds to each pound of cork.

**4. SAME—ESSENTIALS OF OFFENSE.**

To constitute the offense of conspiring "to defraud the United States" under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], it is not essential that the conspiracy should have been to commit an act in violation of a criminal statute.

**5. SAME—DECEIVING GOVERNMENT OFFICERS—FRAUDULENTLY INDUCING APPROVAL OF DEFECTIVE LIFE PRESERVERS.**

The provision of Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], which makes it a criminal offense to conspire "to defraud the United States in any manner or for any purpose," is not limited in its application to conspiracies to deprive the United States of money or property, but should be broadly construed to protect the government in its rights, privileges, operations, and functions against all fraudulent operations; and an indictment is good thereunder which avers facts sufficiently showing that defendants conspired to deceive inspectors of the United States in the exercise of their official functions by fraudulently inducing them to approve life preservers which did not in fact comply with the requirements of the federal law, and that they committed overt acts pursuant to such conspiracy.

**On Demurrers to Indictment.**

Each of the four defendants has filed a demurrer to the indictment in this case, and specified causes of demurrer which are the same in form and substance. The indictment charges the defendants with a conspiracy to defraud the United States by manufacturing and selling, for use in making life preservers, compressed cork blocks with pieces of iron concealed in their centers.

Section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676] of the United States reads as follows: "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such

conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court." Other provisions of the law necessary to be considered are the first part of section 4400 of the Revised Statutes [U. S. Comp. St. 1901, p. 3015], which is as follows: "All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title" (title 52, concerning "Regulation of Steam Vessels"). And section 4405 [U. S. Comp. St. 1901, p. 3017], which is as follows: "The supervising inspectors and the supervising inspector general shall assemble as a board once in each year, at the city of Washington. \* \* \* The board shall establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the Secretary of the Treasury, shall have the force of law." And section 10 of the act entitled "An act to establish the Department of Commerce and Labor," approved February 14, 1903, c. 552, 32 Stat. 829 [U. S. Comp. St. Supp. 1903, p. 48], which is as follows: "All duties, power, authority and jurisdiction, whether supervisory, appellate, or otherwise, now imposed or conferred upon the Secretary of the Treasury by acts of Congress relating to \* \* \* steamboat inspection service and any of the officials thereof, shall be and hereby are transferred to and imposed and conferred upon the Secretary of Commerce and Labor from and after the time of the transfer of the \* \* \* steamboat inspection service to the Department of Commerce and Labor, and shall not thereafter be imposed upon or exercised by the Secretary of the Treasury." And section 4488 [U. S. Comp. St. 1901, p. 3055], which is as follows: "Every steamer navigating the ocean or any lake, bay or sound of the United States shall be provided with such numbers of \* \* \* life preservers \* \* \* as will best secure the safety of all persons on board such vessel in case of disaster. \* \* \* And the board of supervising inspectors shall fix and determine by their rules and regulations the kind of \* \* \* life preservers \* \* \* that shall be used on such vessels. \* \* \*" And section 18 of rule 3 of the general rules and regulations of the board of supervising inspectors of the steamboat inspection service of the United States, approved by the Secretary of Commerce and Labor, which is as follows: "Every life preserver adjustable to the body of a person shall be made of good sound cork blocks or other suitable material. \* \* \* And it shall be the duty of the inspectors to see by actual examination that every such life preserver contains at least six pounds of good cork, which shall have a buoyancy of at least four pounds to each pound of cork. \* \* \*" And section 4417 of the Revised Statutes [U. S. Comp. St. 1901, p. 3024], which is as follows: "The local inspectors shall, once in every year at least, upon application in writing of the master or owner \* \* \* satisfy themselves \* \* \* that all the requirements of law in regard to \* \* \* life preservers \* \* \* are faithfully complied with. \* \* \*"

The indictment declares that since February 1, 1904, under the laws of the United States and the regulations of the board of supervising inspectors approved by the Secretary of Commerce and Labor, the master or owner of every steamer navigating the ocean or any lake, bay, or sound of the United States has been required to provide such steamer with such numbers of suitable life preservers as would best secure the safety of all persons on board such vessel in case of disaster; that under said laws and regulations it has been and is the duty of the inspectors in the steamboat inspection service of the United States to satisfy themselves that as to every vessel submitted to their inspection all requirements of law in regard to life preservers have been faithfully complied with, and to see by actual examination that every life preserver so provided contains at least six pounds of good cork having a buoyancy of at least four pounds to each pound of cork; that it is impracticable for the inspectors, in examining life preservers, to open the blocks of cork of which the life preservers are constructed to ascertain whether the cork is good, for the reason that such action would result in a destruction of

the life preservers; that the firm of David Kahnweiler's Sons have been engaged in New York City in the business of manufacturing life preservers and selling them to the masters and owners of steamers navigating the Atlantic Ocean, Long Island Sound, and many of the bays and lakes of the United States; that in the conduct of its business Kahnweiler's Sons have been accustomed to purchase from the Nonpareil Corkworks of Camden, N. J., great numbers of compressed cork blocks for use in the manufacture of life preservers, and that great numbers of such blocks have actually been used by Kahnweiler's Sons in the manufacture of life preservers, these life preservers having been sold by Kahnweiler's Sons to the masters and owners of vessels navigating the waters above mentioned, and each life preserver containing eight of the compressed cork blocks; that shortly before August 8, 1904, Kahnweiler's Sons purchased from the Nonpareil Corkworks 1,750 of these compressed cork blocks to be used in the manufacture of life preservers for service on vessels navigating the waters above mentioned; that Kahnweiler's Sons found that the cork blocks so purchased were light in weight eight of them weighing but five and one-half pounds; that on August 8, 1904, Kahnweiler's Sons notified the Nonpareil Corkworks of the fact of such shortage in weight, and requested the Nonpareil Corkworks "to make the said blocks heavier, so that eight of them would weigh at least six pounds, and so pass inspection under the laws and regulations aforesaid when used in such life preservers." The indictment then proceeds to charge that the four defendants, one being the president, one the resident manager, one the superintendent, and one the assistant superintendent of the Nonpareil Corkworks, on August 12, 1904, after the receipt of the above-mentioned request from Kahnweiler's Sons, did unlawfully "conspire, combine, confederate, and agree together, and with divers other persons to the said grand jurors unknown, knowingly, wickedly, and corruptly to defraud the said United States, by manufacturing and producing at the said factory at Camden aforesaid, and shipping to the said firm of David Kahnweiler's Sons, at New York City, aforesaid, in response to the said request of the said firm to make the said blocks heavier, without giving any notice to the said firm of their true character, a great number, to wit, two hundred and fifty, compressed cork blocks of the kind aforesaid, each having fraudulently and deceitfully inclosed in its center, in the process of such manufacture, a bar of iron weighing eight ounces, and recommending that the same should be used by the said firm in connection with the said light-weight blocks before then purchased by it as aforesaid, in the manufacture of such life preservers, that is to say, one of such blocks containing iron to seven of such light-weight blocks, and thereby, and through the sale thereof by the said firm, necessarily, fraudulently, and corruptly causing to be used upon steamers of the kind aforesaid, contrary to the said laws and regulations, a great number, to wit, 2,000, life preservers, each containing less than six pounds of cork, to wit, five pounds and eight ounces of cork, and having a bar of iron weighing eight ounces inclosed in each of the same to make up such shortage in the weight of cork, in such a manner as to deceive the said firm and the purchasers of life preservers made from the said blocks, as well as the said inspectors in endeavoring to perform their said duty, and in grievous prejudice of the administration of the said laws and regulations to cause such inspectors to unwittingly approve and pass such life preservers on inspection as being such suitable and lawful life preservers, each containing at least six pounds of cork, as would best secure the safety of all persons on board of such vessels in case of disaster, when they would not and could not lawfully have approved or passed the same if the facts of the shortage in weight of cork and the presence of iron therein had been disclosed to or ascertained by them at the time of making examination thereon in their official capacity as such inspectors, iron being a substance having no buoyancy in water, and entirely unfit for use in making life preservers; they (the said J. H. Stone, H. C. Quintard, Charles W. Russ, and James Russ) then and there well knowing all the premises aforesaid, and well knowing that the unlawful character of such life preservers would, by reason of such iron bars being so deceptively and fraudulently inclosed in the cork blocks composing the same, not be subject to detection in the ordinary course of examination by such inspectors, and intending that the same should

not be detected in such examination, and well knowing that such life preservers would, and intending that they should, be approved and passed by such inspectors in such examination as suitable and lawful life preservers containing at least six pounds of cork, and used as life preservers upon vessels of the kind aforesaid, and intending not to disclose to any person belonging to the said firm or purchasing or using or inspecting such life preservers the fact that there was less than six pounds of cork in each of the same, or the fact that iron was so inclosed in each of the said life preservers. And the grand jurors aforesaid, upon their oath aforesaid, do further present that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said James Russ afterwards, to wit, on the 20th day of August, in the same year of our Lord 1904, at Camden aforesaid, in the said district, unlawfully did direct and cause one James Jones to make a great number, to wit, two hundred and fifty, of the said compressed cork blocks, at the said factory, each containing a bar of iron weighing eight ounces; and that further, in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said J. H. Stone afterwards, to wit, on the 30th day of August, in the year aforesaid, at New York City aforesaid, in the state of New York, unlawfully did cause to be sent by mail to the said firm of David Kahnweiler's Sons a certain letter—that is to say, a letter which, omitting the printed letter head thereof, which it is impossible to here reproduce, and the date and address thereof, is of the tenor which here follows, to wit: 'Replying to yours of the 27th, would advise that the 71 bags of blocks on the dock are not light weights, but full weights, and we believe that the two crates which we shipped you containing 261 special heavy blocks, will be all that you require. If after using them you find that you are still short, let us know how many you need and we will send them. Yours very truly [Signed] Nonpareil Corkworks, J. H. Stone, Manager;' against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

Clarence E. Thornall, Wendell J. Wright, David O. Watkins, and Edmund W. Wakelee, for demurrants.

John B. Vreeland, Dist. Atty., and Theodore B. Booraem, Asst. Dist. Atty., for the United States.

LANNING, District Judge (after stating the facts). The first cause of demurrer to the indictment is that "the indictment does not negative the exceptions contained in the statute and regulations mentioned in said indictment." This objection to the indictment is based on the provision in section 4400 of the Revised Statutes [U. S. Comp. St. 1901, p. 3015] which excepts public vessels of the United States from the legislation contained in title 52 concerning "Regulation of Steam Vessels." Sections 4405, 4417, and 4488 [U. S. Comp. St. 1901, pp. 3017, 3024, 3055], the provisions of which are plainly referred to in the indictment, are, with section 4400, parts of title 52. The rule for negating exceptions in pleadings is frequently stated to be that, if the exception is contained in the enacting clause of the statute, the party pleading must show that the accused is not within the exception, but that, if it be in a subsequent clause or statute, or in a proviso, that is matter of defense, which must be shown by the accused. In *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538, the rule was stated with a material modification of the form in which it is usually expressed. In that case it was said:

"Where a statute defining an offense contains an exception in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly

described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense, and must be shown by the accused."

The substance of the charge in the indictment now under review is that the defendants are guilty of a conspiracy to defraud the United States, contrary to the provisions of section 5440 of the Revised Statutes. In that section there is no exception. Section 5440 is not a part of title 52, concerning "Regulation of Steam Vessels." It is a part of title 70, concerning "Crimes," and was originally passed in 1867, while sections 4400, 4405, 4417, and 4488, now in title 52, in the forms in which they at first stood, were not passed until 1871. As the exception referred to is in a section of the statute passed subsequent to the enactment of section 5440, as the two sections are not now in the same title, and as section 4400 defines no ingredient of the offense mentioned in section 5440, I think the first ground of demurrer is invalid.

The second cause of demurrer is that "the indictment alleges no intent on the part of the said defendant to defraud the United States." This is not necessary. The charge is that the defendants conspired to defraud the United States, and the intent to defraud will be inferred from the unlawful agreement set forth in the indictment. *United States v. Donau*, Fed. Cas. No. 14,983.

The fourth cause of demurrer is that "said indictment does not show that the life preservers mentioned therein did not come up to the requirements of the law or the regulations mentioned in said indictment." The statute requires that the board of supervising inspectors shall fix and determine by their rules and regulations the kind of life preservers that shall be used on steamers navigating the ocean, or any lake, bay, or sound of the United States, and also that they shall establish all necessary regulations required to carry out in the most effective manner the provisions of the law and such regulations when approved by the Secretary of Commerce and Labor. Those rules and regulations require every life preserver to contain "at least six pounds of good cork, which shall have a buoyancy of at least four pounds to each pound of cork." The rules and regulations of the board of inspectors have the force of law, not only by virtue of the express language of section 4405 of the Revised Statutes, but by virtue of the rule stated in the *Kollock Case*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813, and *Caha v. United States*, 152 U. S. 212, 14 Sup. Ct. 513, 38 L. Ed. 415. The indictment charges with sufficient clearness that the defendants intended that eight of the blocks of cork manufactured by them should be used in the manufacture of one life preserver, that eight of the blocks first delivered weighed but five and one-half pounds, and that, in order to bring them up to the requisite weight of six pounds, there was inclosed in the center of each of two hundred and fifty blocks subsequently delivered a half pound of iron, with intention that one of the blocks containing the iron should be used with seven light-weight blocks, so that the life preservers thus made of eight blocks would each



weigh six pounds. I think the indictment sufficiently alleges that the life preservers did not fulfill the requirements of the law and the rules and regulations of the board of supervising inspectors.

The fifth cause of demurrer is that "said indictment does not show facts constituting a crime, for the reason that the intention of the law and regulations is that life preservers shall have the buoyancy of at least twenty-four pounds, and the indictment does not show or allege that the life preservers in question would not have had a buoyancy of at least twenty-four pounds if made up as alleged in said indictment." The rules provide that it shall be the duty of the inspector to see by actual examination that every life preserver contains "at least six pounds of good cork." From the allegations in the indictment it appears that the life preservers proposed to be made up from the blocks furnished by the defendants would not contain six pounds of good cork. It is an essential provision of the rule that a life preserver shall not only have a buoyancy of at least four pounds to each pound of cork, but that it shall also contain at least six pounds of good cork.

The third and sixth causes of demurrer are as follows: "The said indictment does not show any act of the said defendant by which the United States was or could be defrauded;" and "the said indictment does not show any act or conspiracy within the meaning of section 5440 of the Revised Statutes of the United States." These two causes present the most serious questions raised by the demurrers. It is insisted that the life preservers to be made from the blocks furnished by the defendants were not to be delivered to the United States or sold to the United States, and that the United States therefore could not, by any of the acts charged in the indictment, be defrauded. It is also said that the indictment, to be good, must show that the defendants have entered into a conspiracy to violate some criminal statute of the United States. But such construction of the section renders the clause relating to the defrauding of the United States meaningless. The section provides that, if two or more persons conspire "either to commit any offense against the United States or to defraud the United States in any manner or for any purpose," they shall, if one or more of them do any act to effect the object of the conspiracy, be liable to a penalty. The defendants' construction of the section would make it apply only to a conspiracy to commit an offense against the United States. It is evident that the meaning of the section is much broader. If two or more persons conspire "to defraud the United States," not merely contrary to the provisions of any criminal statute, but "in any manner or for any purpose," they shall, if one or more of them do an act to effect the object of the conspiracy, be punishable therefor. May not the United States be defrauded "in any manner or for any purpose" except where it is deprived of its taxes, moneys, or property? If there be a conspiracy between two or more persons to deceive the officers of the government in their execution of a governmental duty for the purpose of securing their unwitting approval of what the law condemns, is not that a conspiracy to defraud the United States of one of its governmental functions? Section 5440 is a revision of section 30 of the act entitled "An act to amend existing laws relating to internal revenue, and for other purposes," approved March 2, 1867 (14 Stat.

484, c. 169). In its original form the clause concerning the defrauding of the United States was "to defraud the United States in any manner whatever." If it be assumed that the section in its original form, and as a part of the act of 1867, was not applicable to any frauds except those concerning the internal revenue, the section in its present form and place cannot be so limited. In the revision of 1878 it was transferred from its place in the internal revenue law to a place in the law concerning crimes, and to the subdivision of crimes entitled "Crimes against the Operations of the Government." At the same time the clause concerning frauds was changed to the form "to defraud the United States in any manner or for any purpose." Obviously, it was the legislative intention by these changes of language and place to make the section applicable not only to conspiracies to defraud the United States of its revenue, but to every conspiracy to defraud the United States, whatever the purpose of the conspiracy might be. In *United States v. Whalan*, Fed. Cas. No. 16,669, Judge Lowell, of the District Court for the District of Massachusetts, declared that the word "conspiracy" in section 5440 has a more comprehensive meaning than is given to it by the common law, "because it includes defrauding the United States in any manner whatever, whether the fraud had been declared a crime by any statute or not," and that the section "has a wide application, and covers all frauds which human ingenuity can devise." In *United States v. Thompson* (C. C.) 29 Fed. 86, it was held that the section as it now stands "must be construed to include every conceivable case of conspiracy to defraud the United States; that is, to deprive or divest it of any property, money, or thing otherwise than as the law requires or allows." In *Palmer v. Colladay*, 18 App. Cas. 426, the Court of Appeals of the District of Columbia, commenting on section 5440, said:

"It is claimed by appellee that to defraud the United States must mean to deprive it of money wrongfully, or of something of money value; and that a falsehood or trick by which its officers are deceived in the matter of selecting those who are to perform work for it could not be a fraud against the United States. We do not agree to this proposition. The civil service commission is a legal agency of the United States, created by act of Congress; and through it the President undertakes to find and appoint such persons as may best promote the efficiency of the civil service; and to that end regulations are prescribed by means of which the age, health, character, knowledge, and ability for the branch of service into which he seeks to enter, of each candidate, may be fully ascertained. If falsehoods are imposed upon the persons charged with the duty of ascertaining these qualifications, and made to take the place of facts, then the United States is defrauded, is deprived by deceit of the knowledge justly due to its officers in the proper discharge of its business, and it is thereby liable to obtain a less efficient employé. We think the trial court may properly hold that the appellee's alleged conduct, in co-operation with the candidate in this case, in making a false statement as to her past experience, constitutes an offense under this section 5440; and that such attempt at deception, if successfully carried out, would defraud the United States, within the meaning of the law."

It was the opinion of the Circuit Court of Appeals of the First Circuit, as expressed in *Curley v. United States*, 130 Fed. 1, that Congress intended, by section 5440, to protect the government "in its rights, privileges, operations, and functions against all fraudulent operations, impositions upon its rights as well as properties, and to this end em-

played the most general terms and the broadest possible phraseology." It was there held that the words "defraud" and "deceive" are nearly synonymous, and that section 5440 "contemplates wrongs other and beyond conspiracies to commit distinct statutory offenses against the United States," and that the government may "safeguard itself against being defrauded out of its right to administer an intelligent and honest service in the interests of the people." In that case the indictment was for a conspiracy to defraud the United States, and the charge was that one of the defendants, desiring to procure an appointment as letter carrier, unlawfully agreed with the other of the defendants that the latter should falsely impersonate the former at a civil service examination, sign the name of the former to the examination papers, and thus secure for the former the placing of his name on the list of persons eligible to appointment as letter carriers. On the trial the defendants were convicted, and the Circuit Court of Appeals refused to disturb the verdict, holding that the defendants by the acts proven against them were guilty of defrauding the United States.

The indictment now under review charges that by the scheme above outlined the defendants sought to deceive Kahnweiler's Sons and their purchasers and the government's inspectors, and to cause the inspectors unwittingly to approve the life preservers that might be made out of the blocks manufactured by the defendants. Unquestionably, the acts charged show that the defendants intended to deceive and defraud Kahnweiler's Sons. But, to constitute a crime under section 5440, the defendants must have conspired to defraud the United States. Assuming on these demurrers, as I must do, that the acts charged in the indictment are true, it appears that the Nonpareil Corkworks were notified of the shortage in weight of the 1,750 blocks first delivered, and that they were requested "to make the said blocks heavier, so that eight of them would weigh at least six pounds, and so pass inspection under the laws and regulations aforesaid when used in such life preservers." The Nonpareil Corkworks therefore had notice of the purpose for which Kahnweiler's Sons intended to use the blocks, and, after receiving that notice the defendants, according to the charge in the indictment, conceived and carried out the infamous scheme of concealing in each of the 250 blocks last delivered a half pound of iron. The evident purpose of such concealment was to lead the inspectors to believe that the life preservers made from the blocks furnished by the Nonpareil Corkworks each contained "at least six pounds of good cork," and thus to induce them to approve what, if the facts should be known, they could not approve. Such deception of the agents of the United States for such a purpose is a deprivation of the United States of a right essential to the due administration of the law, and a defrauding of the United States, within the meaning of section 5440. The indictment charges a conspiracy to commit this fraud and acts by two of the defendants to give effect to the conspiracy. The case clearly comes, I think, within the doctrine of the authorities above cited.

The demurrers must be overruled, and the defendants required to plead.

**CITY OF FAYETTEVILLE v. FAYETTEVILLE WATER, LIGHT & POWER CO.**

(Circuit Court, E. D. North Carolina. February 18, 1905.)

**SPECIFIC PERFORMANCE—CONTRACT BY WATER COMPANY TO SELL PLANT TO CITY—INFORMALITY IN APPRAISEMENT.**

Where the grant by a city of a franchise to a water company was conditioned by an agreement that the city should have the right, at its option, to buy the company's plant at the end of 10 years, a provision of the agreement for the appointment by each party of an appraiser, who, with another selected by them, should fix the value of the property, did not make such appraisement a fundamental condition to the city's right to exercise its option, but it was merely an administrative detail, the purpose of which was to ascertain the fair market value of the property; and, the city having the absolute right to enforce the condition on which the franchise was granted on complying with the provision on its own part, the company cannot avoid carrying out its contract by repudiating an appraisement, fairly made, on the ground that the appraiser selected by resolution of its directors, and who was its general manager, substituted another in his place, to which it never gave its formal assent, where its officers and counsel, with full knowledge of the substitution, participated in the appraisement proceedings without objection.

In Equity. Suit for specific performance of a contract.

N. A. Sinclair, I. A. Murchison, and Q. K. Nimocks, for complainant.

Rose & Rose, H. L. Cook, and C. W. Broadfoot, for defendant.

PURNELL, District Judge. Suit for specific performance of a contract was commenced in the state court and removed to this court, where the pleadings were completed, and the cause referred to the master to find the facts and state his conclusions of law. The report being filed, the cause was heard February 2, 1905. Counsel asked time to file additional briefs, which was granted, and, the time having expired, briefs being filed, the cause is in condition to be disposed of.

The facts as gathered from the report of the master are as follows:

On the 7th day of December, 1892, the city of Fayetteville entered into an agreement, and granted a franchise to Garwood Ferris and H. Dec. Richards, by which said Ferris and Richards were authorized to construct, maintain, and operate a system of waterworks in the city of Fayetteville. About the 1st of July, 1893, this franchise was assigned to the defendant, subject to all the conditions, duties, and obligations therein contained. Section 13 (the only one involved in this litigation) of the contract or franchise is as follows, to wit:

"At the expiration of ten years after the completion of said works, and at the expiration of each succeeding period of ten years thereafter, the said City shall have the right and privilege to purchase said system of waterworks, provided they notify the said grantee or assigns of their intention so to do at least one year before the expiration of said period of years.

"The value of said system shall be ascertained as follows:

"The said grantee or assigns and the said City shall each appoint one person and the two appointees shall choose a third, and the three thus chosen

shall constitute a board to determine the value of said system of water-works.

"In case the two experts chosen disagree in the selection of a third, he shall be appointed by the Circuit Judge of adjoining circuit. None of the board shall be residents of the city of Fayetteville. The said Board in fixing the value of said works shall take into consideration the value of the franchise, the value of water rights, the right of way, the revenue from the works, and all other facts and considerations legitimately connected with the said works. The said City shall within thirty days after the said Board has rendered its decision, pay the amount awarded in cash and upon such payment said grantee or assigns shall transfer to the City all rights and privileges and property included in the same appraisement. In case the City of Fayetteville shall fail or decline to exercise its option to purchase said works, the rights and privileges thereby granted to the said grantee or assigns shall be extended to said grantee or assigns for a further period of twenty years."

More than a year before the 10 years expired, the plaintiff notified the defendant of its intention to avail itself of the option to purchase the plant, and afterwards that it had appointed an appraiser; requesting defendant to appoint an appraiser, as provided in said section 13. Both notices were in apt time and due form.

Under the following resolution, defendant acted, to wit:

"Special meeting of board of directors held at office of the president, Weldon building, Jersey City, June 29th, 1903. Present: Stephen Morgan, Garwood Ferris and R. L. Lawrence.

"On motion, the following resolution was adopted:

"Whereas, the city of Fayetteville has notified this company that it intended to avail of the option to purchase the plant of the company on July 1st, 1903, as empowered so to do under the franchise under which this company is operating; and

"Whereas, it has further notified this company that it will appoint an appraiser to meet a like appraiser to be appointed by this company to meet at Fayetteville July 1st, 1903.

"Resolved: That H. Dec. Richards is hereby appointed with full power to act for this company as its appraiser."

On July 1st, when Richards met the water committee, he stated the appraiser appointed on the part of the complainant was accepted, and, as general manager of defendant, he accepted the appointment as appraiser on the part of the defendant. He then read a paper substantially the same as the above resolution with the addition "that he [Richards] was appraiser and anything that he would do in the matter would be perfectly satisfactory to the company." Richards retained possession of the paper found to have been read, and no other resolution than the one above recited, by the defendant corporation, was found on the records thereof.

The master finds "that whatever may have been read, or apparently read, or interpolated, by the said Richards, or added by Ferris, the secretary and treasurer, in addition to what is contained in the above resolution, was without the authority of the board of directors; the said resolution being the only one shown to have been adopted by the said board before the appraisal in reference to the appointment of an appraiser or his authority." This is the basis of exceptions by complainant.

Richards was questioned as to his interest; and it appearing he was the owner of one share of stock, and had been general manager of the defendant corporation from its organization, for which

services he had not been, but expected to be, paid, objection was made to his serving as appraiser. The city authorities declined to recognize him as such, when he selected W. L. Holt, who was accepted by the city as an appraiser. The two appraisers then selected on July 1, 1903, appointed W. F. Robertson the "third man," and the three on August 4, 1903, valued the complete waterworks at \$79,000. On August 5, 1903, the city, by ordinance, accepted this valuation, and directed the mayor to serve a copy of the ordinance on the company. This was done, and on August 8, 1903, the defendant company replied, repudiating said award; declaring it was of no binding effect. On August 13, 1903, complainant, at the office of defendant, in Jersey City, N. J., tendered the price fixed, which the defendant declined to receive. There was no formal notice of the substitution of Holt for Richards as an appraiser served on defendant company. Ferris, the secretary and treasurer, Richards, the general manager, Ledbetter, the local superintendent, and the counsel for defendant, had knowledge of what was being done; and, except Ferris, all were present and participated in the proceeding before the appraisers. The counsel were paid by the company, and statistics, figures, and estimates furnished by Ferris to Richards were used on the hearing. The city had no notice of any objection to the appraisers or the award until the letter of August 8th, before referred to, was received. When he first arrived in Fayetteville, and before the meeting at which Holt was substituted as an appraiser, Richards attempted, as authorized and instructed by Ferris at the time of his appointment, to settle the price with the city authorities, and offered to take \$120,000 for the plant. The master finds:

"Mr. Richards has been a stockholder of the defendant company and its general manager since its organization, some ten years ago, and his name is still printed as general manager on the letter heads of the home office of the company. Until he removed to California, some four or five years ago, he, in connection with Mr. Gardwood Ferris, a director and the secretary and treasurer, had the management of the defendant company. After his removal to California (that is, for the last four years), Mr. Ferris has had the management of the company; the position of Mr. Richards as general manager since his removal to California being merely nominal, with the exception that he has been occasionally consulted by correspondence about several important matters. He came from California at the request of Mr. Ferris to act for the company in the matter of the appraisal, and shortly after reaching New Jersey, June 27th, was appointed its appraiser by the resolution hereinbefore set forth, dated June 29, 1903. Mr. Ferris told Mr. Richards that he hoped he would do all he could to get the matter closed quickly, and not to try to get all he thought was due, but to meet the city as far as possible on anything that may be reasonably fair. He also told him to do all he could to get the matter settled before he went West again, and not to put any stone in the way of settlement if he could avoid it; that they left it to him to get any cash settlement, and to try to arrange this without the delay and expense of arbitration. On the night of June 30, 1903, before the formal meeting, Mr. Richards had a conference with the water committee, at which he said he would take \$120,000. This was declined by the city, and the conference ended with the understanding that each party would name an appraiser at the formal meeting on the 1st of July."

The above are the facts found as culled from the report of the master, much of said report being argumentative and in the alternative.

The master then states his conclusions of law: First, that, the appraisalment "being fundamental," the defendant is not bound by the award, either by having assented thereto before or after said appraisalment; and, second, in the following words:

"Should the court, however, take a different view, and be of the opinion that the acts and conduct of the said officers and attorney are binding upon the defendant company, then the master is of the opinion that such acts and conduct clearly amount to a waiver of any objection on the part of the defendant company to the substitution of Mr. Holt for Mr. Richards, that it is estopped to question the validity of the said award, and that the same should be enforced."

The complainant filed 27 exceptions to the findings of the master touching the facts, and 9 exceptions to the conclusions of law. The court does not deem it necessary or expedient to notice these exceptions in detail, but regards the question which meets a consideration of the case at the threshold as solving many questions raised by the numerous exceptions. Looking to the contract or franchise for the intention of the parties, and calling it a contract, agreement, or franchise, it amounts to this: That the city of Fayetteville, for the advantages of having a system of waterworks, granted to defendant a part of its sovereignty on certain conditions; one of the conditions being that set out in section 13 of the original contract. Analyzing this section, but one conclusion can be reached; and that is that the condition precedent to the contract on the part of the city was that at the end of 10 years, on its compliance with its part of the agreement, there was a sale of the entire plant of the defendant corporation. This is the fundamental principle in the agreement or franchise touching the sale. The city in apt time and in due form gave notice that it claimed this option or sale—whichever it may be called—and there is no question about the city's compliance with its part of the contract in this respect. Incidentally and subordinate to this agreement was a stipulation that the price should be fixed as set forth in the second paragraph of section 13 of the original contract and franchise. When it came to this, defendant, having interposed no objection up to this point, designated one of the original contractors, Richards (the general manager of the corporation, who, with Ferris, seems to have been as much in control of the corporation as when these two were the sole contractors under the original contract), as one of the appraisers to fix the price. Upon objection, Richards retired, and named a substitute, and here the complication of affairs commenced. This was on July 1st, and the appraisers more than a month thereafter, on August 4th, valued the complete waterworks at \$79,000; and the city accepted this valuation, tendered the money, and has manifested throughout a disposition to comply with its part of the contract.

It seems that Richards had full power to act for the company as provided in the resolution. He had, and was recognized as having, authority to bind the company in all matters touching the subordinate question of fixing the price. As said above, the sale was complete and absolute under the contract, agreement, or franchise; the city having complied with all the obligations it had assumed, of which there is no complaint.

In *Bristol v. Bristol & Warren Waterworks (R. I.)* 34 Atl. 359, 32 L. R. A. 740, in which the contract is almost identical with that sued upon in this case, it is held that the arbitration is not fundamental, but is in effect an agreement that the price shall be a fair one; that the complainant cannot be placed in statu quo, and has no adequate remedy in damages. The only condition under the contract to effect the sale of the property was the exercise by the complainant of its option to purchase at the end of the 10-year period. Upon the exercise of this option the contract became, eo instante, executed, and the sale was perfected. The contract not having contemplated anything but a fair market value, it was not of the essence of the contract how this should be ascertained, as this was a matter of detail, subordinate to the fundamental provisions thereof. If the arbitration, for any reason, failed, the court would itself ascertain the value of the property, and would base its action on the ground that the fixing of a fair market price was a matter of detail, and not fundamental or of the essence of the contract. Then, if the fixing of the value in the case at bar is not of the essence of the contract, but merely subsidiary to the contract itself, the appointment of the arbitrators was not a vital or fundamental act, but was an act of administrative detail, incident to the contract itself, and the acts of defendant's agents, officers, and attorney in constituting and conducting said arbitration were such as were binding upon the defendant corporation, and by such acts it waived any alleged irregularity, and is estopped and bound by the award. If the defendant in the case at bar had refused to name an arbitrator, the court would itself have ascertained the value of the property; but inasmuch as the arbitrators were appointed by the agents and officers of the defendant, and the defendant was fixed with notice of such appointment, and did not object or repudiate such appointment, but actually, through its agents, officers, and attorney, appeared and participated in such arbitration 34 days after said appointment, and by its silence and representation induced the complainant in good faith to do the same, the defendant is bound by the award.

There is no suggestion that the arbitrators were not fair, impartial, honest, and competent; and, this being so, the court will not say the award is not for a fair price. The same rule applies to arbitrators as to jurors. A party cannot be heard to complain that he did not have an opportunity to get a juror partial or biased in his favor. The only right he has is to have jurors competent, fair, and impartial.

The city parted with its sovereignty to defendant for only a limited time, reserving the right to resume its sovereignty, and limiting the right of way given defendant in its streets, so that, upon such limitation taking effect, the defendant could no longer do business as a water company.

Defendant filed no exceptions to findings of fact, and the master did not find the value of the property.

The court, therefore, taking this view of the matter, reverses the master as to the first conclusion of law, and holds that the fixing of the price of the plant was not fundamental, but was administrative and incidental to the sale, which was complete under the contract. The court, therefore, taking a different view, and being of the opinion that



the acts and conduct of the said officers and attorney was binding upon said defendant company, concurs in the opinion of the master that such acts and conduct amount to a waiver of any objection on the part of the defendant company, and that it is estopped to question the validity of said award, and that the same ought to be enforced. This conclusion removes the necessity of considering any of the numerous exceptions, since, upon the finding of the facts by the master, though to some extent unsatisfactory, the court reverses the master on his conclusion of law, and directs a different decree than would be entered were he sustained, and affirms the second conclusion of law as stated by the master. In short, the court holds that the sale was complete under the contract, and the fixing of the price was subordinate, not fundamental—hence reverses the master on his first, and affirms him on his second, conclusion of law. The exceptions by the defendant are ignored, without prejudice, as, in the view which the court takes of this controversy, the consideration thereof is unnecessary.

A decree will be drawn and entered accordingly.

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FOWLER v. FOWLER.

(Circuit Court, M. D. Pennsylvania. February 21, 1905.)

No. 8.

1. DEEDS—EXECUTED GIFTS—REVOCATION—FRAUD.

Where complainant executed a conveyance under seal of all her interest in her brother's estate for a recited consideration of \$1 and certain payments to be thereafter made, such conveyance, being in the nature of an executed gift, would not be set aside in equity unless fraudulently obtained.

2. SAME—EVIDENCE.

In a suit to set aside a deed of complainant's interest in her brother's estate, evidence held insufficient to establish that complainant was induced to execute the deed by fraudulent representations.

In Equity. On final hearing.

Frank Hasbrouck, Abram J. Rose, and Russell Dimmick, for complainant.

H. M. Hannah and E. N. Willard, for defendant.

DALLAS, Circuit Judge. James W. Fowler died intestate at the city of Scranton, in the state of Pennsylvania, on the 11th day of November, 1903. His widow, Achsah B. Fowler, the defendant, and his sister, Sarah Fowler, the plaintiff, survived him. His father and mother died before he did, and he left no issue or lineal descendants, no brother or sister (other than the said Sarah Fowler), and no nephew or niece. Consequently, under the law of Pennsylvania, the widow was entitled to one-half part of his real estate for the term of her life, and to one-half part of his personal estate absolutely; and, subject to the widow's life estate in the realty, it descended to his sister, Sarah Fowler, in fee simple, and she was likewise entitled to the remaining one-half of his personal property absolutely. At the time of his death he owned a piece

of real estate in the city of Scranton, being the dwelling house in which he had resided for many years, which was of the value of about \$8,000, and also certain personal property, consisting of government bonds, shares of bank stock, and cash, to the value of about \$26,000. On the day of its date a deed was executed and acknowledged by the respective parties to this suit, which the defendant afterwards caused to be recorded in the office of the recorder of deeds of Lackawanna county, Pa., of which the following is a copy:

"This indenture made and concluded this 24th day of November, A. D., one thousand nine hundred and three, by and between Sarah Fowler, of the city of Poughkeepsie, in the County of Dutchess, and State of New York, party of the first part, and Achsah B. Fowler, of the City of Scranton, in the County of Lackawanna, and State of Pennsylvania, party of the second part:

"Witnesseth: That whereas, James W. Fowler, late of City of Scranton, the brother of the first party, and the husband of the second party, is recently deceased in said city, leaving certain real estate and personal property hereinafter more particularly described, but leaving no children, and no other heirs at law except the parties hereto: And whereas, the said James W. Fowler, is believed to have made and executed a last will and testament prior to his decease, wherein and whereby he disposed of all his estate, real and personal, but such will or testamentary instrument has not yet been found:

"Now, therefore, for the purpose of settling and adjusting the respective rights of the said parties in and to the real and personal estate of the decedent, and for the further purpose of avoiding litigation and delays in the settlement of the said estate, this indenture has been executed.

"And the said Sarah Fowler, party of the first part, for the purposes aforesaid, and for the consideration hereinafter set forth, hath remised, released and forever quitclaimed and doth hereby, for herself, her heirs and assigns, forever remise, release and quitclaim unto the said Achsah B. Fowler, her heirs and assigns, all the estate, right, title, and interest of the said first party in law, or equity, or otherwise howsoever, of, in, to, or out of all that certain lot, piece or parcel of land situate in the City of Scranton, County of Lackawanna, and State of Pennsylvania, and known as number 819 Linden Street, in said City, and being sixty feet wide in front on Linden Street, and extending back along a public alley at right angles to Linden Street one hundred and forty-nine feet: Also all the right, title and interest of the said first party in and to any and all personal property of the said James W. Fowler, deceased, consisting of Five United States Government Bonds of the denomination of Five Hundred Dollars each, bearing date July 1st, 1877, and numbered respectively, Nos. 20193, 20194, 20195, 20196, and 20197; also ten shares of the capital stock of the Third National Bank of Scranton, represented by certificate No. 59; also one dividend check of the Third National Bank of Scranton, for the sum of One Hundred Dollars, No. 4927, bearing date of November 14, 1903, and payable to James W. Fowler; also all moneys now on deposit in the name of, or to the credit of, said James W. Fowler in the First National Bank of Scranton, and the Third National Bank of Scranton, whether the same be interest accounts or otherwise; and also, all household furniture and goods, wearing apparel, and all other personal property of whatsoever kind and wheresoever situated, late of the estate of said decedent, James W. Fowler.

"Together with all and singular the buildings and improvements, members or appurtenances whatsoever unto the aforesaid lot of land belonging or appertaining, and the reversion and reversions, remainders and remainders, rents, issues and profits thereof. And also, all the accrued interests, profits, income or dividends arising from or accruing out of the personal property aforesaid, or any part thereof.

"To have and to hold the said real estate, together with the appurtenances thereto, and all of the said personal property as aforesaid, unto the said second party, to and for the only proper use, benefit and behoof of the said second party, her heirs and assigns forever.

"In consideration whereof the said second party hereby agrees to pay to the said first party the sum of One Dollar, lawful money of the United States, at and upon the execution hereof, and in addition thereto to pay to the said first party, during the term and period of her natural life, one-half of the net income, profit or revenue, issuing out of or arising from the personal property of the said decedent, James W. Fowler, after the payment of all debts and obligations of the said decedent, and the costs and expenses of the administration of the said estate; but at and after the death of said first party, such payments shall entirely cease and determine.

"In witness whereof the said parties have hereunto set their hands and seals, the day and year first above written.

"Words 'real and' on third page interlined before signing.

"Sarah Fowler. [L. S.]

"Achsah B. Fowler. [L. S.]

"The words 'real and' which were interlined on third page erased before execution.

"In Presence of:

"Stephen G. Guernsey.

"A. Williamson."

The object of the bill is to procure the cancellation of this deed, for which it is alleged there was no consideration, and which it is averred was obtained by fraud.

At law a seal conclusively imports consideration, but in equity, where consideration is requisite to support the instrument, its existence must be shown. In the present instance the deed mentions the nominal consideration of \$1. The evidence warrants the finding that this sum was actually tendered to the plaintiff immediately after she executed the document, and that she either declined to accept it, or returned it to the defendant, not because she intended to repudiate what she had done, but because the appearance of being paid for doing it was distasteful to her. It is, however, quite unimportant what occurred with respect to this formality, for, although the transaction was undoubtedly a gift, and is to be so regarded, yet, being fully executed, equity will not revoke it unless it was wrongfully obtained. *Stone v. Hackett*, 12 Gray, 227; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398; *Fasset's Appeal*, 167 Pa. 448, 31 Atl. 686; *Corle v. Monkhouse*, 50 N. J. Eq. 537, 25 Atl. 157; *Walker v. Dixon Crucible Co.*, 47 N. J. Eq. 342, 20 Atl. 885; *Grover v. Grover*, 24 Pick. 264, 35 Am. Dec. 319; *Pickslay v. Starr*, 149 N. Y. 432, 44 N. E. 163, 32 L. R. A. 703, 52 Am. St. Rep. 740; *Bedell v. Carll*, 33 N. Y. 581. See, also, notes to *Cochrane v. Moore*, 12 Eng. Rul. Cas. pp. 428, 434.

The deed upon its face is a sufficient and valid conveyance, and, apart from the allegation of lack of consideration, the only ground upon which it is asked that it shall be set aside is thus averred in the bill:

"The said agreement was executed by your orator because of the statements and representations made to her by said defendant, as hereinbefore set out, and in ignorance of the rights and interests of your orator in the premises, and was and is fraudulent and void."

Waiving the point that it is here specified that the fraud averred was practiced by means of statements and representations set out in the bill, and that in fact the bill does not set out any statement

which the defendant is alleged to have falsely made, I have carefully examined the evidence with a view to determining whether it has been shown that by any means whatever or in any way the defendant deceitfully imposed upon the plaintiff.

Each party testified on her own behalf. On several points their testimony was conflicting. If the defendant's account of what transpired between them before they visited the office of Mr. Guernsey, a notary and attorney at law, where the paper was signed and acknowledged, is true, then the plaintiff was fully informed of its nature and effect before she executed it; but, if the plaintiff fully remembered and correctly stated the substance of the conversation which they had previously had, then she accompanied the defendant upon that visit in absolute ignorance of its real purpose. No third person was present when this conversation occurred, and therefore the allegation of the bill "that said Achsah B. Fowler did not state to your orator for what purpose she wanted to see a lawyer, nor did your orator know why said Achsah B. Fowler wanted to see a lawyer," could not be, and it was not, supported by any evidence other than the testimony of the plaintiff herself, and that was positively contradicted by the testimony of the defendant. I am unwilling to ascribe to either of these parties a deliberate intention to falsify, and it is not wholly conceivable that the defendant may have been deluded as to what was not said by the plaintiff; but it would be quite impossible to believe that the plaintiff's circumstantial statement of what she did say could be in any substantial respect untrue, and yet not have been artfully fabricated. It seems to me, too, that it is inherently more probable that the plaintiff, before going to the notary's office, would have been informed of the business to be transacted, than that she should have gone there without making inquiry or receiving any information upon the subject. It is, moreover, to be borne in mind that this is a suit to set aside a solemn instrument of writing upon the ground of fraud; and to maintain the fundamental position of the plaintiff, that she executed it without knowing what it was, her own uncorroborated and contradicted testimony will not suffice. Cases *infra*.

The plaintiff called Mr. Guernsey, to whom reference has been already made. I accord full belief to his testimony. His account of what occurred at his office may be briefly summarized. Mrs. and Miss Fowler visited him on the 24th of November, 1903. Mrs. Fowler said they had come to have a paper acknowledged, and asked him if he was a notary. She handed him the paper. He read it over first to himself, and then said it was an important paper—he thinks he told Miss Fowler that "she seemed to be conveying away her rights"—and he asked her if she had consulted her attorney in regard to it. She said she had not; that she did not then have an attorney. He then said: "Miss Fowler, it is an important paper; and you really ought not to sign it without knowing what you are doing." To this he thinks she made no reply, but that Mrs. Fowler said "it was fully understood between them, and that they didn't come there for advice in regard to the

paper, and simply came for a notary. They came to have it simply acknowledged." He then read the paper over aloud, and, upon reaching the words "real and," which were interlined in it, Mrs. Fowler said: "That is wrong, the real was not intended to be in there, and I don't see why my attorney put it in there, because I directed him that it should only be as to personal property." Mr. Guernsey then stated that he could erase that, and Miss Fowler said nothing, and he assumed that she assented to it, and he erased it. Mr. Guernsey remembered that something was said by Mrs. Fowler to Miss Fowler to this effect: "He is speaking of the income of the home. Do you want the income of the home?"—and that Miss Fowler said she did not; she replied, "No," or in some equivalent word." Mr. Guernsey then continued the reading of the paper, and thereafter directed its signing and witnessing, and took the acknowledgment. He suggested that it would be a good thing for Miss Fowler to have a copy of it, and he thinks that Mrs. Fowler said there was no objection. The copy was made, and was given to Miss Fowler. The evidence shows that Miss Fowler's hearing was somewhat impaired; but I see no reason to doubt that she was able to hear Mr. Guernsey's reading of the deed, and that, if she did not do so, it was because she gave no attention to it. He testified that "she remained quiet and did not have anything to say, and I [he] assumed that she was paying attention and heard what was being said. There was nothing to indicate it one way or the other. She did not say anything." She did not ask to have any portion of it re-read, nor suggest that she did not hear it. Mr. Guernsey had no doubt that she heard him say that the paper was an important one; and he testified that Mrs. Fowler spoke plainly in making the remark that they did not want the services of an attorney; that they had talked it over and knew what they were doing, and simply wanted the services of a notary—but that Miss Fowler made no reply to this. He did not ask Miss Fowler anything further, to ascertain whether she knew anything about the contents of the paper, but said, "Very well," or words to that effect, and thinks it was Mrs. Fowler who asked him to read it. He supposed he read it so that both could hear it, and was under the impression that both did hear it.

The stenographer who was in the employment of Mr. Guernsey was also examined, but her testimony adds little or nothing to his. She was in a room adjoining his private office. She did not pay any attention to the conversation, but heard some of it, although she was some distance from them. She heard Mr. Guernsey read the paper. As she remembers, Mrs. Fowler did the most talking. She "don't know" whether Miss Fowler paid any attention to the reading, but "should have thought she was listening."

The only other witnesses produced by the plaintiff were Mr. and Mrs. Schwartz, but they seem to have had no knowledge of any important fact, and their testimony need not be particularly referred to.

Upon all the evidence—and I think the especially material parts of it have been adequately epitomized—I have no hesitation in

holding that the deed of November 24, 1903, ought not to be disturbed. I have not been convinced that the allegation of fraud has been supported by even a preponderance of proof, and it seems to me to be perfectly plain that, at least, it has not been maintained with the degree of certainty required by the well-established rule that "when, in a court of equity, it is proposed to set aside, annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence, which leaves the issue in doubt." *Maxwell Land Grant Case*, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. Ed. 1112; *Treat v. Russell*, 128 Fed. 847, 63 C. C. A. 575; *Brawdy v. Brawdy*, 7 Pa. 157; *Phillips v. Meily*, 106 Pa. 545; *Goggins v. Risley*, 13 Pa. Super. Ct. 316; *Simon's Estate*, 20 Pa. Super. Ct. 450; *Hupsch v. Resch*, 45 N. J. Eq. 657, 18 Atl. 372.

If Mr. Fowler's estate had all passed to his widow, it would have constituted but a moderate provision for her; and she, not unnaturally, supposed that he had made a will, but none was found. She consulted a reputable lawyer, who cannot for a moment be suspected of having consciously abetted or countenanced a fraud, and by him this deed was prepared. Miss Fowler does not appear to have been in want. She was at least 70 years of age, and had no relative nearer than a second cousin. Under these circumstances, I see nothing unreasonable in the belief, which, no doubt, Mrs. Fowler and her counsel entertained, that Miss Fowler's assent to the arrangement for which the instrument provided might, upon a full and truthful disclosure of the situation, be obtained. I am satisfied that Mrs. Fowler's conduct was based upon this belief, and was accordant with it; and I think that a finding that she went to the home of her sister-in-law with the infamous design of depriving her of her interest in her brother's estate, either by misrepresenting or by concealing material facts, would be wholly unjustifiable. On the contrary, I believe that she completely and honestly explained what she desired, and that the plaintiff fully understood and freely assented to it before they went to Mr. Guernsey's office; and, with this in mind, Miss Fowler's apparent indifference to the proceedings there, and her acquiescence in the statements of Mrs. Fowler, appear to have no significance, except as they indicate that Miss Fowler was contented to act upon the information which she already possessed. It was, as Miss Fowler herself has testified, not until some days after Mrs. Fowler had returned to Scranton (Mr. Schwartz says ten days or two weeks after) that she examined the duplicate of the deed which she had received at Mr. Guernsey's office. She then, as she has said, "began to feel a little worried about it," and "showed it to Mr. Schwartz," the husband of her second cousin. She became dissatisfied with what she had done, and was desirous of recalling it; but the authorities heretofore referred to abundantly show that mere alteration of intention on her part does not entitle her to

the interference of a court of equity for cancellation of an executed deed, and, in my opinion, she has utterly failed to establish any better title to such relief.

Let a decree be drawn dismissing the bill of complaint, with costs.

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HOGG et al. v. EATON et al.

(Circuit Court, D. Colorado. February 27, 1905.)

No. 4,868.

1. **WATER COURSES—DIVERSION FOR IRRIGATION.**

The right to divert running waters for irrigating lands in an arid country is not controlled or affected by political divisions. It is the same in all states through which the stream so diverted may pass.

2. **SAME—IN WYOMING AND COLORADO.**

An appropriation of water in the state of Wyoming from a stream which rises in Colorado for irrigating lands in Wyoming is valid as against a subsequent appropriation in Colorado from the same stream for irrigating lands in Colorado.

3. **SAME—PRACTICE—POLICE REGULATIONS IN WYOMING.**

In a suit by settlers in Wyoming on a stream which rises in Colorado to restrain the diversion of water from such stream in Colorado, complainants need not aver or prove that they have conformed to police regulations of the state of Wyoming regulating the distribution of water in that state.

4. **EQUITY—CROSS-BILL IN AN ANSWER.**

In a suit in equity, a charge in an answer, which is denominated a "cross-bill," may be accepted as a statement of respondents' case, notwithstanding the misnomer calling the answer a cross-bill.

N. E. Corthell, for plaintiffs.

James W. McCreery, John T. Jacobs, and S. C. Downey, for defendants.

HALLETT, District Judge. The bill was filed by six natural persons residing in the valley of Sand creek, in the state of Wyoming, and two corporations organized in Wyoming, against Benjamin H. Eaton and Bruce G. Eaton, citizens of Colorado, and the Divide Ditch Company, a Colorado corporation. Three natural persons—George Rintoul, August Wurl, and Robert Ferguson—were made respondents, but were not served with process. August Wurl appeared, and answered the bill. The issue made by him is entirely apart from the issue made by the other respondents, and has not been the subject of controversy in the suit. No decree will be entered as to him.

The prayer of the bill is to restrain the diversion of water from Sand creek within the state of Colorado. The source of Sand creek is in the mountains of Colorado, whence its waters flow in a northerly direction into the Laramie river, in Wyoming. The length of the stream is about 15 miles in each of the states of Wyoming and Colorado, or 30 miles in all. Complainants charge that their grantors first settled upon Sand creek in the then territory of Wyoming, and began the use of water from Sand creek in irrigating their lands in the year 1867.

In times of high water the stream overflowed its banks, and considerable tracts of land adjacent to the stream were irrigated in this way so as to produce good crops of hay. The first settlers confined their operations to cutting hay from the overflowed lands and to the use of the higher lands for pasturage. Within the decade from 1870 to 1880 the waters of the stream were diverted by means of short ditches to other lands, and perhaps also to the overflowed lands, to be used in dry seasons. Afterwards longer ditches were made so as to cover considerable tracts of land much higher than the stream, but not very far from its channel. The channel of the stream is shallow. In some places the banks are higher than the adjacent land, so that it is easy to divert the water. In general, the lands irrigated are in a state of nature, and produce hay or pasturage only, but some small tracts have been plowed in which other crops are cultivated. In all about 5,000 or 6,000 acres are under cultivation by complainants in the valley of Sand creek in the state of Wyoming. In dry years there has not been sufficient water in Sand creek to irrigate all of complainants' lands, and usually the water has been exhausted, so that none reached the Laramie river. Some of the complainants use certain lakes near the lower course of the stream for impounding the water, and take out such water when the stream fails in the end of the summer.

The year 1902 was exceptionally dry, and the supply of water in Sand creek was not sufficient to irrigate complainants' lands and the lands of other persons residing in the valley of Sand creek in the manner and to the extent which had been practiced in the years preceding and since the settlement of the country. The Divide Ditch Company, under the control of the Eatons, who were stockholders and officers of that company, opened a ditch which had been previously constructed between Sand creek and Sheep creek, and by means thereof turned the greater part of the water from Sand creek into Sheep creek. One witness says that more than one-half the water flowing in Sand creek was taken, and, if there is a more definite statement of the quantity taken, the court has not discovered it. The water left in Sand creek after the diversion seems to have been used by irrigators residing in Colorado below the point of diversion, so that none went down to complainants, and they lost their crops from want of water to irrigate them.

This bill was filed November 8, 1902. It sets forth the character of Sand creek, its length and course, and the appropriation of its waters for the purpose of irrigating the lands adjacent to the stream by complainants and their grantors in the years between 1867 and 1890. Proof was made of these facts. Indeed, the settlement of the lands and the appropriation of the waters of Sand creek seems to be the only subject referred to in the testimony. Respondents have offered no proof concerning their title or right to take the waters of Sand creek. In their answer to the bill, and in that part of it which is called "a further answer, defense, and cross-complaint," they give some account of the Divide Ditch Company, and state that it is the owner of certain ditches described in a paper filed by one Philip Wilson in the office of the State Engineer of the state of Colorado on the 22d day of July, 1897. The affidavit is set out in the answer, and is followed by the statement that the ditches therein mentioned were constructed. As to the use



made of the water taken from Sand creek, the answer contains this averment:

"That the water so appropriated and diverted by the Divide Ditch Company from Sand creek and its tributaries as aforesaid, and the other ditches connected therewith, is thence run down into Sheep creek and from Sheep creek into the North Fork of the Cache la Poudre river; thence into and through the 'North Poudre Ditch,' so called, and into sundry large storage reservoirs connected therewith; that, after being so stored, the water is drawn off and to be drawn off for the benefit of the stockholders of the said the Divide Ditch Company and others having contractual rights therewith for water rights for the irrigation of lands in Larimer and Weld counties, state of Colorado."

Thus it appears that the waters of Sand creek, a tributary of Laramie river in the state of Wyoming, are taken by defendants into the North Poudre river, a tributary of the South Platte river in the state of Colorado, for irrigating lands in the counties of Larimer and Weld in the state of Colorado. From the point of diversion on Sand creek complainants' lands are nearly north a distance of perhaps 20 miles. From the point of diversion on Sand creek the water taken by respondents is used on lands in the counties of Weld and Larimer in an easterly direction a distance of about 60 miles. The remarkable feature of this condition is that water is taken from a tributary of the Laramie river, and put into another stream entirely different in its course and character, to serve lands which are not in the basin of Laramie river or of Sand creek, or in any manner subservient to Sand creek or the Laramie river. This purpose was plainly declared in Wilson's affidavit, before referred to, in these words:

"It being also the intention hereby to divert the water herein appropriated from the watershed of the Big Laramie river into the watershed of the Cache la Poudre river, as shown on accompanying plat."

This part of the answer was regarded by respondents as a cross-bill, and the complainants in the original bill, or some of them, answered it. A cross-bill in an answer is not known in the practice of federal courts. If respondents had urged its consideration as a cross-bill, we should have had some difficulty in going on with the case at this time; but they seem to have abandoned it. As the respondents have called it an answer as well as a cross-bill, I suppose we may regard their statement of title in that part of the answer, in so far as it shows the nature and purpose of the diversion of the waters of Sand creek, as entirely correct.

The fourth paragraph of the bill of complaint is as follows:

"The plaintiffs severally claim their rights, hereinafter set forth, as lands under grants of the state of Wyoming, and said defendants severally claim their rights hereinafter mentioned as lands under grants of the state of Colorado."

And the fourteenth paragraph reads as follows:

"The plaintiffs are informed and verily believe that the defendants claim and pretend, by reason of the interstate character of said stream, and by reason of the diversity of citizenship and the location of lands of the plaintiffs and those of the defendants in different states, that the defendants have the right to wholly exclude the plaintiffs from the use of the waters of said creek, and to take and apply and appropriate, in Colorado, all of the waters of said creek. In disregard and exclusion of the vested and acquired prior

rights of the plaintiffs aforesaid; and the defendants deny and dispute all rights of the plaintiffs to make any appropriation or use of the waters of said creek without the limits of Colorado, and claim all of the said waters as lands granted by the Constitution and laws of Colorado exclusively to the citizens and occupants of lands in said state."

The latter paragraph was not answered by respondents, but it was affirmed by Bruce G. Eaton in his testimony before the master.

The fourth paragraph is palpably false, and it is difficult to understand the reason for making the statement. Counsel has not offered any explanation, except that it was intended to support the jurisdiction of the court. Possibly it was intended to support the idea asserted in the fourteenth paragraph that the waters of the state belong to its people for any use that may be made of them within the state. We had occasion recently to consider whether the right of a citizen to use water within the state for irrigation of lands is granted by the state or general government, and we were unable to discover any principle of that kind. *Mohl v. Lamar Canal Co.* (C. C.) 128 Fed. 776. The idea of an exclusive right in the people of a state to divert its running waters to the injury of riparian owners in another state must be equally untenable. Indeed, the doctrine of riparian ownership and use of running water is not subject to political boundaries. Between hostile states the doctrine may not be recognized, but any such repudiation would be simple vis major. Between states dwelling in peace and concord, as are the states of our Union, the equal right of the inhabitants of each state to the waters of intersecting streams must always be recognized. Water is essential to human life in the same degree as light and air, and no bounds can be set to its use for supplying the natural wants of men other than the mighty barriers which the Creator has made on the face of the earth.

There is sound reason and some authority for saying that in the arid country water for irrigating land is a natural want of men, to be ranked with what is commonly called "domestic use." An early case in the state of Illinois was between owners of mills located on a small brook, each of which consumed the entire flow of the brook. The court, with excellent fullness and intelligence, discussed the principles which control the use of running waters for supplying the wants of men and for commercial purposes. In the course of its opinion the court says:

"In countries differently situated from ours with a hot and arid climate water doubtless is absolutely indispensable to the cultivation of the soil, and in them water for irrigation would be a natural want." *Evans v. Merriweather*, 8 Scam. 495, 38 Am. Dec. 106.

This doctrine, so reasonable and just as to commend itself to all acceptance, was early recognized in the territory of Colorado as inherent in the conditions of the climate and aridity of the soil. *Yunker v. Nichols*, 1 Colo. 551. In the Circuit Court of Montana the principle was put upon the act of Congress of 1866. *Howell v. Johnson et al.* (C. C.) 89 Fed. 556. And the Supreme Court has said that the act of 1866 was the recognition of a pre-existing right, rather than the establishment of a new one. *Broder v. Water Company*, 101 U. S. 274, 25 L. Ed. 790.

We need not pursue the subject very far. The parties to this suit are not in controversy, except upon the point that complainants have not made a valid appropriation of the waters of Sand creek under the laws of Wyoming. Respondents maintain that complainants have no standing in court, because they have not shown compliance with certain acts of assembly in Wyoming regulating the appropriation of water in that state. The acts have been called police regulations, and they are intended to regulate the distribution of water among the inhabitants of a stream so as to insure to each his rightful proportion according to the extent of his appropriation. Obviously, these acts have no application or controlling force in this controversy. As before stated, they control the conduct of parties inhabiting the same stream. Respondents are not subject to them. They have diverted the water of Sand creek, and carried it to another district in another state. The parties to the suit are foreign in purpose as they are in residence. They have no relations for sharing the waters of Sand creek between them. Each denies to the other any use whatever of the waters of Sand creek. Therefore laws regulating the use of water amongst inhabitants of the same stream are not pertinent to the controversy. It is enough that complainants and their grantors were in the possession and enjoyment of the water a long time prior to respondents' diversion, and therefore the first appropriators under the law of the land as understood in Wyoming and Colorado.

Some question was made whether complainants' appropriations, and those of others residing in the basin of Sand creek, were of all the waters flowing in that stream. I regard the evidence on that subject as sufficient to establish the fact against respondents, who claim a right to divert all the waters of the stream as against complainants' use of the same waters.

An injunction will be allowed according to the prayer of the bill.

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#### IN RE DISMAL SWAMP CONTRACTING CO.

(District Court, E. D. Virginia. January 21, 1905.)

**1. BANKRUPTCY—LIENS—MORTGAGE EXECUTED PURSUANT TO PRIOR AGREEMENT.**

A parol agreement by a borrower, when the loan was made, to give security upon the property which was to be purchased with the borrowed money, does not render valid a mortgage given pursuant thereto within four months prior to the borrower's bankruptcy, and when he was insolvent, which constitutes a voidable preference under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 8445].

**2. SAME—MORTGAGE GIVEN IN PART FOR PRESENT CONSIDERATION.**

A mortgage given by an insolvent within four months prior to his bankruptcy, in part to secure an antecedent debt and in part to secure a loan made at the time, is valid to the extent of the latter consideration.

In Bankruptcy. On review of decision of referee.

This proceeding is now before the court upon the petition of the bankrupt's trustee, for a review of the decision of Referee D. Lawrence Groner, heretofore made herein, in regard to the claim of Henry Rhodes, allowed by the said referee as a lien against the bank-

rupt's estate. The referee in his decision states the facts upon which he bases his ruling, as follows:

"In June, 1903, B. E. Holladay, D. T. McKee, and W. J. Strickler, having formed a partnership under the name of the Dismal Swamp Contracting Company, entered into a contract with the Virginia Land & Lumber Company, whereby they undertook to do a large logging business for the latter company, and in addition to run a commissary store for its employees. The conduct of this business required the purchase of considerable equipment, and of the stock of goods in the store, and all of the partners were without funds. Holladay, however, had a rich uncle in Ohio (the claimant here), to whom he applied for the necessary funds to enable the partnership to carry out its contract. He went out to Ohio in June, 1903, at the instance of his associates, and succeeded in borrowing from his uncle the sum of \$8,700, and at the latter's request agreed to secure the indebtedness by a mortgage upon the property purchased. On his return from Ohio, bringing with him the borrowed money, he explained to his associates the terms upon which he had obtained it, and they likewise agreed that the mortgage should be given. Nothing, however, was done to consummate this agreement until December, at which time Mr. Rhodes made a trip from Ohio to the works of the partnership in Virginia, and upon his demand the deed of trust which is now the subject of dispute was executed, and properly recorded on the 12th day of December, 1903. The claim of the petitioner under this trust is resisted by the trustee upon three grounds: First, that the trust deed is void under the Virginia decisions, in that it covers a stock of merchandise and reserves to the grantors possession and the power of sale; second, that the deed is voidable under the bankruptcy act, in that it creates a preference; and, third, that it is voidable in that, comprising the entire estate and assets of the bankrupts, it is, in the meaning of the bankruptcy law, a conveyance with intent to hinder, delay, and defraud the creditors."

H. H. Rumble, for petitioning creditors.

H. C. Sherritt, for claimant.

WADDILL, District Judge. The referee was of the opinion that neither of the above grounds of objection made to the allowance of this claim were well taken, and therefore overruled the same, and held that the deed constituted a lien, entitling the holder of the debt therein secured to a priority of payment over all debts of the bankrupt contracted from and after the date of its recordation.

The court will first consider the second objection made to this deed, namely, that it was void under the bankruptcy act, in that it created a preference in favor of the beneficiary therein. The deed was confessedly executed and recorded within four months of the bankruptcy; that is to say, the deed was executed on the 11th day of December, 1903, and admitted to record on the day following, and the petition in bankruptcy was filed on the 2d day of April, 1904. The deed secured an indebtedness of \$9,725.64; \$8,725.64 being an antecedent debt contracted on the 29th of June, 1903, and \$1,000 for a present consideration paid at the time of the execution thereof. The referee decided that the trust deed constituted a valid lien, as well for the antecedent debt secured therein as for the present consideration of \$1,000 paid at the time of its execution, because the same was executed pursuant to a pre-existing bona fide parol agreement, made by the bankrupt at the time of negotiating the loan in June, 1903, to secure the payment of said amount upon property to be thereafter acquired by the bankrupts, and subsequently covered by the trust deed in question. In this con-

clusion the court cannot concur, as it does not believe that the four-months period prior to the bankruptcy, within which transfers of the bankrupt's property may be avoided, can be enlarged and extended beyond the four-months period, so as to prevent the assailing and invalidating of such conveyances, by means of a parol agreement such as was had in this case. The trust deed in question constitutes a preference under Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. Once let it be understood that conveyances made within four months of bankruptcy can be successfully attacked, while those made in pursuance of a pre-existing bona fide agreement will be upheld, and the entire policy of the bankrupt law, in so far as it undertakes to specify the time within which preferences can and cannot be assailed, will be frustrated and destroyed. The door for fraud would be left wide open, and creditors would never know when they were safe in dealing with the estates of their debtors. A condition, alike destructive of the interests of creditors and bankrupts, would be brought about, and a harvest for dishonest debtors afforded. The debtors knowing the circumstances under which they make the preferences, their general creditors to be affected thereby would be entirely at their mercy.

The parol agreement, pursuant to which it is claimed the lien was given in this case, should certainly not avail to place the secured creditor in a better position than he would have been had he actually taken his security at the time he loaned the money and failed to record his trust deed. Under the Virginia statute (Code 1887, § 2465 [Va. Code 1904, p. 1223]), trust deeds, as against creditors, etc., do not constitute a lien until duly recorded. Under the present bankruptcy act (Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), a trust deed actually executed and delivered would be subject to successful attack unless recorded more than four months prior to the bankruptcy. By section 67 of the bankruptcy act (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) it is expressly provided that claims which, for want of record or for other reasons, would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate. This precise question as to the effect of a parol agreement, such as is set up in this case, was passed upon in the case of *In re Ronk* (D. C.) 111 Fed. 154. This decision was by Judge Baker, of the District of Indiana, a judge of long experience and recognized ability, who said:

"It cannot be successfully maintained that the verbal agreement created a valid lien as against the claims of the creditors; and, if it did not create a valid lien, then, by the terms of the bankruptcy act, it cannot be enforced as a lien entitled to priority over other claims. It created no lien—nothing but a secret equity, possibly good as between mother and son, but certainly not valid and enforceable to the prejudice of the claims of creditors. The bankruptcy act embraces payments for the purpose of giving preferences, as well as the giving of securities for such purpose; and it would hardly be contended that a preference by way of payment, otherwise invalid, would be valid because the debtor had agreed at the time it was contracted to pay the debt, without defalcation, on a specified day. The doctrine contended for by the mortgagee would necessarily invite and inevitably lead to the defeat of the bankruptcy act. It would be easy, in every case where it was desired to thwart the operation of the law and to give a preference to a relative or a

friend, to make an agreement at the time the money was loaned or the credit given for a mortgage to be executed in the future. If the law can be thus evaded, it would be an open invitation to every person loaning money or giving credit to the bankrupt to enter into such a verbal agreement with him. Such agreements, if held valid, would create secret liens upon the bankrupt's property, and would enable him in every case to effect the very objects which it was the purpose of the bankruptcy act to prevent. Such agreements would undoubtedly be made, in every case where the debtor wished to secure relatives and friends, to the detriment of his other creditors. It would be a standing invitation to perjury, and would defeat the declared policy and purpose of our state legislation, as well as the policy and purpose of the bankruptcy act."

In the case of *Pollock v. Jones*, 124 Fed. 163, 61 C. C. A. 555, a decision of the Circuit Court of Appeals of this Circuit, and which bears strongly upon the question under consideration, in discussing the question of a parol promise to secure an indebtedness in future, the court, speaking through Judge Simonton (page 166, 124 Fed., page 558, 61 C. C. A.) says:

"We are of the opinion that the bare promise to give security, not expressing in terms the character and subject-matter of the security, could not create either an equitable or legal mortgage."

Under the facts of the present case, it cannot be seriously contended that the specific property upon which the security was to have been given, or, as a matter of fact, was subsequently given, was in terms enumerated or known, or could have been known. It was purchased long after the making of the loan, and at the time of the making of the same was known of in a general way only; that is to say, one of the borrowers, knowing that he and his associates were going to embark in the lumber and sawmill business, promised to secure the money borrowed upon the plant, fixtures, appurtenances, and appliances thereof, and a stock of certain mercantile goods to be used in connection therewith, which they subsequently did, and not only conveyed the property purchased with the money borrowed as aforesaid, but also other property which had not been paid for. The conclusion reached by the court is that the lien in question is invalid, and should be avoided, except as to the \$1,000, the present consideration paid at the time of the execution of the same. As to that sum the same is a valid and subsisting lien, and should be upheld. *City National Bank v. Bruce*, 109 Fed. 71, 48 C. C. A. 236, a decision of the Circuit Court of Appeals of this circuit, is express authority in support of the validity of said deed as to the \$1,000.

This case has been argued with exceptional ability on the part of counsel on both sides; and the authorities cited by them, respectively, tending on the one hand to maintain the validity of said deed in its entirety, and on the other its total invalidity, have been carefully examined. They are not in entire harmony on the many questions argued; and, since the case on its merits turns upon the points herein specifically passed upon, no general discussion of them will be made.

A decree may be entered overruling the first and third exceptions to the referee's report, and sustaining the second.

## UNITED STATES v. HARDISON.

(District Court, S. D. Georgia, W. D. January 20, 1905.)

**1. PERJURY—INTERNAL REVENUE BOND—SURETIES—JUSTIFICATION—OATHS—DEPUTY COLLECTOR—POWERS.**

Rev. St. § 8165, as amended by Act Cong. March 1, 1879, c. 126, § 2, 20 Stat. 329 [U. S. Comp. St. 1901, p. 2057], authorizes every collector and deputy collector to administer oaths touching any part of the administration of the internal revenue laws, or where such oaths are authorized by law, or by regulations authorized by law. Internal Revenue Laws 1900, p. 47, § 821 (Rev. St. U. S. § 821 [U. S. Comp. St. 1901, p. 186]), gives the internal revenue commissioner general supervision of the collection of taxes imposed by any internal revenue law, and authorizes him to prepare and distribute instructions, regulations, etc., pertaining thereto; and one of the regulations providing for the collection of taxes on distilled spirits required collectors to examine distillers' sureties, and to require them to "justify" on a prescribed form. *Held*, that under such provision an oath taken by a distiller's surety, with reference to his qualifications, before a deputy collector, was an oath taken in a case in which "a law of the United States authorizes an oath to be administered," within Rev. St. U. S. § 5392 [U. S. Comp. St. 1901, p. 3653], defining perjury.

**2. SAME—STATE LAW.**

Where defendant swore falsely, as to his qualifications to become a surety on a distiller's bond, before a deputy internal revenue collector, he was properly charged with perjury thereon, as defined by Rev. St. U. S. § 5392 [U. S. Comp. St. 1901, p. 3653], though under the state law perjury could only be committed in a judicial proceeding, other false oaths being defined and punished as "false swearing."

**3. SAME—NOTARIES PUBLIC—JUSTICE OF THE PEACE.**

Act Cong. March 15, 1876, c. 304, 19 Stat. 206 [U. S. Comp. St. 1901, p. 662], provides that notaries public of the several states, etc., are authorized to take affidavits in the same manner and with the same effect as commissioners of the United States Circuit Court may lawfully take or do. *Held*, that since a United States commissioner was authorized by Act Cong. May 28, 1896, c. 252, 29 Stat. 184 [U. S. Comp. St. 1901, pp. 499, 500], to take the oath of a proposed surety on a liquor distiller's bond, on which perjury might be assigned, an indictment for perjury in the taking of such oath was not defective on the ground that the officer administering it styled himself as "notary public and ex officio justice of the peace."

Alexander Akerman, Asst. U. S. Atty.

M. G. Bayne and Minter Wimberly, for defendant.

**SPEER**, District Judge. The defendant, Henry G. Hardison, is under indictment for perjury charged in several counts. It is charged that the accused offered to become a surety on the warehousing bond of a distiller of spirits within the collection district. He went before one Calvin McCarthy, a deputy collector of internal revenue, was duly sworn, and made and subscribed to certain written declarations relating to his sufficiency as such surety, and made oath before McCarthy that such declarations were true, when it is alleged that such statements were false and the accused knew them to be false. The technical phraseology adopted in the indictment is that usual in cases of perjury, but for brevity this is omitted. The material statements alleged to be false are that Hardison was the owner in fee of certain lots of land which were not incumbered,

when in point of fact it is charged he was not the owner of such lots; that previously to signing said declaration he had made, executed, and delivered to the British-American Mortgage Company, Limited, a certain deed to secure debt in the sum of \$2,200, due said company, which conveyed the title to the tract of land to his creditor; that this debt was due, and, as a consequence, that Hardison had no title to the land. Other counts present similar charges. One count recites that the oath alleged to be false was taken before James D. Dossey, a notary public and ex officio justice of the peace of the county of Crawford, state of Georgia. It is alleged in all the counts that McCarthy, the deputy collector, or Dossey, the notary public and justice of the peace, had competent authority to administer oaths. On arraignment the defendant demurred in writing to the indictment, on the ground that the oath taken before McCarthy, the deputy collector, was not an oath authorized by any law of the United States to be made by sureties on such bonds as that set out in the indictment, and that for this reason counts 1, 2, 3, and 4 are fatally defective and should be quashed. The second ground of demurrer is that no specified oath authorized by law was duly administered to the defendant, nor did he subscribe any specified affidavit required by law, nor that he was duly sworn before subscribing to any such affidavit. Another ground is that the indictment is fatally defective in that the affidavit alleged to have been signed by the defendant is not set out in the indictment, nor is it alleged that the affidavit was authorized by the law of the United States. The fourth ground of demurrer is that J. D. Dossey, notary public and ex officio justice of the peace, was not an officer qualified to administer an oath under the laws of the United States. The indictment is framed under section 5392, Rev. St. [U. S. Comp. St. 1901, p. 3653].

In support of the demurrer it is insisted by counsel for the accused that the oath taken before the deputy collector was not taken in a case in which a law of the United States authorizes an oath to be administered. In reply to this contention the assistant district attorney directs the attention of the court to section 3165, as amended by section 2, Act March 1, 1879, c. 125, 20 Stat. 329 [U. S. Comp. St. 1901, p. 2057].

This section, thus amended, provides:

"Every collector and deputy collector and inspector is authorized to administer oaths and take evidence touching any part of the administration of the internal revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulations authorized by law to be taken."

The words "or regulations authorized by law" did not appear in the original act, which became the law on June 30, 1864. It appears, then, that before the amendment the deputy collector could not administer oaths and take evidence unless "authorized by law." No regulation of the department had empowered that officer to perform this function. Since the amendment, however, so far as the act of Congress could give the power, such officer can take oaths and evidence authorized by a regulation, which itself must be



authorized by law. In section 321 of the internal revenue laws, as compiled under the direction of the commissioner of internal revenue and printed in the compilation of 1900 (page 47), Rev. St. U. S. § 321 [U. S. Comp. St. 1901, p. 186], we find this language:

"The commissioner of internal revenue under the direction of the Secretary of the Treasury shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters appertaining to the assessment and collection of internal revenue."

Now, it is plain that to require a sufficient bond from a distiller, who is himself liable to the government for his share of the taxation imposed by law, is a part of the duty of collecting taxes. It is to obtain surety for the taxes due; in other words, to make the collection certain. To accomplish this, the commissioner is thus empowered to prepare and issue regulations. This power was granted by act of Congress, and it follows that, being thus endowed with legislative authority to make the regulations, we have but to determine if the commissioner has made a regulation pertinent to the particular subject under discussion. Turning to the regulations and instructions concerning the tax on distilled spirits, printed in 1895, we find this provision:

"Collectors will in addition to a careful and searching examination of the sufficiency of all sureties offered, require the sureties to justify on form 33 in such amounts as are safe, prudent and adequate to save the government harmless from loss, which amounts should not be less than the penal sum of the bond."

Now, what may be done by a collector may be done by a deputy collector. *Qui facit per alium, facit per se*. We have, moreover, seen from section 3165, as amended, that a deputy collector is expressly empowered to administer oaths when authorized by such regulation as that just quoted. Thus it is clear that by virtue of this regulation, construed in connection with section 3165, as amended, and form 33, which presents the particular oath required by the Treasury Department, the deputy collector is empowered to administer that particular oath to one seeking to justify as a surety on any bond relating to the collection of internal revenue taxes. The word "justify" in this sense must be understood to have the same meaning as when used with regard to sureties on a bail bond. Bouvier's Law Dictionary, art. "Bail." It is the proceeding by which bail establish their ability to perform the undertaking of the bond or recognizance. Bouvier, art. "Justification." As we have seen, a distiller's or warehousing bond is a part of the familiar system for the collection of this species of taxes. From these considerations it seems clear that the deputy collector, in the meaning of section 5392, Rev. St. [U. S. Comp. St. 1901, p. 3653], is an officer who is competent to administer an oath, and that the laws of the United States authorize the administration of the particular oath described in the indictment. It is true that the deputy collector finds his authorization in the regulation of the department, but we have seen that this regulation was made in pursuance of

an act of Congress, and that it is well settled that the regulations thus made have the force of law. *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538. In the case of *U. S. v. Ormsbee* (D. C.) 77 Fed. 209, it was held that the regulations of the Secretary of War for the use of canals have the force of law. In *re Hirsch* (C. C.) 74 Fed. 931, it was held that regulations by the head of a department have the force of law. In *Re Huttman* (D. C.) 70 Fed. 702, it was held that regulations approved by the commissioner of revenue have the force of statutes. Many other authorities to the same effect might be cited, but these will suffice.

It is, however, insisted that perjury cannot be assigned upon an oath thus taken, even though its substance is known by the affiant to be false. It is true that by virtue of the provisions of the criminal law of this state the objection would seem to be well taken. Perjury can be committed only in a judicial proceeding. There is, however, a statutory provision of the state law for the punishment of false swearing, and, if we were proceeding under the classification there adopted, the charge against the accused must be classed as false swearing rather than as perjury. In other words, the state law seems to adopt the common-law definition of perjury. It is, however, true that there is no common law of the United States in criminal cases; each crime is the creation of the statute defining it, and it is competent for Congress to designate that as perjury which, in a state where the common law prevails, would be treated as false swearing. This question was closely discussed by Mr. Justice Brewer in *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. It was there held that false swearing in a land contest before a local land office in respect of a homestead entry is perjury within the scope of Rev. St. § 5392. In that case it will be conceded that there was a contest judicial in its nature. The court there, however, reaffirms the doctrine as announced in *U. S. v. Bailey*, 9 Pet. 250, 9 L. Ed. 113. In this case Justice Story delivered the opinion of the court. The defendant, John Bailey, was indicted under a provision of an act of Congress which provides that, if any person shall swear or affirm falsely touching the expenditures of public money or in support of any claim against the United States, he or she shall, upon conviction therefor, suffer as if for willful and corrupt perjury. The oath was taken before a justice of the peace who was authorized to administer the oath, not by an act of Congress, but merely by a regulation of the Secretary of the Treasury. The contentions in that case are very clearly put by the opinion of Justice Story and the dissenting opinion of Mr. Justice McLean. There was, however, no difference in the opinion of that court that Congress had the power to make false swearing perjury and to have it punished as perjury, and it was held by the majority of the court that where an oath is taken before a state or national magistrate authorized to administer oaths in pursuance of any regulations prescribed by the Treasury Department or in conformity with the practice and usage of that department, so that the affidavit would be admissible in evidence at the department

in support of any claim against the United States, and the party swears falsely, the case is within the purview of Act 1823, c. 37, 3 Stat. p. 770. This law, as we have seen, denounced the act as perjury. In *Caha's Case* the court also distinguishes *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591, on which the defendant's counsel here rely, and point out with clearness that there is a grave distinction between a regulation authorizing an officer of the Treasury Department to administer an oath and assigning perjury for such false oath, and a regulation like that against dealers in oleomargarine, where the Secretary of the Treasury, by regulation, imposed penalties which were not provided by the act of Congress. In one case it is a violation of a general law, which violation is intended to hinder the effective operations of government. This law has been made applicable by regulation of the appropriate executive department. In the other case it is an attempt to create a distinct penalty by a regulation of the department, which penalty Congress itself had omitted to enact, and which was therefore no part of the general law. It is, besides, true that section 5392, Rev. St., which now defines perjury, in view of the national law, is a general provision recommended by the revisers of the statutes to take the place of numerous provisions affixing the pains and penalties of this crime every time an oath was required by any statute to be taken before either a judicial or administrative officer. Gould & Tucker's Notes on Revised Statutes, vol. 1, p. 1013. There are many cases where the United States courts have upheld convictions for perjury where the oaths were not taken in judicial trials. It is committed where the clerk of the Circuit Court makes false statements in his emolument returns and accounts for services rendered (*U. S. v. Ambrose* [C. C.] 2 Fed. 556; *Id.*, 108 U. S. 336, 27 L. Ed. 746); where a false oath is taken to a pension claim before a justice of the peace (*U. S. v. Hearing* [C. C.] 26 Fed. 744); where one intentionally swore falsely in making returns of his income (*U. S. v. Smith*, 1 Sawy. 277, Fed. Cas. No. 16,341); where one intentionally omits to place part of his property on schedules in an application under the bankruptcy act (*U. S. v. Nihols*, 4 McLean, 23, Fed. Cas. No. 15,880); where statements which the deponent does not believe to be true are made on justification as bail (*U. S. v. Volz*, 14 Blatchf. 15, Fed. Cas. No. 16,627). The cases cited in opposition to this view are *United States v. Maid* and *U. S. v. Blasingame* (D. C.) 116 Fed. 650-655. These opinions were rendered by the same learned judge, and go merely to the effect that Congress has no power to define as a crime something which may thereafter be thus designated by regulations of an executive department. It does not appear necessary to the question now before the court to consider this doctrine. Here, as stated, the crime is not created by a regulation of the department, but an officer of the department is authorized to take an oath, a violation of which constitutes a crime under the general law.

The ground of demurrer that the count charged perjury on the oath taken before Dossey, a notary public and ex officio justice of

the peace, seems equally untenable. By Act Aug. 15, 1876, c. 304, 19 Stat. 206 [U. S. Comp. St. 1901, p. 662], it was provided that:

"Notaries public of the several states, territories and the District of Columbia be and they are hereby authorized to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States, to take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do."

It will not be contended, we presume, that it would be incompetent for a commissioner of the Circuit Court to take the oath by which the surety upon a distiller's bond attempts justification. The United States commissioner has general jurisdiction to administer oaths. This is an especial function of that officer, and is equally enjoyed by the clerks and deputy clerks of the United States. See Act May 28, 1896, c. 252, 29 Stat. 184 [U. S. Comp. St. 1901, pp. 499, 500]. It is obvious that, since a commissioner can administer the oath on which perjury is assigned here, a notary public of the state may do so. Nor does it impair this function on his part that, in addition to his public notarial distinctions, he enjoys the ex officio honor of a justice of the peace. As notary public he administers oaths, as justice of the peace he dispels "the gladsome light of jurisprudence."

For these reasons the court feels constrained to overrule the demurrer.

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#### TARABOOCHIA v. AMERICAN SUGAR REFINING CO.

(District Court, E. D. Pennsylvania. February 23, 1905.)

No. 65.

#### SHIPPING—GENERAL AVERAGE—LOSS THROUGH NEGLIGENT NAVIGATION.

A steamship laden with sugar left the port of Samarang, Java, at night, and about 5 in the morning ran upon the Korea reef, a small unmarked, but charted, coral rock lying under the water; and in order to float her it became necessary to jettison a part of the coal and cargo. The course of the vessel was laid by the master, and was to be changed after she had proceeded a certain distance, which would have taken her to the southward of the reef four miles, which distance should have been increased by the prevailing current, the weather being calm. At the time the change of course was made in the night, the navigation of the vessel was in charge of the first mate. Neither his testimony nor that of the engineer was taken, and there was no direct evidence as to the time or distance from port when the change was made. *Held*, that on such state of the evidence the probability was that the accident occurred through the error or negligence of the mate in overrunning the course, and that the vessel was not entitled to a general average contribution from the cargo owner.

[Ed. Note.—General average, see note to *Pacific Mail Steamship Co. v. New York, H. & R. Min. Co.*, 20 C. C. A. 357.]

In Admiralty. Suit to recover a general average contribution from cargo owner.

Henry R. Edmunds, for libellant.

Harrington Putman and Biddle & Ward, for respondent.

J. B. McPHERSON, District Judge. This action is brought to recover from the owner of cargo its proper contribution toward a general average loss sustained in June, 1900, during a voyage from Java to the Delaware Breakwater. The libellant is master of the steamship *Adriatico*, an Austro-Hungarian vessel, which was chartered in April, 1900, to carry a cargo of sugar from certain ports on the north coast of Java to the Delaware Breakwater, this being one of the possible points of destination in Europe and America that were named in the charter party. On June 24 she finished loading at the port of Samarang, and began her voyage to this country in calm and clear weather about half past 11 in the night of that day. She was drawing 22 feet 8 inches forward and 24 feet aft, and, at a quarter to 5 in the morning of June 25, when she had proceeded about 30 miles on her way, she ran upon the Bapang, or Korea, reef, which is a small, unmarked coral rock about 13 yards in circumference, hidden under 14 feet of water. There is plenty of depth all around it. Immediate efforts were made to get the ship off by reversing the engines, and afterwards by the use of a hawser and other lines, an anchor and the steam winch, and by filling a tank at the stern in order to raise the bow. The vessel could not be moved, however, and, as speedy assistance could not be obtained, and the ship was in a dangerous position if bad weather should come on 100 tons of coal were jettisoned, and afterwards 100 baskets of sugar, a part of the cargo. Another effort that day to relieve the vessel was also ineffective, but about 8 o'clock in the morning of the 26th she was finally pulled off the rock, losing the anchor and lines and sustaining other damage, which aggregated a considerable amount, and forms the basis of the present claim. The loss was adjusted after the vessel arrived in America, and I do not understand the accuracy of the computation to be in dispute. The controversy has to do wholly with the question of the ship's negligence, the respondent denying liability in toto on the ground that the stranding was due to negligent navigation, and that the loss is therefore not the subject of general average.

It is undoubtedly true, as was decided in *The Irrawaddy*, 171 U. S. 189, 18 Sup. Ct. 832, 43 L. Ed. 131, that "the owner of a ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew." And the rule is declared to be "founded on the principle that no one can make a claim for general average contribution if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant, or of some one for whose acts the claimant has made himself, or is made by law, responsible to the co-contributors." It is necessary, therefore, to inquire whether the master or some other officer of the ship was negligent in directing the navigation, and thus caused the stranding and the losses that are complained of. The vessel was of steel, only a few months old, of nearly 2,600 tons net register, was properly manned, equipped, and supplied when she left Samarang, and was then in a thoroughly seaworthy condition. The master was a man of 43 years' experience at sea, 27 years in command of sailing vessels and 10 years in command of steamships, and had been in these waters twice before, although this was his first voyage to the island of Java. I see no reason to doubt

his testimony that "before leaving Samarang I made, as usual in all my voyages, a study of the course to be taken, and of the winds, currents, banks, rocks, etc., in order to make the voyage successfully, and protect the lives and property confided to me." That he was a careful and competent commander is evidenced by the fact that this was the first time a vessel in his hands had ever been stranded. He was in charge of the ship when she started, and gave orders that her course should be laid northwest until the taffrail log, which was thrown overboard very soon after the voyage began, should register nine miles, after which the course was to be changed to west-northwest. The first course was intended to pass about three miles to the northward of Korowelany rock, and the second course to pass four miles to the southward of Korea reef. These rocks are well known, appeared on the chart that was examined by the officers of the ship, and the master and both mates knew where they were. It has been argued that the course referred to brought the vessel imprudently near to Korea reef, and that a margin of at least 10 miles should have been aimed at, so as to provide against all contingencies, there being plenty of sea room both north and south of the reef. I am not prepared to say, however, that there was negligence in adopting the course described. The compasses were correct (so the master testified), the sea was calm, the wind was not strong enough to be an element of danger, and the slight current which exists in these waters sets toward the shore, and, as the master testified, "should have helped to keep us still further away from [the reef]." It clearly appears, as it seems to me, that, if the course laid down by the master had been exactly, or even approximately, run, the vessel would not have encountered the rock. And this brings me to what I cannot help regarding as the fatally weak point in the libellant's case, namely, the total absence of testimony concerning the hour and the distance run when the course was changed. The master went below at half past 12, leaving the ship in charge of the first mate, whose watch lasted until 4 o'clock, when the second mate relieved him. The change of course was made by the first mate, but neither his testimony nor the testimony of the man at the wheel has been taken, and no direct information is offered upon the vital question of the time when, and the place where, the direction of the ship was changed. The second mate testified to certain declarations made to him by the first mate upon this subject at 4 o'clock, but this is merely hearsay, and cannot be allowed to have any weight. In addition to the usual objections against hearsay evidence, there is a special danger here; for, if the first mate had been negligent, and had overrun the point where the course should have been changed, he would be under a strong temptation to conceal his fault. Neither was the engineer examined, although the exact speed of the ship during these hours was a most important factor in the problem; and neither the master nor the second mate could throw any further light upon the question than by testifying to the vessel's customary speed. But how fast she was actually going between midnight and 4 o'clock has not been directly proved, and the two persons best qualified to speak on this subject were not called to the stand. Calculations from the data accessible in the logs would seem to indicate that the speed testified to by the master and the second mate was prob-

ably an underestimate. The failure to produce the witnesses just referred to greatly strengthens the probability that the master's orders were not carried out. The New York, 175 U. S. 204, 20 Sup. Ct. 67, 44 L. Ed. 126. It cannot be denied that the course he laid would have carried the ship clear of the reef, and the fact of the stranding proves conclusively that the vessel did not keep that course. There is no evidence of sufficient disturbance by the wind and the waves to account for so large a deviation in so short a run. The captain's suggestion that the unsuspected event was caused by "a deviation of the current, which, from some meteorological cause, not explainable, carried, on the night of her departure, the water from west to east," although its usual flow was from east to west, has the misfortune to be mere conjecture, and to be opposed to all the testimony in the case concerning the ordinary direction of the current. The second mate offers the same explanation: "The only way that I can account for it is that a strong current sent us away from the coast of Java, driving us toward the reef." But the force of this suggestion is much weakened by what he says in the next sentence: "I assert, however, that we could not have anticipated this, since, as is well known, the current on the coast at that season flows for eighteen hours of the day from east to west, which drives one toward the island, and during the remaining six hours of the day the water is slack." And the ship's own log has this entry on the day of, but after, the stranding: "During the various run along the coast, we experienced a current which, when navigating toward the west, was carrying us toward the southwest, and when steering to the east would carry us to the southeast. In consideration of this fact, if the course followed was carrying us to the south of said reef, the current should have carried us still further south of it."

In this state of the proof it is inevitable, I think, to reject the master's explanation, and accept the much more probable theory that by some error or fault of the first mate the northwest course was carried too far, so that the second course took the vessel directly upon the reef. She certainly did strike the reef, and this theory accounts for that fact much more naturally than any other, and it does not conflict with any of the testimony in the case. The important witnesses for the libelant assume, in effect, that the master's instructions were carried out, although the essential and preliminary inquiry upon that subject is not assisted by a word of direct evidence, while the probabilities point, I think, in the opposite direction. If I have drawn the correct inference from the testimony and the lack of testimony in the case, it is unnecessary to pay any attention to the controversy concerning the precise place of anchorage at Samarang, the possible variation of the ship's compass, and the question whether the course laid by the master was true or magnetic.

The libel must be dismissed.

## UNITED STATES v. W. P. DEVEREUX CO.

(Circuit Court, D. Minnesota, Fourth Division. February 7, 1905.)

## CUSTOMS DUTIES—CLASSIFICATION—FROSTED WHEAT.

Wheat injured by frost to such an extent as to reduce it to a low grade or to "no grade," but which can still be used for seed and for making flour, is dutiable as wheat, under paragraph 234 of the tariff act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], and not as a nonenumerated unmanufactured article, under section 6 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1698]).

On Review of the Decision of the Board of General Appraisers Sustaining the Protest of the Defendant against the Action of the Deputy Collector at Minneapolis, Minn.

See G. A. 5,796, T. D. 25,626.

Charles C. Houpt, U. S. Dist. Atty.

C. D. O'Brien, for defendant.

LOCHREN, District Judge. The commodity imported by the defendant was invoiced as "wheat screenings," and was claimed by defendant to be subject to the duty of 10 per cent. ad valorem, as a non-enumerated unmanufactured article, under section 6 of the tariff act of July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]. The deputy collector classified the commodity as wheat, and assessed the duty thereon at 25 cents per bushel, under paragraph 234 of Schedule G of said act (30 Stat. 170, c. 11, § 1 [U. S. Comp. St. 1901, p. 1649]). Upon defendant's protest, and the evidence taken thereon by the Board of General Appraisers upon which the decision of the board was based, it appeared that the commodity was not "wheat screenings," but was wheat of which the entire crop had been considerably injured by frost before the kernels were fully hardened by ripening, and were still in the "milk" or "dough" state; resulting in some shrinking or wrinkling of most of the grains, reducing the weight of a bushel to less than 50 pounds. From that testimony it also appeared that such wheat would not produce flour fit to be made into human food, and that such wheat would not germinate, and was worthless for seeding. The Board of Appraisers found the facts accordingly, and concluded that the article imported was different from the article intended by the designation "wheat," as used in the tariff, and therefore sustained the protest. Upon the same evidence, I should concur with the decision of the board, and should regard the case like one where wheat had been ruinously scorched in a burning warehouse to such an extent that its capacity to germinate was gone, and that it had become unfit to be ground for breadstuff, and could no longer be rated or regarded as wheat in trade or commerce. But after the removal of the cause to this court it was referred to one of the General Appraisers to take and report further testimony; and many witnesses—among them, grain dealers and large farmers from North Dakota, having personal experience in frosted wheat—testified as to their personal knowledge and observation during several years when in that state the wheat crop was much injured by early frosts, and particularly respecting the crop of 1888, which was so injured by frosts early in August that the wheat which was harvested



that year was of the same character as the imported commodity under consideration. This testimony showed that considerable of that wheat of 1888 was put in the elevator warehouses and disposed of, other portions shipped by railroad and sold, and that the inhabitants of that region had it ground into flour at their local mills, and used the same for their bread, and that in the spring of 1889 the same farmers, to a large extent, used this frosted wheat for their seeding, and that it germinated and produced a good crop that year. Prof. Henry L. Bolley, teacher of botany at the Agricultural College of North Dakota, testified to careful experiments made by himself with samples of this very imported wheat to test its power of germination and value as seed, with the result that more than 70 per cent. of the seeds planted germinated and grew as well, substantially, as the shoots from wheat of the highest grade planted at the same time. This additional testimony shows that the actual character of this imported commodity is very different from what was represented by the testimony received and considered by the Board of Appraisers.

The single question is whether this article is wheat. No distinction as to grades of wheat is made by the tariff. A sample of the article shows the grains of which it is composed, and any person looking at such sample would unhesitatingly pronounce it to be wheat somewhat injured. The testimony now shows that wheat similarly injured has been used to produce bread for human food by a whole community, including such large farmers as Mr. Dalrymple, with 600 men to subsist, and that it is but little inferior to wheat of the best grade for seeding purposes, and is actually dealt in as wheat, whether classified as "rejected" or as "no grade."

The decision of the Board of General Appraisers is reversed, and the assessment by the deputy collector is affirmed.

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DONALD v. GUY et al.

(District Court, E. D. Virginia. January 28, 1905.)

**1. COLLISION—STEAM AND SAILING VESSELS CROSSING—VIOLATION OF RULES.**

It is the duty of the navigator of a steamer approaching a sailing vessel on a crossing course, under Inland Navigation Rules, arts. 20-23 (30 Stat. 101 [U. S. Comp. St. 1901, p. 2833]), which require the steamer to keep out of the way, and if necessary to slacken speed, stop, or reverse, to act in time to avoid risk of collision, and he has no right to keep his course and speed on the assumption, or in the expectation, that the sailing vessel will change her tack; and the presence of a passing steamer, instead of furnishing an excuse for violating the rules, renders their observance and the exercise of precautionary care all the more necessary.

**2. SAME—NEGLIGENT NAVIGATION BY PILOT.**

The pilot of a steamer having her navigation in charge *held*, under the evidence, solely in fault for a collision with a crossing schooner in Chesapeake Bay, for failing to change his course or speed until collision was unavoidable, although the schooner kept her course and speed as required by the rules.

**3. SAME—RIGHT TO RECOVER COLLISION DAMAGES PAID FROM PILOT—LACHES.**

The owner of a vessel is not debarred from maintaining a suit against her pilot to recover the amount of damages paid on account of a collision.

which occurred through the pilot's negligence by the fact that such damages were paid without suit, nor is his right of action barred by laches where suit is commenced within the time allowed by the statute of the state to sue at law on similar claims.

**In Admiralty.** Suit to recover damages arising from alleged neglect of pilot.

On the early morning of the 14th of January, 1901, a collision occurred in Chesapeake Bay, near Thimble Light, between the George Churchman, a three-masted schooner, and the steamship Santuit, at the time in charge of respondent Guy, a member of the Virginia Pilot Association. Subsequently to the collision, upon threatened suit by the Churchman against the Santuit, the latter adjusted and paid the damages occasioned by such collision, amounting to \$3,175, and Donald, the owner of the Santuit, afterwards filed this libel against the pilot and 26 others, the individual members of the Virginia Pilot Association, to recover the amount thus paid, alleging that the collision in question resulted solely from the negligence of the pilot, Guy. Exceptions were duly taken to this libel, raising the question of the liability of the pilots' association, and the individual members thereof, for the acts of one of them, and whether or not, if liable, they should be held to answer at the suit of the libellant, who voluntarily settled the claim asserted against his steamship. The legal questions thus raised were decided adversely to the exceptants, and will be found reported in 127 Fed. 228, to which reference may be had.

Hughes & Little, for libellant.

R. C. Marshall and D. Tucker Brooke, for respondents.

**WADDILL**, District Judge. This case is now before the court upon its merits, the legal questions having been determined as heretofore stated. The sole question at this stage is, whose fault brought about the collision? and in this connection it should be borne in mind that the Santuit, having elected to pay the damages sustained by the Churchman without legally contesting the question of fault, must make out its case against the respondents with the same definiteness and certainty that the Churchman would have been required to establish its case in a suit against the Santuit.

At the time of the collision the Santuit, in charge of the respondent Guy, a member of the Virginia Pilot Association, was coming in from the Capes, and some time before reaching a point opposite Thimble Light sighted the schooner Churchman on her port bow, moving on an intersecting course with the said steamer, and when about opposite Thimble Light, in mid-channel, collided with the schooner, causing the injury to her to recover damages for which this suit is brought. The question is, whose negligence brought about this collision? and in passing thereon it will not be necessary to review at great length the evidence adduced by the respective parties, further than to say that the same has been fully considered, and the conclusion reached by the court is that the collision was the result solely of the negligence of the pilot Guy, in charge of the steamship Santuit, in failing to properly and seasonably observe the customary rules and regulations prescribed for the government of steam vessels, in the position in which he, the pilot, was placed, at and about the time of this collision, with reference to the Churchman. These rules, embodied in articles 20, 21, 22, and 23 of the Inland Rules of Navigation (30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]) are too well understood in cases of this character to need special

amplification. Suffice to say, they impose upon the steam vessel the duty of keeping out of the way of the sailing vessel under the circumstances of this collision, and, if needs be, to slacken her speed, stop, or reverse, and require that the sailing vessel shall keep on her course and speed. That the respondent Guy on this occasion failed to observe these regulations is manifest from his own testimony. The weather was good; the night light; the sea calm, with ample room for all purposes of navigation; the pilot observed the Churchman apparently crossing his course 12 or 15 minutes before the collision, and some two miles distant, and nevertheless continued on his course without changing the same, or lessening or slackening speed, until within such close proximity to the Churchman, who in the meantime had confessedly continued on her course and speed, that a collision was unavoidable; and in that way collided with the Churchman, causing her serious damage. The navigator of the Santuit cannot, under the circumstances, escape liability; and while it is claimed that to some extent a passing steamer caused him to continue on his course and speed, and that he was in part misled by the schooner's lowering her fore gaff topsail, which he construed to mean that the Churchman was about to change her tack from the port to starboard—which she did not in point of fact do—it is quite apparent from the whole evidence that the passing steamer did not and should not have interfered with the navigation of the Santuit. It was the duty of the navigator of the Santuit not only to have avoided the collision with the Churchman, but to have avoided the risk of collision, and that there was such risk of collision is apparent from the result which followed. *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126. In that case the Supreme Court said:

"The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect."

*The Richmond* (D. C.) 114 Fed. 208, 213; *The Elizabeth* (D. C.) 114 Fed. 757.

The presence of the passing steamer should have caused the Santuit's navigator to exercise greater care in the management of his vessel, and to have kept her under control, so as to avoid the contingencies liable to arise from the exigencies of the position in which he was thus placed, and he should not have speculated upon the possible change of course of the schooner by tacking.

Counsel for the respondents in argument again raised the legal question heretofore passed upon in overruling the exception as to the right to maintain the suit against the respondents, because of the failure legally to resist the same; and, further, that the same should not now be entertained because of the laches of the libellant in its institution. Upon the first proposition it may be said, in passing, that the court sees no reason to change its ruling in that respect heretofore made. *Donald v. Guy* (D. C.) 127 Fed. 229, 230.

Upon the question of laches, while the same is not raised formally and properly, and perhaps in a way that it could be considered at all, still it does not appear upon the facts here that there exists such laches as

would disentitle the libelant to recover. The Churchman, had the damages not been settled, would have been entitled to bring this suit either against the Santuit in rem or her owner at the time of the institution of this suit; and it cannot be said, under the circumstances of this case, that there exists any special consideration which would prevent the libelant Donald, the owner of the Santuit, from maintaining a like cause of action against the respondents. When there is nothing exceptional in the case, courts of admiralty govern themselves by the analogies of the common-law limitations, and under the Virginia statute the institution of this suit would be clearly within the statutory time. *The Sarah Ann*, 2 Sumn. 206, Fed. Cas. No. 12,342; *The Martino Cilento* (D. C.) 22 Fed. 859; *Southard v. Brady* (C. C.) 36 Fed. 560; *Bailey v. Sundberg*, 49 Fed. 583, 586, 1 C. C. A. 387; *Nash v. Ingalls*, 101 Fed. 647, 41 C. C. A. 545.

While the failure of the libelant to contest legally with the Churchman the right of recovery in this case should not, in the opinion of the court, disentitle him to a recovery herein, nor the delay which has occurred prevent the maintenance of this proceeding on the part of the libelant, the court thinks it proper to say that the better practice would have been on the part of the Santuit, purposing to maintain the liability of the pilot for the collision, to have forced the Churchman to contest the same, and by proper proceedings had to have brought in the pilot; and, while the delay that has occurred is not such as should prevent a recovery, still the libelant ought to have exercised a greater degree of diligence in instituting the suit than he did.

It follows from what has been said that a decree should be entered determining that the collision was caused solely by the fault of the pilot Guy.

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In re DOHERTY.

(District Court, D. Connecticut. December 26, 1904.)

No. 1,293.

1. **BANKRUPTCY—DISCHARGE—CONCEALMENT OF PROPERTY.**

The portion of the monthly salary of a public officer of a state which was earned, but not payable, at the time of his filing a petition in bankruptcy, did not pass to his trustee, and his failure to schedule the same was not, therefore, a concealment of property which defeats his right to a discharge.

2. **SAME.**

Specifications of objection to the discharge of a bankrupt on various grounds considered, and held not sustained by the evidence.

In Bankruptcy. On petition for discharge.

The following is the report of the special master upon petition for discharge:

I, Henry G. Newton, referee in bankruptcy for the New Haven County District of the District of Connecticut, to whom the petition for discharge in the above-entitled case was referred as special master, do hereby certify: That the above-named John B. Doherty, of Waterbury, Connecticut, was duly adjudicated a bankrupt herein on May 25, 1904. That on September 9, 1904, the petition of the bankrupt for a discharge from all his debts in bankruptcy was

duly filed with the clerk of said court, and was duly referred to me by said court for further proceedings. That on September 18, 1904, I fixed the 23d day of September, 1904, at 8 p. m., at my office, room 7, No. 818 Chapel street, New Haven, Connecticut, as the time and place for a hearing on said petition for discharge, for examining the bankrupt, and for showing cause, if any, why such discharge should not be granted; and on September 18, 1904, I gave due notice thereof to all creditors whose names appear upon the schedules of the bankrupt, to all attorneys who appear in the case, and to all persons interested, by mailing and publishing, as appears by my certificate with copy of notice hereto annexed. F. O. Peabody, by N. R. Bronson, Esq., his attorney, appeared in opposition to the discharge, and filed the annexed specifications; and in reference thereto the special master finds the following facts: At and before the time of his bankruptcy, bankrupt was superintendent of the public employment bureau in Waterbury, receiving from the state of Connecticut a salary of \$1,200 per year. He was receiving some compensation, but not a large amount, as deputy sheriff. He kept a bank account in the name of John B. Doherty, agent, in which he deposited the salary received from the state and any other moneys received by him, and from which he paid the expenses of said public employment bureau and his own personal expenses. He had no other account book, and, being without property or income other than as aforesaid, had no occasion for any. Said check book is not mentioned in bankrupt's schedules, and was not delivered to the trustee until upon motion of Mr. Bronson on a hearing before the master it was produced, and placed by the master in charge of the trustee in bankruptcy. At the time of the adjudication a check for about \$17, which had been given by bankrupt, signed with his own name as agent, in payment of an expense of said employment bureau, had not been presented; so that there actually remained in the bank a balance of \$16.79. If the check had been presented, it would have drawn the whole balance, and some few cents over. I do not find that bankrupt concealed the book with intent to conceal his true financial condition, or that he destroyed or failed to keep any accounts or records which might have shown his condition, and therefore find and report that reasons 1 and 2 of said specifications are not sustained. Reason 3 of the specifications refers to the \$16.79 balance in the bank in Waterbury. In my opinion, this \$16.79 is the property of the estate; but I do not find that it was transferred, removed, destroyed, or concealed, or permitted to be transferred, removed, destroyed, or concealed, with intent to hinder, delay, or defraud bankrupt's creditors, and therefore find the third reason of said specifications not sustained. The specifications under the fourth reason—of his having made a false oath—are insufficient, because it does not allege that it was done knowingly or fraudulently. The facts as to 4 A and B are those above set forth. As to 4 C, the schedules were filed on May 24, 1904. His salary as superintendent of the employment bureau was paid monthly, and he had not received the salary for the first 23 days of May, and could not receive it until the first of June. In my opinion, the salary of a public officer of the state of Connecticut does not pass to a trustee in bankruptcy. As I understand it, the United States hold that, in order that its officers may properly perform their duties, if necessary, their salaries shall be exempt from attachment and execution; and I think the same rule should apply to an officer of the state. It is not a chose in action for which a suit could be brought. If an attempt were made to take it by foreign attachment, no scire facias could be brought against the state; and, in my opinion, it does not pass to the trustee. Also, as a matter of fact, I do not find that the failure to include it in the schedules or transfer it to the trustee was with fraudulent intent, and therefore find and report said reason 4 not sustained. Reason 5 A, B, and C is insufficient because the acts are not alleged to have been done knowingly and fraudulently, and upon the evidence I do not find that they were done fraudulently, and therefore find them not sustained. In the hearing upon the specifications it was agreed that the evidence taken in the examination at the first meeting should be considered as before the master upon the petition for discharge. Counsel for creditor offered no further evidence. Counsel for bankrupt thereupon called the bankrupt as a witness, who, in answer to questions by his counsel, stated that he had con-

tracted bills for living and other expenses in excess of the \$100 due him from the state, and upon cross-examination he testified that he had borrowed \$75 from his wife in order to pay his attorney in the bankruptcy proceedings; that he paid the \$75 to Messrs. Kennedy & Cassidy, his attorneys, with his (bankrupt's) wife's check; and that, after receiving his salary in June, he returned it to her in cash. Counsel for creditor thereupon requested the master to issue a subpoena to bring the bankrupt's wife before him, in order that she might be inquired of as to the truth of the statement. Counsel for bankrupt objected, and the master declined to issue the subpoena, not considering the fact to be material, or of sufficient importance to require the testimony of a wife against her husband, even if she could legally be compelled to testify. That the bankrupt has in all things conformed to the requirements of said act. That, so far as appears from the papers now on file before me, and the proceedings had before me show, he has committed none of the offenses and done none of the acts mentioned in subdivision "b" of section 14 of said act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 8427]) as preventing a discharge. And that, in my opinion, the bankrupt is entitled to a discharge from his debts in bankruptcy.

Dated at New Haven, Conn., this 22d day of December, 1904.

Henry G. Newton,

Referee in Bankruptcy and Special Master.

Wm. H. Ely and William Kennedy, for bankrupt.

N. R. Bronson, for opposing creditor.

PLATT, District Judge. Responding, as best I could, to the insistence of counsel for the objecting creditor, I have examined this case with exceeding care, even going so far as to request the referee to furnish the data from which he prepared his evidential facts. I cannot discover that he has omitted anything which would constrain the mind to reach any legal conclusions not warranted by the facts which he has found, and upon which he bases his report. I am in substantial accord with him upon the conclusions of law. I am inclined to disagree with him in his opinion that the \$16.79 remaining in the Waterbury bank in bankrupt's name as agent at the time he filed his petition is the property of the estate, but such a view strengthens the argument in favor of the bankrupt's discharge. The referee's action in refusing to issue a subpoena to bring in the bankrupt's wife was a proper exercise of his discretion. Her testimony could not, in any way, have thrown light upon material matters.

The report of the referee is accepted, and the bankrupt is discharged.

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#### BALL v. BEST.

(Circuit Court, N. D. Illinois. January 9, 1905.)

No. 26,370.

#### UNFAIR COMPETITION—SIMULATION OF TRADE-NAMES—MAIL-ORDER BUSINESS.

Complainant became the owner of the business and good will of an establishment in New York engaged in supplying clothing for infants and children under the name of "Best & Co., Lilliputian Bazaar," which advertised extensively, and had established a large mail-order business throughout the country. Defendant, the son of a former proprietor of the New York business, established a similar business in Chicago; using the name "A. S. Best & Co.," and placing on his sign the words "Lilliputian Outfitters," and "Formerly with Best & Co., New York." He also engaged in the mail-order business. *Held*, that it was the evident purpose

of defendant to obtain the benefit of the advertising and standing of complainant's business, and that complainant was entitled to an injunction restraining defendant from using the name "Best & Co.," with or without prefixes, and also the name "Liliputian" in connection therewith, in competition with his own business.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper*, 30 C. C. A. 376.]

In Equity. Suit to enjoin infringement of trade-name and unfair competition.

Frank F. Reed and E. S. Rogers, for complainant.  
Dent & Whitman, for defendant.

KOHLSAAT, District Judge. This is a final hearing upon complainant's bill to restrain defendant from using the firm style of "Best & Co.," with and without prefixes, of the words "Liliputian" and "Liliputian Outfitters," and of the fancy device of a hat, boot, and small human figures.

Complainant, by various steps, became and was the owner of the good will and business of Best & Co., of New York, and was under that name, together with a nominal partner, running the business of manufacturing and dealing in infants' and young folks' clothing and supplies. Said firm had for years adopted the trade-name "Liliputian Bazaar," and the device of a large hand, with small human figures, as a trade-mark. Defendant's father, Albert Best, was formerly the Best of said New York firm. Before and after his death, on April 21, 1900, defendant and his brother Ralph W. Best were employed by said firm. The New York firm made use of its said several trade symbols and words in substantially all of its business transactions, on its signs, letter paper, bill heads, and garments. Circulating pamphlets were distributed in sets of 20 to 100,000. Advertisements were carried in the New York City and neighboring newspapers, in various magazines, women's journals, and other papers. The evidence shows no attempt to advertise locally in Chicago. A very considerable attempt was made to circularize thoroughly complainant's stock for a number of years. Some years as much as \$70,000 was expended in advertising, whereby a large mail-order business was established; extending, as it is claimed, all over the world, and constituting from 20 to 25 per cent. of its business. A large amount of capital is embarked in the business. About July 1, 1900, defendant quit the employ of complainant, of which he was the manager of the boys' department. On November 9, 1901, said Ralph W. Best also left said firm on account of sickness. About the same time defendant advised complainant that he was intending to go into said business for himself; that he expected to buy out the firm of M. Schulz & Co., at Chicago. Complainant says that he then told defendant that he could not use the term "Liliputian Bazaar," as Schulz & Co. had been doing. It appears that complainant then had a suit pending against Schulz & Co. to restrain the use of that term, and that afterwards, by consent, a decree was entered permanently enjoining Schulz & Co. from using the same, of which defendant then had notice. To this decree little weight should be given. Defendant then associated his said brother Ralph with himself to the amount of a \$1,000 in-

terest, and bought out the Schulz & Co. business, and took the name of A. S. Best & Co. The brother gave no attention to the business. On the sign he caused to be placed under the name the words "Liliputian Outfitters"; then the words "Formerly with Best & Co., New York." The Schulzes then sent out circulars headed, "A. S. Best & Co., Liliputian Outfitters, 107 State Street," saying that "they desired to announce that the sons of Albert Best, the founder of Best & Co., Liliputian Bazaar, New York, who had long been associated with that house, had purchased their business, and would increase the stock of children's clothing," etc. Later defendant bought out his brother. The use of "Liliputian" was dropped from his catalogue and clothing. Thereafter, until the filing of this suit, defendant continued as afore-said to conduct said business along the same lines as those followed by complainant. Under these facts, the suit was instituted.

Formerly it would have been assumed, in the absence of most positive proof, that a party might carry on his own business under his own name in Chicago, notwithstanding the fact that parties had established business under the same name in New York, since there could be no presumption that the business interests of the two cities could be so intimate as to extend the good will of such a business as that before the court all the way from New York to Chicago. It is not a light thing to restrain a man from the full benefit of his name, nor would a court of equity consider such a course in any case even now, in the absence of fraud or actual damage. It is apparent in this case that defendant shaped his business and presented the same to the public with the intention of getting the benefit of complainant's standing and business prestige. The only basis upon which a contrary conclusion could be arrived at would be positive evidence to the effect that the two fields of patronage did not conflict. But it is in evidence that complainant is a manufacturer and dealer, and that he does a large mail-order business, as does also defendant. It hardly needs saying that the proficiency of the mails at this date is such that every nook and corner of the nation as well as of Manitoba is as accessible as were places 50 miles away from New York a few years ago. It cannot be otherwise than that the advertising and canvassing of these two rival concerns pass and repass each other innumerable times in their journeys to the centers of trade as well as to the homes of the people—mute contestants for the favor of supplying the wants of each customer. I am clear that under the facts in this case the court must hold that the use of the name of Best & Co. by defendant, even with its present prefix, especially in connection with the word "Liliputian," is a fraud upon complainant's business rights. The action of defendant was deliberate. He both intended to and did trespass upon complainant's rights, and take advantage of his good will and trade. It is not important what definition is placed upon "Liliputian." The name of Best & Co., with the use of that word, constituted complainant's good will. That use was arbitrary, and stands for complainant's goods. The complainant is clearly entitled to the relief prayed for as to the use of the name "Best & Co.," with and without prefixes. He is also entitled to the sole use of the word "Liliputian" in connection with the name Best & Co., with and without prefixes, but only in the line of his business.



I am at a loss to see how the use of a boot, hat, and figure can be said to simulate complainant's large hand and little figures. To my mind, that contention is without merit. I do not deem the other points raised as essential, in view of the above finding.

Complainant may prepare a decree in accordance with the foregoing.

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SWIFT & CO., Limited, v. JONES.

(Circuit Court, E. D. North Carolina. February 11, 1905.)

**GUARANTY—CONTRACT—NONPERFORMANCE—DISCHARGE OF GUARANTOR.**

A contract employing defendant's son as plaintiff's broker, which was signed by defendant as guarantor, required that the son should give a fidelity bond in such sum, and with such company as surety, as plaintiff should designate; plaintiff to pay the premium. Plaintiff sent the son a blank application for a bond, in a company selected by it, which he properly executed and returned to plaintiff, but the latter failed to obtain the bond until after the son's defalcation. *Held*, that such bond was for the security of both plaintiff and the guarantor, and that plaintiff's failure to obtain the same discharged defendant from liability on the guaranty.

S. F. Mordecia and T. W. Bickett, for complainant.

F. S. Spruill and Wm. H. Ruffin, for defendant.

PURNELL, District Judge. The facts, which will more fully appear from the findings of the special master, to which no exceptions are filed, and which is in all respects affirmed, are, in brief, as follows:

Complainant, engaged in the packing business, entered into a contract with E. C. Jones, son of defendant, from which the following facts only need be quoted, as presenting the question at issue:

"This agreement, made this Nineteenth day of March, A. D. 1903, between Swift and Company, Limited, party of the first part, and E. C. Jones, of Louisburg, North Carolina, party of the second part:

"Witnesseth: That the said party of the first part, in consideration of certain covenants to be performed by said second party, and the guaranty of J. F. Jones, appended, hereby appoints said second party its broker for the sale of certain of its products in Louisburg, North Carolina, which appointment the said second party accepts in consideration of certain commissions to be received by said second party, the agreement being subject to the following conditions and special agreements:

"Party of the second part shall give a fidelity bond in such sum and with such company as surety as party of the first part shall designate; party of the first part to pay the premium."

On the 27th day of March, 1903, J. F. Jones, the defendant, signed the following indorsement on the contract:

"In consideration that Swift and Company, Limited, execute the foregoing agreement with E. C. Jones, I hereby guarantee the performance thereof by E. C. Jones of all the terms and conditions therein by him agreed to be kept and performed. It is understood this is a continuing guaranty."

E. C. Jones was and is insolvent, and J. F. Jones is solvent. This suit is to recover for the default of E. C. Jones against J. F. Jones, as guarantor or indorser, the sum of \$2,434. Prior to the shipment of any goods, E. C. Jones made personal application in writing for the fidelity bond as provided for in the contract, and sent the same to the com-

plainant; but the bond was never given, and no notice was given J. F. Jones that the fidelity bond was not given, nor notice of any default, until an agent of the complainant was sent to "check up" after default made.

Defendant, upon these facts, claims he is not liable, and this presents the question upon which the case rests principally.

The argument based on the relationship of father and son is very touching, and, from a moral standpoint, sound, but will it stand as law? A court cannot consider such arguments as controlling. Relations, except fiduciary and the like, can have no influence, but causes must ordinarily be decided as dealing between man and man, at arm's length. This much is in reply to the argument in complainant's brief that the father was appealing to complainant "for an appointment to a responsible position, knowing he [the son] was utterly insolvent," and "that thereupon the plaintiff [complainant], in consideration of the guaranty of the father that the son will perform all the obligations of his contract, and a faithful and true account render for all goods consigned to him, appoints the son its sale agent at Louisburg, North Carolina, and consigns to him large quantities of its products." The goods not being accounted for, the complainant "makes the righteous and reasonable demand that the father save it harmless from this loss," which demand, it is said, is well founded in law and good conscience, etc. Is it so well founded? That is the question at issue. Defendant contends it is not. It is hardly necessary to go into the issues of commercial law, to discuss the liability and distinction of sureties and guarantors. This is a contract—a commercial contract—which may be construed under the rule laid down by the Supreme Court in *Davis v. Wells*, 104 U. S. 170, 26 L. Ed. 686, and numerous authorities cited in complainant's brief, that "it has always been held by this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument, in the furtherance of its spirit, and liberally, to promote the use and convenience of commercial intercourse." And further, in the construction of all written instruments, to ascertain the intention of the parties is the great object of the court, and this is especially the case in acting upon guarantors. Generally all instruments of suretyship are construed strictly, as mere matter of legal right. This rule is otherwise when they are founded on valuable consideration. *Mauran v. Bullus*, 16 Pet. 528, 10 L. Ed. 1056; *Bell v. Bruen*, 1 How. 185, 11 L. Ed. 89; *Lawrence v. McCalmont*, 2 How. 450, 11 L. Ed. 326. Applying this rule to the construction of the contract, what was the intention of the parties? It will be noted that the contract was executed by E. C. Jones on the 19th of March, and eight days thereafter the guaranty was indorsed thereon. Possibly the guarantor looked over the contract, and the first thing that caught his eye, which is the first provision of the contract, was that the factor was to give a fidelity bond, not, as is argued, at the option of the complainant, but as part of the contract to indemnify the complainant against loss, and equally for the security of the guarantor. It appears that this was then a condition precedent for the guaranty, and a fundamental provision of the contract itself. It further appears by the finding of fact that the factor, understanding this provision in

the contract, made application to the complainant, in writing, for the fidelity bond. If it was optional with the complainant, as contended, it must be presumed that it had exercised this option, and designated the company and the amount of the fidelity bond; otherwise how did the factor know how to make the application? It is found as a fact that he did make the application in writing. The burden then was on the complainant to pay the premium and secure the bond, not only for its own benefit, but for the benefit of the guarantor. This is a reasonable, legal, and equitable construction of the contract; and, having neglected to pay the premium and secure the fidelity bond, the guarantor was released from all responsibility. Brant on Suretyship & Guaranty, § 397 (2d Ed.); *United States v. McIntyre* (C. C.) 111 Fed. 590; *Leggett v. Humphreys*, 21 How. 66, 16 L. Ed. 50; *United States v. Hough*, 103 U. S. 73, 26 L. Ed. 305; *Meyers v. Block*, 120 U. S. 213, 7 Sup. Ct. 525, 30 L. Ed. 642. The law and equity on this subject is so well established that it hardly requires the citation of authorities. As said by a distinguished judge:

"He who would charge a surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however iron-bound it may be, for there is for the surety, in the enforcement of his bond, no equity nor latitude beyond its strict terms."

The conclusion reached is that the failure to secure the fidelity bond as required in the contract, being a condition precedent, compliance with which the guarantor had a right to expect on the part of complainant for his protection and for the protection of complainant, thus added to his liability and absolved him.

It is therefore considered, ordered, and decreed that the bill herein be dismissed, with judgment for the costs against the complainant, to be taxed by the clerk.

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IN RE COLE.

(District Court, D. Maine. March 4, 1905.)

No. 74.

**BANKRUPTCY—CONCEALMENT OF ASSETS—EVIDENCE.**

In a proceeding against an involuntary bankrupt to recover assets, evidence held to support a finding that the bankrupt had under her control the sum of \$2,425, which she had concealed and refused to surrender to her trustee.

**In Bankruptcy.**

Benj. F. Cleaves and Albert S. Woodman, for trustee, Chas. A. Moody.

Geo. F. & Leroy Haley, for bankrupt.

HALE, District Judge. This case now comes before the court upon the certificate of John B. Donovan, referee, in which he says that the following question arose, pertinent to the proceedings:

"On October 24, 1904, the trustee filed in this case with the referee a petition under oath, in which said trustee alleges a concealment of assets of the

bankrupt, and a refusal to turn over the same. After notice and hearing, the referee ordered said bankrupt to turn over the sum of twenty-four hundred twenty-five dollars, as appears by the order. From the findings and order of the referee the bankrupt appeals, in writing. The matter is hereby certified to the judge of said court. The petition above mentioned, the evidence in the case, and the findings and order of the referee are included in this certificate."

The referee's findings of fact relating to the question at issue are fully stated in his report. The facts material to be stated are: That on the 14th day of September, 1903, the bankrupt sold her homestead, on Elm street, in Saco, to Frank L. White, of Saco, for \$3,800 in cash. Her husband joined in the deed of warranty given by her. Mr. White, the grantee, paid the purchase price in bills, instead of by check. He says he did this at Cole's request, but Cole denies this. In November, 1903, upon the petition of her creditors, involuntary proceedings against the bankrupt were begun, and she was adjudicated a bankrupt, and subsequently filed her schedules. By these schedules it appears that the only debts she owed were to three local banks, who are the petitioners, and that her only assets were the \$3,800 which she claims to have loaned her husband. The schedule does not show any security taken, nor name any date when the loan was made. Less than two weeks after selling the homestead, the bankrupt and her husband moved to Massachusetts. The bankrupt denies ever having seen any of the proceeds of the sale of the home, and says that she gave the money to her husband at the time of the sale, and told him to pay his debts with it. She also says that she made no inquiry as to any payment, or to whom he paid the money, but that she has not the money, and never had it, and is not concealing the same from her trustee. The husband says he had the money—received it from Mr. White, the grantee of the real estate—and that the money is all gone. He undertakes to account in detail for the payment of \$3,625. He says, among other things, that he paid \$1,000 to a brother in Nicaragua by registered letter. The bankrupt's statement is that she never had a dollar of the money herself in her own hands, and so she claims she cannot be held to turn it over to her trustee. She says that her husband had the money put in his hands in bills, and carried the bills to Massachusetts with him soon after their receipt. The court will not undertake to state fully all the testimony recited by the referee.

The conclusions of the referee are as follows:

"The evidence here satisfies me conclusively that Mrs. Cole had full control over the proceeds of the sale of her home. It was her money which bought the lot, and, while her husband paid the bills for the erection of the building, she supplied the funds. It is highly incredible to believe for a moment that she did as she says—give him that money to pay his debts, which he did not pay, and which she must have known were still unpaid when they left Saco. The home was gone. The departure for another state from the place of her youth was before her. It appears to me that this fund came into the possession of them both at the day of the sale, was fully under her control, and it has so remained, except that which was disbursed from it, and which I shall allow as fully and as amply as the facts seem to warrant. It was under her control at Wakefield when she said that it had been sent away to her husband's brother. 'We thought differently,' was her reply when she was asked why it was not paid to the banks and the brother pro rata. She did not then claim or state that she had delivered it to her husband for the payment of

his debts. Her statement at that time served its purpose. I cannot accept as true her version of the transaction. Her mind was the controlling one at the interview at Wakefield, and has so remained. There has been no haste in affording her every opportunity to fully inform her trustee as to her affairs. She has been well served by counsel of ability, having a long time to submit evidence. The evidence is conclusive that she still controls a portion of the fund. The testimony of the husband that he sent one thousand dollars, as described, is incredible. He was a business man; knew how to forward money to a foreign country by draft or in some safe manner, and not assume the risk of fire and flood, which, if incurred, would entail loss beyond recall, and still leave his brother's debt unpaid. That brother, as has been stated, has been within the jurisdiction of this court since she first knew a petition of this character was to be filed. While this opportunity to corroborate the claim of payment was not taken advantage of, it carries still stronger conviction that the whole scheme was a fraud, and a plan to avoid the payment of these notes. It is a hard case—one that has involved care and anxiety on my part to do justice as the facts appear to me to warrant. I shall allow the payments to the amount of thirteen hundred seventy-five dollars, as follows: [Here follow the items which make up the said amount of \$1,375.] These payments were made, as claimed by Mr. Cole, after the sale of the house, and prior to the date of the filing of the involuntary petition, and, no doubt, were fully understood and assented to by the bankrupt. For several of those payments she was also liable. I find that she has under her control the balance of the same fund to the amount of twenty-four hundred twenty-five dollars, and that she had possession or control of the same at the time of the filing of the petition in bankruptcy against her on November 23, 1903; that said bankrupt withheld and concealed the same from her trustee as assets of her estate, and is withholding and concealing the same from him. I do therefore order the said bankrupt, Annie M. Cole, to pay over to said trustee the sum of twenty-four hundred twenty-five dollars on or before the 16th day of January, 1905, and that a certified copy of the original petition and this order be served by the trustee on her forthwith; a copy of the findings and order to be delivered to the counsel for the petitioner and bankrupt."

The learned counsel for the bankrupt urged with great earnestness and ability that the testimony taken before the referee showed that she had no control of the funds received from the real estate, and that, not having control of such funds, she cannot be compelled to account for them; that the law does not undertake to compel a bankrupt to perform an impossibility. And learned counsel cited the controlling decisions bearing upon this proposition. But upon a full examination of the testimony, the court cannot say that the referee has erred in his conclusions of fact. The referee has found affirmatively that the bankrupt has under her control the balance of the fund to the amount of \$2,425, and that she had possession or control of it at the date of the filing of the petition in bankruptcy; that she has withheld and concealed the same from her trustee, and is now withholding and concealing the same from him. The referee had the witnesses before him. He conducted the examination of the bankrupt herself, saw her appearance, and was the proper tribunal to decide the question of fact submitted to him. After full examination of the testimony, I cannot say that I should have come to a different conclusion. In any event, the conclusion of a competent referee, who has seen the witnesses, is entitled to great weight.

After fully examining the testimony and considering the arguments of counsel, the court sustains the findings of the referee. It is therefore ordered that the bankrupt turn over and deliver to the trustee

within 15 days the said sum of \$2,425, in default of which she stand committed to the marshal of this district, to be incarcerated until she obeys the order of this court or is otherwise discharged by due process of law, or until the further order of this court.

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In re WIESEN BROS.

(District Court, E. D. Pennsylvania. February 27, 1905.)

No. 1,749.

**BANKRUPTCY—PROCEEDINGS AGAINST BANKRUPT—EVIDENCE.**

In a proceeding to compel a bankrupt to pay over money alleged to be still in his hands, the stenographer's notes of the testimony of the bankrupt taken at creditors' meetings called for the general purpose of inquiring into the bankrupt's affairs is admissible, but the testimony given by other witnesses at such meetings is incompetent.

In Bankruptcy. Certificate of referee.

Furth & Singer, for bankrupts.

Edmund B. Seymour, for creditor.

J. B. McPHERSON, District Judge. This certificate presents the question how far the testimony of the bankrupt and other witnesses, taken at the meetings of creditors that are called for the general purpose of inquiring into the bankrupt's affairs, is admissible afterwards in a proceeding to compel him to pay over money alleged to be still in his hands. The referee admitted the stenographic notes of the bankrupt's own testimony, but excluded the testimony of other witnesses, and it is these rulings that are brought up for review. In several cases decided by the federal courts this question has been passed upon, or was perhaps involved. In New York the Circuit Court of Appeals for the Second Circuit decided at first (*Re Wilcox*, 109 Fed. 628, 48 C. C. A. 567) that the testimony of all the witnesses was competent, and Judge Brown followed this ruling in *Re Cooke* (D. C.) 109 Fed. 631. But, upon a rehearing of *Wilcox's Case*, the Court of Appeals reversed its decision in part, and decided that the testimony of third persons was inadmissible, although it continued to hold that the bankrupt's own testimony was competent as an admission against himself. In *Re Leinweber* (D. C.) 128 Fed. 641, Judge Platt made an order requiring the bankrupt to pay, and apparently considered the testimony of other persons; but the opinion leaves it in doubt whether they were called as witnesses at the creditors' meetings, or directly upon the petition for the order to pay, and it contains no discussion about the competency of the evidence. In *re Adler* (D. C.) 129 Fed. 502, did not directly raise the question, but Judge Hammond uses some language that seems to intimate that he considered the testimony of all persons admissible:

"The creditors and their trustee in bankruptcy, by the ordinary process of the examination of the bankrupt, and the power to compel all witnesses who have any knowledge of his affairs to come before the referee and be examined in relation thereto, have ample procedure for disclosing all the facts in relation to the bankrupt's affairs which would furnish a foundation for the order on him to pay money into court or to surrender property in his possession to

the trustee. He is in a certain sense ever present in court to answer such demands, and all that is necessary is a simple motion for a rule on him to show cause against the order that is required, and petitions for that purpose are wholly unnecessary."

And finally, in *Re Alphin & Lake Cotton Co.* (D. C.) 131 Fed. 824, Judge Trieber followed the decision in *Re Wilcox*, and admitted the previous testimony of certain officers of a bankrupt corporation, while excluding the testimony of a third person.

It is argued on behalf of the petitioning creditor that the testimony of all persons is admissible for the reason given in *Wiswall v. Campbell*, 93 U. S. 348, 23 L. Ed. 923. In that case, which arose under the bankrupt act of 1867 (chapter 176, 14 Stat. 517), the Circuit Court had affirmed an order of the District Court rejecting the claim of a creditor, and the Supreme Court dismissed the writ of error on the ground that the order was not a final judgment, and was therefore not reviewable. In the course of the opinion the court said, and it is this language that is relied upon:

"The cases are numerous in which it has been decided that we cannot review the action of the Circuit Courts in the exercise of their supervisory jurisdiction under the bankrupt law. \* \* \* The principle upon which these decisions rest is that a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankrupt court in the progress of the cause are not distinct suits at law or in equity, but parts of one suit in bankruptcy, from which they cannot be separated. As our jurisdiction extends only to a re-examination of final judgments or decrees in suits at law or in equity, it follows that we have no control over judgments and orders made by the courts below in mere bankruptcy proceedings."

Evidently these words are to be read in the light of the question that was then being considered; and as this had no reference to the admissibility of evidence, but was solely concerned with the character of the order that had been made by the District Court, it would be going much too far, in my opinion, to regard them as decisive of the present question, or, indeed, as even applicable thereto. The other cases already cited show, I think, that the weight of authority is in favor of the referee's ruling, and I shall follow them without further discussion.

The decision of the referee is therefore affirmed.

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IN RE VETTERMAN.

(District Court, D. New Hampshire. February 2, 1906.)

No. 997.

#### **BANKRUPTCY—ACTS—ATTACHMENT.**

A creditor's petition in an involuntary bankrupt proceeding, which merely alleges as an act of bankruptcy that an attachment has been made of the debtor's property in a legal proceeding, without reference to the disposition thereof, is insufficient, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 8418], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. 1903, p. 410], providing that if the bankrupt suffer or permit, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days

before sale or final disposition of any property affected by such preference vacated or discharged the same, he shall have committed an act of bankruptcy.

John E. Allen, for petitioning creditors.  
Harry J. Brown, for bankrupt.

ALDRICH, District Judge. This petition of creditors, sufficient in number and representing a sufficient amount of indebtedness, filed January 5, 1905, alleges the insolvency of Vetterman, and, as an act of bankruptcy, that he on the 8th of October, 1904—"Suffered and permitted two attachments, mesne process, to be made upon his property at said Walpole under writs returnable at the April, 1905, term of the superior court for said county of Cheshire, which said attachments are still undischarged and in force," and by amendment "that said respondent did suffer and permit on October 8, 1904, while insolvent, certain creditors to obtain a preference through legal proceedings, in that two of his creditors, Moore & Sinnott and the Davenport Malt Company, did attach on said date, under mesne process, the property of said respondent, upon writs sued by them, respectively, and returnable at the April, 1905, term of the superior court of the state of New Hampshire, for the county of Cheshire, the said attachment in said suit of Moore & Sinnott being for the sum of four thousand dollars (\$4,000), and the said attachment of the Davenport Malt Company being for the sum of one thousand dollars (\$1,000); said attachments being made on said date of October 8, 1904, by the officer in whose hands said writs were placed for such purpose by said creditors; and said attachments have been continued in full force and undischarged, and without any sale or final disposition of the property thereby attached having been made to the present time."

It is said in the Seaboard Steel Casting Co. Case (D. C.) 124 Fed. 75, at page 76, that the mere suing out of an attachment, and levying the same, does not suffice to constitute an act of bankruptcy. Such a conclusion apparently results necessarily from the peculiar wording of section 3, cl. 3, of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." The concluding part of the clause, with reference to the sale or final disposition, is connected with what precedes, in respect to preference through legal proceedings, by the word "and," thus making it one act of bankruptcy, culminating five days before sale or final disposition. If it were otherwise, and the inception and the culmination of the legal proceeding were separated by the word "or," it might be different. In such case there might be two acts of bankruptcy.

I find no authority for holding that a creditors' petition in an involuntary bankruptcy proceeding, which merely alleges that an attachment has been made in a legal proceeding, sets forth an act of bankruptcy, within the meaning of the statute of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), as amended in February, 1903, Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410].

This decision in no way touches the question whether an attaching creditor acquires a valid lien, whose attachment is more than



four months old, when that part of clause 3 relating to the sale and the "five days before" operates upon the situation. See *Wilson v. Nelson*, 183 U. S. 191, 197, 198, 22 Sup. Ct. 74, 46 L. Ed. 147. See, also, *Metcalf Bros. v. Barker*, 187 U. S. 165, 174, 23 Sup. Ct. 67, 47 L. Ed. 122; *In re Blair* (D. C.) 108 Fed. 529.

Demurrer sustained and petition dismissed.

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BETHELL V. MELLOR & RITTENHOUSE CO.

(District Court, E. D. Pennsylvania. February 28, 1905.)

No. 84.

ADMIRALTY—ALLOWANCE OF INTEREST—DISCRETION OF COURT.

While interest is recoverable in admiralty as a matter of right on claims arising out of contract, as on a claim for freight, the allowance of interest by way of damages, as in cases of collision or other cases of pure damage, as well as the allowance of costs, is in the discretion of the court.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, § 796; vol. 10, Cent. Dig. Collision, § 284.]

In Admiralty. On entry of decree for damages and costs.

Convers & Kirlin and Henry R. Edmunds, for libelant.

Horace L. Cheyney, for respondent.

HOLLAND, District Judge. While interest is allowable, as a matter of right, on claims arising out of contract, the allowance of interest by way of damages in cases of collision and other cases of pure damage, as well as the allowance of costs, is in the discretion of the court. *The Scotland*, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153. The libelant sued in this case for a balance of freight. The respondent answers the cargo was damaged to a certain amount, and \$838.21 was retained as a set-off against the libelant's claim. The respondent alleged in its answer it was willing to pay the balance due over and above its claim, which was found to be a just one by this court, but such payment was never made or tendered. The libelant is responsible for the litigation and the creation of the costs on both sides of the case. We think, however, the respondent was in fault to the extent of retaining more money than its claim justified. It has been agreed by the parties that the respondent's damages shall be \$475.16. We do not think that under all the circumstances it is entitled to interest on this amount, and, as the libelant's suit was on a contract for freightage, he is entitled to interest on the balance due him, and we think this balance ought to be restricted to the sum of \$363.05.

As to the costs, the libelant being entirely responsible for the suit, as his liability for the damaged cargo will show, he should pay the costs in this case.

Let a decree be entered accordingly.

Final Decree.

This case having come on to be heard on the pleadings and proofs of the respective parties, and having been argued by their proctors, and

due deliberation having been had, and the court, by its opinion herein, dated May 27, 1904, having determined that the respondent was entitled to deduct from the freight the damage sustained by it by reason of the broken condition of the bales of licorice on delivery, and the parties having agreed on the damages of the respondent in the sum of \$475.16, and the amount withheld from the freight being \$838.21, which sum is now on deposit with the Pennsylvania Company as security for the claim of the respondent, it is hereby ordered, adjudged, and decreed that the libellant, Henry Bethell, recover of the respondent, the Mellor & Rittenhouse Company, the sum of \$363.05, with interest from August 27, 1902, to date, amounting to \$49.50, making a total of \$412.55, with interest thereon until paid; the libellant, however, to pay all costs accruing in this litigation to date.

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THE ELTON.

(District Court, E. D. Pennsylvania. March 2, 1905.)

No. 7.

ADMIRALTY—REFERENCE—COSTS—MISSTATEMENT OF FACTS.

In a suit in admiralty for personal injuries the court found in favor of libellant, and referred the matter to a commissioner to take testimony and assess damages. The testimony taken before the commissioner showed plainly that libellant and one of his witnesses made untrue statements as to his ability to work and the work he had performed since the injury, thereby necessitating meetings additional to those which would otherwise have been required, and the taking of testimony and the incurrence of stenographer's costs which would have been unnecessary had he told the truth. *Held*, that the libellant would be required to pay the portion of the commissioner's and stenographer's costs for which his misstatements were responsible.

In Admiralty. Sustaining exceptions to costs of commissioner.  
See 131 Fed. 562.

Samuel M. Clement, Jr., and Allen C. Thomas, for libellant.  
Convers & Kirlin and Henry R. Edmunds, for respondent.

HOLLAND, District Judge. In a suit for personal injuries by the libellant this court found in his favor, and referred the matter to a commissioner for the purpose of taking testimony and assessing damages to him for the injury. The commissioner had a number of meetings, took considerable testimony, and made a report awarding damages to the libellant in the sum of \$1,800, and directed the respondent to pay all costs. Exceptions were filed by both parties. It is unnecessary to consider them in detail. All of those filed by the libellant are overruled. There are five exceptions filed by the respondent, all of which are overruled, with the exception of the third, which is as follows: "The commissioner has awarded the libellant his costs, and refused to deny costs to the libellant because of his fraud and perjury on the reference." An examination of the evidence shows plainly that the libellant and one of his witnesses, in testifying as to the extent of his injury, stated facts as to his ability to work and the work he had performed since the injury

which were untrue, thereby making it necessary to have a number of meetings in addition to what otherwise would have been required, and to take testimony and incur costs for stenographer which would have been unnecessary had he told the truth about this matter. We think, therefore, that he should be required to pay all the costs that his misstatements and misrepresentations caused in this reference. It was necessary to refer this case to a commissioner for the purpose of ascertaining the extent of the personal injury, and we have no doubt the commissioner, in his report assessing damages, took into consideration his exact state of health and his ability to do work, and his misstatements as to that only resulted in the incurring of additional costs, which would be, in the judgment of the court, one-half of the costs of the reference. The labors of the commissioner would not have been so great, nor would the cost of the stenographer have amounted to the sum paid by the commissioner, had it not been for the libelant's misrepresentation; and an examination of the evidence would indicate that this caused about twice as much labor on the part of the stenographer and commissioner as otherwise would have occurred. He is therefore required to pay the same.

The order of the court is that the libelant in this case pay one-half of \$306.25 costs incurred in this reference, to wit, \$153.12<sup>1</sup>/<sub>2</sub>; the clerk's costs to be paid by the respondent.

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In re VON KERM.

(District Court, E. D. Pennsylvania. March 18, 1905.)

No. 1,982.

**BANKRUPTCY—EXEMPTION—TIME OF CLAIMING—AMENDMENT OF NOTICE.**

While a notice in general language, both in a voluntary and involuntary petition in bankruptcy, of an intention to claim the exemption, may be amended if done in time, yet where the notice in either case is so general as not to indicate to the trustee what specific articles the bankrupt claims as his exemption, and the bankrupt files no schedule and makes no request upon the trustee to set aside specific articles of exemption until after the sale, he must be regarded as having waived his right of exemption, and he cannot claim the amount thereof out of the proceeds of sale.

In Bankruptcy. On certificate from referee.

Reber & Downs, for trustee.

F. Earle Von Leer, for bankrupt.

HOLLAND, District Judge. A voluntary petition in bankruptcy was filed in this case on the 1st day of July, 1904, in which the alleged bankrupt claimed his exemption, under the laws of the state of Pennsylvania, in the following form: "Fixtures and Wearing Apparel under and by virtue of the Act of April 9th, 1849, \$300." This notice was inserted in Schedule B5 in the bankrupt's petition for exemption. Nothing more was done by him in the way of specifying the articles he intended to claim until November 9, 1904, 29 days after a sale of all his property by the trustee, which took place

on October 11, 1904. He then filed a petition before the referee, asking that his claim for exemption might be amended nunc pro tunc by adding a specified list of articles claimed. The prayer of the petitioner was refused by the referee.

While a notice in general language, both in a voluntary and involuntary petition, of an intention to claim the exemption, may be amended, if done in time (*In re Duffy* [D. C.] 118 Fed. 926), yet, where the notice in either case is so general as not to indicate to the trustee what specific articles the bankrupt claims as his exemption, and the bankrupt files no schedule and makes no request upon the trustee to set aside specific articles of exemption until after the sale, he must be regarded as having waived his right of exemption, and he cannot claim \$300 out of the proceeds of sale. *In re Otto L. Wunder* (D. C.) 133 Fed. 821; *Prince & Walter* (D. C.) 131 Fed. 546; *In re Manning* (D. C.) 112 Fed. 948; *In re Haskin*, 6 Am. Bankr. Rep. 485, 109 Fed. 789.

The order of the referee denying the prayer of the petitioner is approved.

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**In re MARKS BROS.**

(District Court, E. D. Pennsylvania. February 24, 1905.)

No. 1,687.

**BANKRUPTCY—INVOLUNTARY PROCEEDINGS—NEW TRIAL.**

A new trial granted, on a petition in involuntary bankruptcy, on the ground of error in the court's instructions.

**In Bankruptcy.** On motion for new trial in involuntary proceedings.

Samuel W. Cooper and Benjamin Alexander, for plaintiffs.  
William A. Carr, for defendants.

**HOLLAND, District Judge.** The sixth reason for a new trial in this case is as follows:

"The learned trial judge erred in his charge to the jury wherein he charged them that it was necessary, in order for them to find a verdict for the respondents, to find that the petitioning creditors had secured control of the judgment of Frederick Gelger, under which the execution issued which was averred to be the act of bankruptcy."

Upon the authority of *In re Williams*, 14 N. B. R. 132, Fed. Cas. No. 17,706, *Clark v. Henne*, 11 A. B. R. 595, 127 Fed. 288, 62 C. C. A. 172, and *Simonson v. Sinsheimer*, 95 Fed. 954, 37 C. C. A. 337, it is clear that this part of the charge of the court is error, and a new trial is therefore granted.

## STRATTON'S INDEPENDENCE, Limited, v. DINES et al.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1905.)

No. 2,083.

**1. PLEADING—CONFESSION AND AVOIDANCE.**

A separate affirmative defense, complete in itself, in the nature of a confession and avoidance of plaintiff's cause of action, if good in law, defeats the action, notwithstanding a plea of the general denial accompanying the same.

**2. SAME—REPLICATION—AVOIDANCE OF AFFIRMATIVE PLEA.**

A replication which, while denying certain averments of fact contained in an affirmative defense, does not avoid the legal effect of such defense, presents no issue of fact for the jury.

**3. SAME—JUDGMENT ON PLEADINGS—WHEN LIABLE.**

Judgment on the pleadings may be entered on motion where a party is, on all the pleadings, entitled to judgment.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1048-1077.]

**4. SAME.**

Injury or damage to plaintiff as a result of fraudulent representations is a necessary prerequisite of recovery in an action for deceit.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 24.]

**5. SAME—MEASURE OF DAMAGES.**

The measure of damages for deceit in a contract of sale is not the difference between the contract price and the reasonable market value of the property if it had been as represented, but is merely the difference between the actual value of what the buyer parts with and the actual value of what he receives under the contract.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 60-62.]

**6. SAME—DAMAGES.**

Deceit in the sale of mining property is not ground of action, where the seller receives in exchange for his mines merely the stock of a corporation organized to buy the same, and no other stock than that given him is issued, except seven shares allotted from the reservation for working capital to the seven incorporators, and at the time of the conveyance the corporation has no assets or property other than the mining properties so conveyed. In such case no damages are suffered.

**7. SAME.**

Defendant's decedent sold mining properties to plaintiff, which was a corporation organized merely to purchase such properties, for its stock. By a separate contract, with which plaintiff had no concern, decedent authorized another corporation to sell his stock on such terms as to realize a liberal commission for itself, and as much over a fixed minimum as possible for decedent. In the event the attempt should fail, decedent was to keep the stock, or not, as he pleased. Meanwhile the mining properties belonged absolutely to plaintiff, and the stock absolutely to decedent. *Held*, that any financial profit in actual cash which decedent made out of sales of plaintiff's stock through the other corporation did not constitute the transaction with plaintiff any other than one of exchange of stock for properties, nor damage plaintiff in such way as to authorize a recovery by it in an action for deceit perpetrated by decedent in the sale of the mining properties to it.

**8. CORPORATIONS—DUTIES TO SHAREHOLDERS—RIGHTS OF ACTION.**

A corporation, as an artificial entity, owes no fiduciary obligation to its shareholders, except to protect their legal title to shares owned by them by giving proper attention to transfers and reissues thereof; and it is not the duty, nor within the power, of the corporation to prevent

a shareholder from selling his stock for any price that he may obtain, and any rights of action accruing to a purchaser by reason of representations made by the shareholder in effecting such sale in no manner rebound to the corporation.

In Error to the Circuit Court of the United States for the District of Colorado.

For opinion below, see 126 Fed. 968.

This suit was originally instituted by plaintiff in error (hereafter called "plaintiff") against the defendants in error, as executors and trustees under the will of Winfield S. Stratton, deceased, to recover damages alleged to have resulted from false representations made by Stratton concerning certain mining property sold by him to plaintiff. The first count of the complaint is essentially an action of deceit; the second, an action in assumpsit. They present different theories of law for application to one and the same state of facts.

The second count was adjudged bad on demurrer, and abandoned in argument and brief by plaintiff.

The first count is, in substance and effect, as follows: That defendants' testator was the owner of certain mining property located in Cripple Creek mining district, Colo.; that, with a view of selling his property to a corporation to be organized in England, he represented to its promoters, and, after its organization, to its officers and agents, that his property was reasonably worth \$10,000,000, and had ore bodies in sight of the value of \$7,000,000; that he caused certain samples of ores taken from his property to be salted, as it is called, so as to indicate a great value, and a false and misleading report made thereon to be presented to the promoters, officers, and agents, so as thereby to induce them to believe in the truthfulness of his representations concerning the value of his property; that the representations so made were false, and known by Stratton to have been false when he made them, and were made by him with intent and for the purpose of inducing the corporation, when formed, to purchase his property for \$10,000,000, when, as alleged, it was worth only \$4,000,000; that, relying upon the truth of the representations so made, the promoters caused the corporation to be organized, and the corporation, when organized, to purchase his property, paying him \$10,000,000 therefor, when it was in fact worth only \$4,000,000; that by reason of the facts so alleged the plaintiff was injured in the sum of \$6,000,000, for which it prays judgment.

After an unavailing demurrer to this count, the defendant answered, admitting certain formal allegations of the complaint, but denying all allegations constituting the cause of action for deceit, and particularly denying that the mining property was sold to plaintiff for \$10,000,000, or that plaintiff was damaged in the sum of \$6,000,000, or any other sum, by reason of the matters or things set forth in the complaint.

For a second defense it is alleged that on April 27, 1899, defendants' testator agreed to the organization of a corporation for the purpose of taking over his mining property in consideration of shares of its capital stock to be allotted and issued to him; and, to that end, that he made an agreement with one George Butcher, of London, England. This agreement, after reciting the ownership by Stratton, therein called the "vendor" of the mining claims and properties, as scheduled at the foot of the agreement, proceeds as follows:

"Whereas it has been determined and agreed to register and incorporate a Company with limited liability under the British Companies Acts with a capital of one million one hundred thousand Pounds divided into one million one hundred thousand ordinary shares of one pound each for the purpose of taking over and acquiring and working the said properties, now it is hereby agreed as follows:

"(1) The vendor [Stratton] shall sell and the said intended Company when formed as aforesaid shall purchase \* \* \* the properties" as set out in the schedule hereto.

The second section agrees upon "Stratton's Independence, Limited," as the name of the proposed corporation, and confers upon Stratton the right to purchase at any time within 18 months the 100,000 shares of working capital therein provided for, at £2 per share.

"(8) The consideration for the said sale shall be the sum of one million pounds to be paid and satisfied by the issue and allotment to the vendor of one million shares of one pound each of and in the said intended Company credited as fully paid up, to be numbered 1 to 1,000,000, inclusive."

The fourth, fifth, and sixth sections obligate Stratton to advance the requisite money to defray expenses of incorporating and registering the company, the same to be refunded to him out of proceeds of sale of working capital, to produce evidence of good title to his property, and to warrant title.

"(7) \* \* \* The Company shall immediately after its incorporation in England issue and allot to the vendor or as he shall direct the said one million fully paid shares in the Company but pending the completion of the purchase the allotment shall be regarded as conditional and the certificates shall be deposited at Lloyd's Bank Limited, and held by them until the receipt by the company of the cable hereinafter mentioned. The Company shall also immediately after its incorporation appoint a duly authorized agent as its legal representative in the said state [Colorado] and upon the receipt by the said Company from such legal representative of a cable informing it that such registration as owner has taken place, the said share certificates shall be released by the said bank and handed to the vendor or his nominees."

The eighth section is unimportant.

"(9) There shall be not more than seven and not less than three Directors in England. The vendor shall be one of such Directors and shall join the Board after allotment of the said one million shares and he shall also be appointed managing Director at a salary of four thousand pounds per annum for a period of two years from the incorporation of the Company but so that he shall be entitled to resign at any time." The balance of this ninth clause of the contract relates to the formation of a local board in the state of Colorado, and a method of filling vacancies when they may occur in such local board.

"(10) During the period in which the vendor shall act as managing Director no additional properties shall be acquired by the Company without the written consent of the Vendor."

The eleventh, twelfth, thirteenth, fourteenth, and last clauses of this agreement are unimportant for the present purposes.

It is then alleged that on April 29, 1899, the plaintiff corporation was organized pursuant to the Butcher agreement of April 27th; that the incorporators were seven in number, interested only nominally in the creation and organization of the corporation, each subscribing to but one share of the capital stock of the company; that the capital was fixed, according to the terms of the Butcher agreement, at £1,100,000 sterling, divided into 1,100,000 shares, at the par value of £1 sterling per share. It is further alleged that after the plaintiff corporation was so organized, on May 4, 1899, a tripartite agreement was executed between the newly organized corporation, Stratton, and Butcher, which, after referring to the agreement of April 27th, called the "Principal Agreement," recites and agrees as follows:

"Whereas since the execution of the principal agreement the Purchasing Company has been incorporated in accordance with the intention in that behalf in the Principal Agreement mentioned, And Whereas, by the principal agreement it is provided that one million shares of one pound each in the purchasing Company part of its nominal capital of one million one hundred thousand pounds, which is divided into one million one hundred thousand shares of one pound each shall be allotted to the Vendor as consideration for the sale of the properties therein mentioned and that the Vendor shall have the right to apply for and have allotted to him the whole or any portion of the balance of the one hundred thousand shares for the period and on the terms hereinafter mentioned, and Whereas the subscribers to the Memorandum of Association of the Purchasing Company, having agreed to take seven shares in the purchasing Company, it has been agreed between the

parties hereto that the number of shares over which the Vendor shall have an option as aforesaid shall be decreased by seven shares, and Whereas, it is intended that the one million Shares which by the principal agreement it is provided shall be allotted to the Vendor shall be either allotted to him or as he may in writing direct and Whereas, the purchasing Company has resolved to adopt and carry into effect the principal agreement subject to the before mentioned modifications, Now it is hereby Agreed, as follows:

"(1) Subject as hereinafter mentioned the principal agreement is hereby ratified and adopted by the purchasing Company and shall be binding on the Vendor and the Purchasing Company in the same manner and take effect in all respects as if the purchasing Company had been in existence at the date of the principal agreement and had been a party to the same instead of the said George Butcher.

"(2) The one million shares of One pound each in the purchasing Company which by clause 3 of the principal agreement it is provided shall be allotted to the Vendor shall be issued and allotted to the Vendor or his nominees as he may in writing direct and shall for all purposes be considered as fully paid up, and shall be numbered from 1 to 1,000,000 inclusive."

The third section of this agreement gives the vendor an option for 2 years to buy the 100,000 shares referred to in the Butcher agreement as working capital, less the 7 shares subscribed by the incorporators of the purchasing company. The fourth section provides for the discharge of George Butcher from all further liability under the principal agreement.

The defendants further allege in their second defense that after the execution of the agreement just referred to, on or about May 23, 1899, Stratton duly conveyed his mining properties to the corporation; that the corporation thereupon allotted and issued to Stratton, as the consideration for such conveyance, 1,000,000 shares of its capital stock; that the same was the sole and only consideration which Stratton, or any one representing him, then or at any time received for the mining properties conveyed by him to the corporation; that, while in form the transaction resulted in the conveyance by Stratton to plaintiff corporation of the mining properties, it, in truth and fact, constituted but a change in the manner of Stratton's ownership and possession of the properties; that at the time when the shares were allotted and issued to Stratton the corporation had no assets or property other than the properties so acquired from Stratton; that, in allotting and issuing 1,000,000 shares of its capital stock to Stratton, it parted with nothing of value, except as the shares had value by reason of the ownership by the corporation of the mining properties it had so acquired; that the corporation has never at any time since its incorporation acquired, held, possessed, or owned, and does not now own, possess, or hold, any property or assets of any character, save and except the mining properties, and issues, profits, and emoluments therefrom; that, after the issue and delivery of the 1,000,000 shares of capital stock to Stratton, he remained the owner thereof for a long period of time; that, immediately upon the execution and delivery of the conveyance by Stratton to the corporation, plaintiff entered into full and complete possession of the mining properties, and has continued in the possession and enjoyment of the same ever since. Finally the defendants aver in the second defense that, by reason of the facts so pleaded, the plaintiff has not been damaged in any manner, and cannot maintain this action.

In the view taken of this second defense, the others, relating to the qualification of the executors and the survivability of the cause of action against them, need not be considered. A demurrer was filed to the second defense and overruled.

In due course plaintiff filed a replication, in which it admits the execution of the Butcher and supplemental agreements as alleged; admits that plaintiff corporation was organized with a capital of 1,100,000 pounds sterling, divided into 1,100,000 shares, of £1 each, and that only 1,000,007 shares thereof were ever issued by the corporation; admits "that, at the time said transfer [by Stratton to the corporation] was made, the plaintiff had no assets, and, when the property was transferred to it, it had no assets but said property"; admits that the corporation issued 1 share of its stock to some of the seven directors, and issued 1,000,000 shares thereof to Stratton, but denies that



the 1,000,000 shares were received by Stratton in full payment for the property sold by him, or that the 1,000,000 shares was the sole, only, or any consideration received by Stratton for his conveyance; alleges the real transaction to have been that plaintiff sold and disposed of its capital stock for the sum of \$10,000,000, and paid over that amount to Stratton for his mining properties; alleges that certain other agreements, which are set forth in the replication, made contemporaneously with the Butcher and supplemental agreements, disclose the real contract between the parties, in pursuance of which the property was sold by Stratton to the plaintiff corporation for the full sum of \$10,000,000, paid by the corporation to Stratton therefor. It is then averred in the replication that prior to February 2, 1899, Stratton, having conceived a scheme to sell his mining properties to an English corporation to be formed, employed one Verner Z. Reed as a promoter and agent to carry out his scheme; that Stratton induced the Venture Corporation, Limited, of London, and George Butcher and others, to agree to form a corporation in England to be known as "Stratton's Independence, Limited," with a capital of such an amount that enough could be sold to realize \$10,000,000, which should go to Stratton for his mining properties; that, in executing this scheme, Stratton made the false representations of facts stated in the complaint, to the promoters and proposed organizers; that, to carry out the scheme to sell his properties for \$10,000,000, Stratton entered into certain contracts with Reed, the Venture Corporation, Limited, George Butcher, and William Allen Ramsay, all of which are set out in the replication. These are the agreements referred to in the replication as the ones which disclose the real contract between Stratton and the plaintiff corporation for the sale of, and payment for, the mining properties in question.

The first of these contracts is between Stratton and Verner Z. Reed, referred to hereafter as the Reed agreement, and bears date February 2, 1899. This agreement first recites the fact that Stratton is the owner of certain mining properties, which are there fully described, and then recites that Stratton is desirous of having an English corporation formed through and by the agency of Reed, who is designated as promoter, and the Venture Corporation, Limited, of London, which is designated as the financial agent, for the purpose of acquiring Stratton's mining properties, in order "that the same may be worked, mined and operated thereby, and that the shares of the said corporation so to be formed may be sold on the London market." The agreement then provides that Reed (the promoter) shall immediately proceed to accomplish the purpose of the agreement; that he shall have an expert examination made of Stratton's mining properties by Thomas Arthur Richard, a mining engineer of Denver, Colo., representing the financial agent, and, if the report of the expert shall prove favorable, that Reed and the Venture Corporation shall cause a corporation to be formed, under the British companies acts, to purchase Stratton's mining properties. The agreement then provides that the name of the corporation to be formed shall be "Stratton's Independence Gold Mines, Limited"; that its capital shall be £8,000,000 sterling, divided into shares of £1 each; that it shall have a board of directors, with offices in London, and a local managing board in Colorado; that the expense of the London office, as well as the cost of organizing the corporation and transferring Stratton's properties to it, shall be borne by Reed and the Venture Corporation until they may be reimbursed out of the proceeds of the sale of stock to be set apart for working capital; that 2,500,000 shares of the capital stock shall be allotted to Stratton "in payment for the properties to be by him conveyed to the Corporation"; that these shares shall be deposited in escrow in some London bank pending the transfer by Stratton of his mining properties to the corporation; that the remaining 500,000 shares shall be set aside as working capital to be sold at not less than par. The fourth clause of the agreement is as follows:

"Fourth: The consideration for the said purchase and sale shall be two million five hundred thousand pounds sterling and shall be paid and satisfied by the allotment and issue to the vendor of two million five hundred thousand shares of the stock of the proposed corporation, credited as fully paid up, and as soon as said vendor's shares shall have been duly allotted, issued, and placed in said Lloyds Bank Limited, or with such other depositary as may

be agreed upon the vendor agrees that he will convey the properties above described and the whole thereof, together with all the plants, buildings, machinery and appurtenances thereunto belonging or in any wise appertaining to the proposed corporation by good and sufficient mining deeds and free of all liens, charges and incumbrances whatsoever, thereby vesting in the said proposed corporation the fee simple title thereto." The agreement then obligates Stratton to give, and, in terms, grants, to Reed, the promoter, an option for 18 months to purchase his 2,500,000 shares at the aggregate sum of £2,000,000, to be paid for proportionately as the stock is sold by Reed. It then provides that, as soon as the corporation is formed, the mining properties transferred to it, and Stratton's 2,500,000 shares allotted to him, these shares shall be placed in the hands of a proper person or bank in London, as trustee, to be agreed upon between Stratton and Reed, to be delivered out by such trustee to the promoter, Reed, or to the Venture Corporation, with the consent of Reed, as the same may from time to time be paid for under the terms of Reed's option agreement. The eighth clause of the agreement is in words and figures, as follows:

"Eighth: It is mutually understood that the said option is given for the purpose of enabling the promoter by and with the assistance and co-operation of the financial agent and its allies, connections and associates, to sell the shares covered by and included in the said option on the London market and the promoter does hereby covenant and agree that he will account for and pay over to the vendor, by himself or through the financial agent, sixty per cent. of all monies received or realized from the sale of such stock, over and above the par value thereof and when any part of the said stock shall be sold for more than its face value a statement of such sales shall be rendered to the trustees under the said option, and the promoter and financial agent shall pay to the trustee all sums to which the vendor is entitled on account thereof, for the use of the vendor."

The last clause of the agreement provides, that Reed may make any such agreement as to him seems best with the Venture Corporation, Limited, for the purpose of carrying out the enterprise, but that he shall assign no interest in the contract to any other corporation or person, except to the Venture Corporation, Limited.

The next agreement set out in the replication is between Verner Z. Reed and the Venture Corporation, Limited, and is dated February 9, 1899. This agreement recites the substance of the Reed agreement of February 2, 1899, and the last clause thereof, conferring upon Reed the right to make such agreements and contracts as he may desire with the Venture Corporation, and then, in effect, after making provision for a division of commissions between Reed and the last-named corporation, substitutes it for Reed in the performance of the contract of February 2, 1899.

The replication next sets out in full the Butcher contract of date April 27, 1899. This is the contract set out in the second defense, which has already been analyzed.

Next follows in the replication an agreement, bearing date April 27, 1899, between Stratton and the Venture Corporation, Limited. This agreement, after reciting the making of the Butcher agreement of that date; that Stratton has thereby agreed to sell his mining properties to a limited company to be formed, at the price of £1,000,000, to be satisfied by the allotment to him of 1,000,000 fully paid shares, of £1 each, in the limited company; that Stratton has entered into certain obligations for the payment of certain preliminary expenses in connection with the formation and registration of the corporation to be formed—obligates the Venture Corporation to pay these preliminary expenses for Stratton, and for a period of 18 months to pay all the expenses of the London office, excepting Stratton's salary of £2,000 per annum; the same, however, to be reimbursed to the Venture Corporation when it shall have sold one-half of Stratton's allotment, "as purchase consideration," and after one-half of the working capital shall have been subscribed as in the agreement later provided for. This agreement next provides that Stratton shall deposit in the hands of some person or corporation in the city of London, to be agreed upon, the certificates for the whole of the 1,000,000 shares allotted to him "in respect of the consideration for the said

sale," to be held in trust for delivery to the Venture Corporation or its order as and when the shares are sold and paid for as provided later in the agreement, and, notwithstanding the deposit of stock, and the option given the Venture Corporation to sell the same, that Stratton shall be entitled to exercise all rights of voting, and all other rights incident to the ownership of so many of the said shares as may from time to time remain unsold. It next provides that the Venture Corporation shall for the period of 18 months have the sole option and right of making sales of any and all of Stratton's 1,000,000 shares of stock. It fixes the price at which the Venture Corporation may sell the 1,000,000 shares of stock. It gives it the right to sell the same at such price or prices as it from time to time thinks best, but provides that Stratton is to receive £1.16.0 per share until 666,666 shares have been sold, and thereafter the sum of £2.8.0 per share; the Venture Corporation to have any and all surplus above that which Stratton is so to receive, except that, if any shares shall be sold by it at a price exceeding £2.10.0 per share, it shall pay to Stratton for such shares, in addition to the price above mentioned, a sum equal to three-fifths of the amount of such excess. This agreement, among other things, provides that, if any of Stratton's shares shall remain unsold at the expiration of the term of 18 months, the certificates for the same shall be immediately delivered over to Stratton by the trustee holding the same.

The replication next sets out in full the tripartite supplemental agreement of May 4, 1899, between Stratton, George Butcher, and Stratton's Independence, Limited. This agreement is embodied in the second defense, and has already been analyzed.

The replication next sets out letters of attorney, dated May 4, 1899, executed by Stratton to William Allen Ramsay, in which, after reciting that he had, by the Butcher contract, agreed to sell his mine to a trustee for a corporation to be called Stratton's Independence, Limited, "for the price of £1,000,000, to be satisfied by the issue and allotment to him of 1,000,000 ordinary shares, of one pound each," and after reciting that by the agreement of April 27, 1899 between him and the Venture Corporation, he had granted to that corporation the option to sell any or all of the shares "forming the said purchase consideration" at the price and on the terms therein stated, and, after reciting the agreement requiring the certificates for those shares to be deposited with a person or corporation to be agreed upon, he designates and appoints Ramsay as his attorney in fact, to agree upon such person or corporation (to be called a trustee) to vote his stock from time to time, to transfer his shares as required by former agreements either to the trustee or purchasers thereof, and generally to represent him (Stratton) when dealing with the trustee or the Venture Corporation. Next follows a paper of date June 9, 1899, signed by Stratton, per William Allen Ramsay, as attorney in fact, designating the Anglo-American Debenture Company Limited, to be the depositary of Stratton's stock, pursuant to the provisions of former contracts, and therewith hands to the depositary certificates for 1,000,000 shares of the stock, with a duly executed transfer of the same into the name of the trustee, and authorizes and requests the trustee to forthwith have the stock registered in its own name. He then uses the following language:

"I hereby request you to transfer to the Venture Corporation Limited, or their nominees, as and when required by them all or any of the said shares which by the accounts delivered to you by The Venture Corporation shall be expressed to have been sold by them upon The Venture Corporation complying with the conditions as to transfer and payment which are hereinafter set out."

"You are to forward to me at Colorado Springs, Colorado, U. S. A., or to me at such other place as I may from time to time direct every three months or oftener if required by me in writing, an account showing the number of shares transferred by you, and the amounts received in respect thereof. You are to remit to me, from time to time, in such manner and to such address as I shall direct and at my risk, all moneys shown by the above accounts to be in your hands belonging to me."

Then follow certain mentioned conditions, stating the amount which the Venture Corporation is to pay to the trustee in order to secure the release

of any shares, and also stating that a certain sum received for each share of stock sold shall be accounted for to Mr. Verner Z. Reed as he shall direct.

The replication next sets out an agreement between the Venture Corporation and Verner Z. Reed, of Colorado Springs, in the state of Colorado, of date April 18, 1900, which, after reciting the terms of some prior agreement between them in relation to commissions to be earned in the sale of Stratton's stock, declares that agreement null, and substitutes another for it. This substituted agreement relates exclusively to the settlement between Reed and the Venture Corporation with respect to services rendered by Reed, and is otherwise inconsequential. Next follows an agreement between Stratton and the Venture Corporation, dated April 18, 1900, designated as "supplemental to an agreement of April 27, 1899, between the same parties." This agreement recites the sale and disposition of 592,500 shares of Stratton's stock on the terms of the pre-existing agreement, and that Stratton had received, as the proceeds thereof, certain sums of money. Then follows an agreement by Stratton to sell the balance of his stock out and out to the Venture Corporation "at such a price as with the cash already received on account of sale of shares and dividends already received and to be received by him from the Company, shall make up a total inclusive sum of \$10,000,000." The replication then avers that all of the foregoing contracts, except that of February 5, 1899, between Stratton and Reed, were carried out, and "that in pursuance of the contracts above set forth, and their full execution, and in accordance with the original agreement and understanding, the said Stratton did convey to the plaintiff the property herein, and did receive in full satisfaction therefor the full sum of \$10,000,000; that in truth and in fact the said Stratton never had the beneficial ownership or any control or disposition, or even possession, of the 1,000,000 shares of capital stock that for a time stood in his name upon the books of the company, but said stock was issued for the sole purpose of carrying out said original transaction, which was to enable the said Stratton to receive the sum of \$10,000,000, although apparently receiving 1,000,000 shares of the capital stock of the plaintiff company." The replication then puts in issue the allegations of the answer to the effect that the suit was prematurely instituted, and to the effect that the cause of action did not survive as against the executors.

Afterwards the defendants filed motions (1) to strike out these several replications; and (2) for judgment in their favor on the pleadings. These motions were sustained by the trial court, and judgment was finally rendered in favor of the defendants. The case is brought here by writ of error to secure a reversal of this judgment. The only assignments of error deemed necessary to consider are those challenging the action of the trial court in overruling the demurrer to the second defense, and finally rendering a judgment for the defendants on the pleadings.

Samuel Untermeyer, W. H. Bryant, and Charles J. Hughes, Jr. (Randolph Guggenheimer, Louis Marshall, C. S. Thomas, and H. H. Lee, on the briefs), for plaintiff in error.

Elmer E. Whitted and Henry McAllister, Jr. (L. M. Goddard and Newton S. Gandy, on the brief), for defendants in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

Some argument was made at the bar, as well as in briefs, touching the regularity of the practice resulting in the judgment below. It is said that plaintiff pleaded facts in the complaint on which issue was joined in the answer. This is true, and, if there had been nothing more, the case should have been tried to the jury. But besides the denial, the defendants pleaded a separate affirmative defense,

complete in itself, in the nature of a confession and avoidance of plaintiff's cause of action. If that defense is good in law, the action is defeated, notwithstanding the general denial. It is also argued that the replication to the affirmative defense puts in issue certain averments of fact therein contained, and that the issue so made should have been tried to the jury. But manifestly, if the replication does not avoid the legal effect of the affirmative defense, it presents no issue of fact for the jury. The legal sufficiency of the affirmative defense, and of the replication in avoidance of it, are the real questions to be determined by the court.

It is also contended that the trial court was not warranted by any admissible practice in striking out the replication and rendering judgment on the pleadings. The record shows that the replication was stricken out and judgment rendered for defendants by one and the same order, and that no request was made by plaintiff's counsel to file further or amended pleadings. Whether the learned trial judge was technically correct in striking out those parts of the replication specially applicable to phases of the answer other than the second defense, we need not discuss. If, on all the pleadings, taken together, defendants were entitled to judgment, a practice resulting only in such a judgment cannot be substantially wrong. In such circumstances, motion for judgment on the pleadings is a useful and recognized practice. *Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291; *Humboldt Mining Company v. American Manufacturing M. & M. Company*, 10 U. S. App. 415, 62 Fed. 356, 10 C. C. A. 415.

We are brought, then, to a consideration of the substantial and decisive questions involved in the case—whether the affirmative defense, known in the pleadings as the “second defense,” is good in law, and, if good, whether it is avoided by the replication. The conclusion reached on these questions, if favorable to the defendants, will dispose of this case, notwithstanding any or all other assignments of error. This defense, fully detailed in the statement of the case, is substantially that even if defendants' testator made the false representations concerning his mines, as charged in the complaint, the plaintiff was not injured thereby, and sustained no damages as a result thereof.

The preliminary contract of April 27, 1899, between Stratton and Butcher, known as the “principal agreement,” and the subsequent ratification of it by the plaintiff corporation after its organization, disclose the purpose of the contracting parties to have been to organize a corporation in London with a capital of £1,100,000 sterling, divided into 1,100,000 shares, of £1 each, which, when formed, should purchase Stratton's mines with 1,000,000 of these shares, leaving 100,000 of them unissued. The principal agreement bound Stratton to make the sale to the corporation when it should be organized, and undertook to bind the corporation, when so organized, to make the purchase on the terms therein stated, namely, for 1,000,000 shares of its capital stock. Within a reasonable time after the execution of the principal agreement, and in conformity with its provisions, plaintiff corporation was organized with the capital

stock as contemplated. The supplemental tripartite agreement made after the incorporation of plaintiff bound the corporation to make the purchase on the terms stated in the principal agreement. Words cannot more clearly express what parties agree upon, than do the words employed in these contracts. Referring to the subject of the sale then under consideration, the parties say:

"The consideration for the said sale shall be the sum of one million pounds, to be paid and satisfied by the issue and allotment to the vendor [Stratton] of one million shares of one pound each of and in the said intended company credited as fully paid up to be numbered 1 to 1,000,000 inclusive."

Nothing is found in either of these contracts remotely suggesting that the corporation should pay Stratton any money or further consideration for his mining properties, excepting the 1,000,000 shares of its capital stock; and nothing is found in them making provision for any sale by Stratton of his stock, or for the disposition of the proceeds of such a sale, if one should be made. The contracts, in plain and unambiguous language, provide for the sale by Stratton of his mines for a fixed and definite consideration. It further appears that the sale was made by Stratton, and that 1,000,000 shares of its capital stock was allotted and issued to him by the corporation pursuant to the terms of the contracts; that the corporation has never issued any of the remaining authorized stock, except 7 shares to qualify the incorporators; and that, when Stratton transferred his mining properties to the corporation and received his allotment of shares, the corporation had no assets, except the properties so transferred to it, and never has since acquired any other assets, except the issues, profits, and emoluments accruing from the operation of the mines so acquired from Stratton.

Such is the state of facts upon which the defendants base their second defense, and they contend that it appears that all that Stratton received from the corporation was shares of stock representing in kind exactly what he transferred to it, and that, as a result, the corporation was not injured or damaged by any false representations, if made by Stratton. If the facts so stated are true—and for present purposes they must be so taken—it appears that, at the time Stratton conveyed his mines to plaintiff corporation, it had no good will or prestige in business, or other assets that gave its stock any value over and above that which the properties actually conveyed by Stratton gave to it. In actions of deceit, injury or damage to the plaintiff, as a result of the fraudulent representations, is a necessary prerequisite to recovery. Fraudulent representations and deceit, if not productive of injury or loss, are moral, not legal, wrongs; or, as often expressed by law writers, "Fraud, without damage, or damage without fraud, gives no cause of action." In *Ming v. Woolfolk*, 116 U. S. 599, 602, 6 Sup. Ct. 489, 491, 29 L. Ed. 740, the Supreme Court, quoting from Baron Parke in *Watson v. Poulson*, 15 Jurist, 1111, says:

"The requisites to sustain an action for deceit are the telling of an untruth knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage."

After citing several cases in support of the proposition so announced, the court, speaking of the case before it, says:

"Considered, therefore, as an action for a deceit, it is plain that the case must fail, for, conceding the alleged representations to have been made by the defendant, and to have been false, the plaintiffs were not induced thereby to change their condition, and, moreover, have suffered no damage."

To the same effect is the case of *Marshall v. Hubbard*, 117 U. S. 415, 6 Sup. Ct. 806, 29 L. Ed. 919.

In order now to determine whether plaintiff, in the circumstances disclosed by the second defense, sustained any injury or damage, it is necessary to advert to the rule governing the measure of recovery in such cases. Whatever may be the measure of damages in actions of deceit in other courts, the rule laid down by the Supreme Court of the United States and this court, in harmony therewith, is that the measure of damages is not the difference between the contract price and the reasonable market value, if the property sold or exchanged had been as represented to be. As said by Mr. Chief Justice Fuller in the case of *Smith v. Bolles*, 132 U. S. 125, 129, 10 Sup. Ct. 39, 40, 33 L. Ed. 279:

"The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be. \* \* \* What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase."

In *Rockefeller v. Merritt*, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633, this court had the same question before it, and there entered into an exhaustive consideration of the authorities, and announced the rule that:

"The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with, and the actual value of that which he receives under the contract. It is the loss which he has sustained, and not the profits which he might have made by the transaction."

*Smith v. Bolles*, supra, and a large number of other cases, are there cited in support of the proposition announced.

The case of *Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113, was an action brought to recover damages for deceit alleged to have been practiced by the defendant in the sale of a gold mine to the plaintiff. Mr. Justice Harlan, in delivering the opinion of the court, reviewed extensively the authorities, both English and American, concerning the true measure of damages in such cases, quoted approvingly from the opinion of Judge Sanborn in *Rockefeller v. Merritt*, supra, and finally concludes as follows:

"We adhere to the doctrine of *Smith v. Bolles*. Upon the assumption that the property was not worth what the plaintiffs agreed to give for it, they were entitled to have \* \* \* a verdict and judgment representing in damages the difference between the real value of the property at the date of its sale to the plaintiffs and the price paid for it, with interest from that date, and, in addition, such outlays as were legitimately attributable to the defendant's conduct, but not damages covering 'the expected fruits of an unrealized speculation.' If the plaintiffs were inveigled by the fraud of the defendant into purchasing this mining property, a judgment of the character

just indicated would make them whole on account of the loss they sustained. More they are not entitled to have at the hands of the law in this action."

Applying the rule thus authoritatively laid down, plaintiff's only injury or damage in this case is the difference between the value of the 1,000,000 shares issued by it to Stratton, and the value of the property received in exchange therefor from Stratton. If that which plaintiff received is equal in value to that which it paid, clearly, plaintiff sustained no injury by the transaction.

It conclusively appears from the facts pleaded in the second defense that all the issued capital stock was allotted to Stratton for his mines, and that this stock had no other or greater value than the properties acquired from him. The plaintiff acquired the legal title by deed, and returned to Stratton, in other evidences of title, all the beneficial interest in the same property, and nothing more. It therefore gave back, in substance, that which it received, and no more.

Argument is made that the 7 shares allotted from the reservation for working capital to the 7 incorporators changes the situation; but this suggestion does not impress us. The value of the 1,000,000 shares allotted to Stratton was not increased by the allotment of the 7 shares to the incorporators. The second defense under consideration contains an averment (admitted in the replication) that, at the time of Stratton's conveyance to the corporation, it had no assets or property other than the mining properties conveyed to it. Obviously, therefore, the transfer of these 7 shares to the incorporators was a formality resulting in no substantial increase of assets.

The conclusion reached on this part of the case follows so logically and irresistibly from the established rule governing the measure of damages in actions of deceit that we do not deem it necessary to attempt to harmonize or apply the many English and American cases to which our attention has been called. It is sufficient to say that they, generally speaking, are suits to recover from stockholders unpaid portions of capital stock, or to hold directors liable for fraudulent disposition of capital stock or fraudulent overvaluation of property for the purpose of defeating some constitutional or statutory enactments against fictitious issues of stock, or to hold promoters to liability for secret profits, and other cases of like kind. We have carefully considered those cases, as well as the arguments of counsel resting upon them, and find in the equitable principles announced in them nothing in conflict, but much in harmony, with the conclusion reached in this case. This is a case (in many respects different from any of them) in which a corporation, as an entity distinct from its shareholders, sues defendants, in an action at law, for an injury which it claims to have sustained by reason of fraud and deceit practiced directly upon it by their testator, in the sale of property by him to the corporation.

For the reasons given, we are unanimously of opinion that the second defense, as pleaded, is a good defense to plaintiff's cause of action.

The question remaining for consideration is whether this defense is avoided by facts pleaded in the replication. The contention, as stated in the replication, and as argued by counsel, is that contemporaneously with the execution of the Butcher "principal agreement" and the tripar-



title or "supplemental agreement," which form the basis of the second defense, certain other agreements, which are fully set forth in the replication, were made by Stratton and others, which disclose that he was to, and did, receive from the plaintiff corporation \$10,000,000 in money, and not 1,000,000 shares of its capital stock, as the consideration for the sale of his mining properties. What, now, do these agreements disclose? The Reed agreement of February 2, 1899, seems to be the initiation of Stratton's undertaking. Its preamble discloses the ostensible general purpose to have a corporation formed under the British companies acts by Reed (who is called the "promoter"), and his associate, the Venture Corporation, Limited, "for the purpose of acquiring [Stratton's mining properties] that the same may be worked, mined and operated thereby; and that the shares of the said Corporation so to be formed may be sold on the London market." This agreement then provides for the organization of a corporation with a capital of £3,000,000 sterling, divided into 3,000,000 shares, of £1 each; that 2,500,000 of these shares should be allotted to Stratton "in payment for" his mining properties; that Reed should have an option, for and during 18 months, to purchase these shares from Stratton at prices specified, and that in the meantime these shares, after allotment to Stratton, should be deposited with some depositary in London, with provisional transfers ready for convenient delivery to purchasers; and that, if any of the shares should remain unsold at the expiration of the 18 months, the same should be returned to Stratton. The next agreement, of February 9, 1899, is between Reed and the Venture Corporation, Limited. It recites by way of preamble the substantial provision of the Reed agreement, and then obligates the Venture Corporation to proceed with the organization of the proposed corporation in place of Reed. It then assigns to the Venture Corporation Reed's option to purchase Stratton's stock in the contemplated corporation, carefully providing for substantial participation by Reed in the commissions to be earned on sales to be made by the Venture Corporation.

Each of these agreements, it will be noticed, discloses two purposes—one for organizing a corporation, and the sale of Stratton's mines to it for a certain number of shares of its stock, and the other for selling these shares, when secured, on the London market. There is nothing in either of them remotely suggesting that the corporation, when organized, should have anything to do with the sale of the stock when issued, or that the sale should be avoided if the stock should not be sold. On the contrary, the sale was to be complete by itself; the title was to be fully vested in the corporation when and as soon as the agreed number of shares should be issued to Stratton. Stratton was to assume the chances of his agents making the sale of his stock. In so far as they failed to do so or to exercise their option within 18 months, the stock was to be delivered by the depositary back to Stratton. Moreover, it does not seem to have been intended in these early agreements that \$10,000,000 should be the measure of Stratton's receipts for stock sold. On the contrary, his minimum was to be £2,000,000, and his maximum that much plus 60 per cent. of all moneys realized from the sale of his stock over and above its face value. In other words, the original scheme was to sell the mines for a certain

fixed amount of the capital stock, and afterwards to so deal with this stock on the London market as to realize for Stratton from credulous investors (not from the corporation) the largest possible sum. Accordingly, giving to these first agreements, which, although abandoned, are relied upon by counsel as disclosing the original purpose of the parties, their plain and natural meaning, it is apparent that the original purpose was to make separate transactions of the sale of the mines to the corporation, and the sale of the stock to the public. In these initiative agreements we find nothing suggestive of the sale of the mines to the proposed corporation on any other terms than for a specified number of its corporate shares, and nothing suggesting that the corporation should have anything to do with the sale of the stock to be issued to Stratton. But whatever may have been the purpose of these first agreements, they were never carried into execution, but were abandoned, and the new scheme evidenced by the contracts of April 27th and May 4th was devised. These last-named contracts make no provision for disposing of the stock which Stratton should receive for his mines. They make no mention of Reed or the Venture Corporation. They relate exclusively to the details of the organization of an English corporation, and to the terms and conditions of the proposed sale by Stratton to it. The first or "principal agreement" was one whereby Stratton contracted with Butcher, a promoting agent, to sell his mining properties to a corporation to be formed. The consideration was fixed in unambiguous terms as "one million pounds to be paid or satisfied by the issue and allotment to the vendor of one million shares of one pound each of and in the said intended company, credited as fully paid up, numbered one to one million inclusive." The next or supplemental agreement was between Stratton, Butcher and the corporation created pursuant to the principal agreement, wherein the parties make the following recital:

"Whereas, by the principal agreement, it is provided that one million shares of one pound each in the purchasing company \* \* \* shall be allotted to the vendor as consideration for the sale of the properties therein mentioned.  
\* \* \*

Following this and other recitals, the principal agreement made by the promoting agent is in terms adopted and ratified by the newly created corporation, and Butcher, the promoter, is discharged from all liability imposed upon him by the principal agreement. These last agreements are complete in themselves, and provide for the organization of a corporation, and the sale of Stratton's mining properties to it, and nothing more.

Another contract, of April 27th, between Stratton and the Venture Corporation, relates primarily to the disposition of Stratton's stock. It refers to the agreement of same date between Stratton and Butcher, and recites that thereby "the vendor [Stratton] has agreed to sell to the limited company to be formed as therein mentioned the properties therein described at the price of £1,000,000 to be satisfied by the allotment of 1,000,000 fully paid shares of £1 each in the said company, which is to be called 'Stratton's Independence, Limited,' \* \* \*"; and then, for certain considerations in the nature of services to be rendered and advances to be made by the Venture Corporation, an option

for the period of 18 months is given it by Stratton to effect sales of his 1,000,000 shares, or any part of them, on the terms, namely, £1.16.0 per share for the first 666,666 shares, and £2.8.0 for the remaining 333,334 shares, net to Stratton; the Venture Corporation to retain for its commissions all it may realize above those figures, except that, if it should sell any of the shares for a price in excess of £2.10.0, three-fifths of such excess should be accounted for to Stratton. Further details of this agreement are unnecessary for the purposes of this opinion.

As in the original abandoned contract between Stratton and Reed, so in this, a depositary in the city of London is provided for, to hold Stratton's shares, with transfers so arranged as to permit of ready and convenient delivery whenever sales should be made. As in that contract, so in this, it was distinctly provided that, if any of Stratton's shares should remain unsold at the end of the option period, the same should be immediately delivered back to Stratton. As in that, so in this, a minimum of Stratton's net returns for stock to be sold under the option was fixed, but the maximum depended upon the success of the undertaking. It thus appears that Stratton, by a contract made between him and plaintiff corporation, agreed to, and did, sell his mines for 1,000,000 shares of its capital stock, and that by another separate contract between Stratton and the Venture Corporation, with which the plaintiff corporation had no concern, he agreed that the last-named corporation might make an attempt to sell these shares for him so as to realize a liberal commission for itself in so doing, and as much over a fixed minimum as possible for Stratton. In the event the attempt should fail, Stratton was to keep his stock, or otherwise alienate it, as he pleased. Whether the proposed attempt to sell it succeeded or failed was of no concern to the plaintiff corporation. The mines belonged to it, and the shares to Stratton. They took their chances as to value and the ultimate outcome of the property mutually exchanged.

After the stock was issued to Stratton pursuant to the terms of these executory contracts, and when he, by the document of date June 9, 1899, delivered his 1,000,000 shares to the depositary, agreed upon, with instructions to facilitate their sale by the Venture Corporation, he stated what seems to us to be the true situation resulting from all the prior contracts, as follows:

"Except as far as may be necessary for the carrying into effect the arrangements herein, the said shares are for all purposes to be considered the absolute property of me the said W. S. Stratton and all dividends payable in respect of such shares, except those as are sold cum dividend, are to be remitted by you to me as I may direct and I or my nominees or my representatives are and am to have the sole right of voting in respect of the said shares or such of them as may from time to time be unsold."

By the contract of April 18, 1900, between Stratton and the Venture Corporation, the latter, after reciting that it had already disposed of 592,500 shares of Stratton's stock under the option contract of date April 27, 1899, enters into an engagement, and purchases from Stratton all his remaining stock at such a sum as, with that before then received by Stratton for sales made under the option contract, aggregates the total sum of \$10,000,000. In other words, this final contract shows

that, as a result of all the contracts relied upon by plaintiff in its replication, and of the proceedings taken thereunder, Stratton ultimately received \$10,000,000 for his stock in the plaintiff corporation. But certainly this did not come about proximately by reason of the contract of sale between him and the plaintiff corporation, but rather as a result of the option contract and its successful execution. Whether Stratton's contract with the corporation was for an exchange of his mines for its stock, or for a sale of his mines to it for £1,000,000, to be satisfied by an issue of a million shares of its stock (and certainly it is one or the other), when the contract was executed and the properties exchanged an indefeasible title to the mines was secured by the corporation, and a like indefeasible title to the stock was secured by Stratton. Plaintiff corporation thereafter, as an independent entity, could operate, sell, or otherwise dispose of its properties; and Stratton thereafter, without the consent or co-operation of the corporation, could retain or alienate his stock at pleasure. If, in alienating any of it, he either directly or indirectly deceived purchasers, to their injury, by false representations concerning its value, he became liable to such purchasers therefor. Any money which he received for stock sold came from the vendees of the stock, and not from the plaintiff corporation. Moreover, plaintiff, as an artificial entity, owed no fiduciary obligations to the shareholders, except to protect their legal title to shares owned by them by giving proper attention to transfers and reissues of shares. 2 Thompson's Commentaries on the Law of Corporations, 2, § 2486, and cases cited. It was not the duty or within the power of plaintiff corporation to prevent the Venture Corporation or Stratton from selling any of the stock in question for any price they could obtain, and any rights of action which might accrue to any purchaser by reason of representations made in so doing in no manner redound to plaintiff.

In view of the earnest contention of plaintiff's counsel that all the contracts and documents set out in the replication, when taken together and properly understood and interpreted, lead to the conclusion that the sale was made to plaintiff corporation for \$10,000,000 in money, we have given to them our most patient and careful consideration. We have given the language employed its fair and natural meaning; we have considered every fair and reasonable inference that may be drawn from them; we have regarded the rule of construction requiring the consideration of all parts of written documents in their relation to each other and to the object sought to be accomplished; and, as a result, we are unable to find any substantial support for the averment in the replication that the real transaction was the plaintiff sold and disposed of its capital stock for \$10,000,000, and paid over that sum to Stratton for his mining properties. It appears incontrovertibly that plaintiff had nothing to do with the sale of its stock after it was once issued to Stratton, that it never received or had any interest in any of the proceeds of such sale, and that the \$10,000,000 which Stratton ultimately received as a result of such sale did not directly or indirectly come from the plaintiff, but came from divers individuals who purchased the stock from him. Plaintiff, therefore, cannot occupy the attitude in this case of having paid any money to Stratton. It exchanged 1,000,000

shares of its capital stock for his mines. What money Stratton received came from independent investors in that stock, to whom he may or may not be under obligations.

We have also had regard to all facts well pleaded in the replication, other than the contracts and documents set out, and, as a result of all, we are unable to find anything in the replication to the second defense which is sufficient in law to avoid its legal effect.

Many other questions are presented by the assignment of errors, but their decision either way cannot make the second defense bad or the replication good.

The conclusion is that the learned trial court committed no error in rendering a judgment on the pleadings in favor of the defendants. Its judgment is accordingly affirmed.

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TEXAS & P. RY. CO. V. COUTOURIE.

(Circuit Court of Appeals, Second Circuit. December 20, 1904.)

No. 104.

1. EVIDENCE—RELEVANCY ON ISSUE OF NEGLIGENCE—HABITUAL INTOXICATION.

Where the destruction of a large quantity of cotton by fire while it was piled in and around sheds on a dock was charged to have been due to a course of negligent conduct on the part of the agents and servants of defendant, which was in possession of the cotton as carrier, in so piling the cotton as to subject it to unnecessary danger, and as to render it difficult to discover a fire, if one should start, in time to stop it; in allowing cotton to be piled over the fire apparatus provided, so that it could not be used; and in failing to provide sufficient or competent watchmen—it was competent for plaintiff to show that defendant's superintendent in charge of the dock, whose duty it was to attend to such matters, habitually became intoxicated and neglected his duties during the time the cotton was being placed on the dock.

2. WITNESSES—EXAMINATION—RESPONSIVENESS OF ANSWER.

To a question whether the gangways left between piles of baled cotton were straight, "or how were they?" an answer which, after stating that they were usually straight, added that "sometimes the cotton might happen to fall off and block them a little," was responsive; the immediate question to which the examination was directed being as to whether the gangways were so left as to enable watchmen to readily discover a fire, should one start in the cotton.

3. DEPOSITIONS—SUFFICIENCY OF OBJECTIONS.

A general objection to a question asked a witness on the taking of his deposition, as immaterial and irrelevant, without stating any specific ground, was properly overruled.

4. ERROR—REVIEW—ADMISSION OF EVIDENCE.

Error cannot be assigned in the appellate court to the admission in evidence of letters, a portion of which was relevant, on the ground that other parts were not, where no motion was made to strike out the irrelevant parts.

5. EVIDENCE—RELEVANCY.

Upon the issue as to the negligence of a railroad company in failing to employ a sufficient number of watchmen to guard a large quantity of cotton piled upon its wharf against fire, evidence as to the existence at the time of labor disturbances relating to men employed on ships loading at such wharf was competent.

**6. NEGLIGENCE—INSTRUCTIONS—PROXIMATE CAUSE.**

In an action to recover damages for loss of property by fire, while in defendant's possession as carrier, through the alleged negligence of defendant in failing to take proper measures for its protection, the failure of the court to specifically define in its instructions the distinction between proximate and remote causes was not reversible error, where the jury were told that, to authorize a recovery, the defendant must not only have been negligent, but its negligence must have been the "direct cause" of the loss.

**7. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.**

Instructions requested, although technically correct, are properly refused where the court, in its general charge, has covered the ground in different language.

**8. SAME.**

Instructions requested in an action for negligence considered, and *held* properly refused, as either covered by the general charge, or as omitting pertinent facts shown by the evidence.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here by writ of error from a judgment of the United States Circuit Court for the Southern District of New York, entered upon a verdict of a jury, for the sum of \$5,047.74, in favor of the plaintiff below.

Rush Taggart, for plaintiff in error.

Treadwell Cleveland, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. This action is one of a series of cases arising out of a fire which occurred at Westwego, La., a point on the Mississippi river opposite the city of New Orleans, on November 12, 1894, and which destroyed a large amount of cotton there stored on defendant's wharf and in its cars. The defendant had undertaken to transport this cotton from points in Texas to Havre, France. By its bill of lading it was exempted from liability for destruction by fire.

Former decisions discussing the situation and covering various questions raised as to the liability of the defendant are reported as follows: *Texas & Pacific Railway Company v. Clayton*, 84 Fed. 305, 28 C. C. A. 142; *Id.*, 173 U. S. 348, 19 Sup. Ct. 421, 43 L. Ed. 725; *Reiss v. Texas & Pacific Railway Company*, 98 Fed. 533, 39 C. C. A. 149; *Texas & P. R. Co. v. Reiss*, 99 Fed. 1006, 39 C. C. A. 680; *Id.*, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. Ed. 358; *Texas & Pacific Railway Company v. Callendar*, 98 Fed. 538, 39 C. C. A. 154; *Id.*, 183 U. S. 632, 22 Sup. Ct. 257, 46 L. Ed. 362; *Marande v. Texas & Pacific Railway Company*, 102 Fed. 246, 42 C. C. A. 317; *Id.*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487; *Id.*, 124 Fed. 42, 59 C. C. A. 562.

The bill of exceptions challenges certain rulings, charges and refusals to charge, and specific portions of the charge of the court below.

For the purpose of a satisfactory understanding of the situation, it is necessary to first discuss the arrangement of the wharf and buildings at Westwego, the course of business there, and the condition of affairs at and prior to the time of the fire. The wharf extended along the bank of the river. On it were located two covered freight sheds, open

at the ends and sides, each about 150 by 260 feet in size, known respectively as Nos. 1 and 2, and separated from each other by an open space, not planked, about 50 feet wide. There was one track in front of these sheds on the river side, and two tracks in the rear, situated at a distance from the sheds of 15 feet in front and 10 feet in the rear, and prior to November 12, 1894, a great quantity of cotton had been accumulating for some weeks at the wharf and in cars in the rear of the sheds. On the 12th of November both sheds and a considerable part of the intervening space were filled with bales of cotton. There was evidence tending to show that there were over 20,000 bales of cotton at the wharf; that the bales were piled up as high as possible in the sheds; that the platform was crowded; that cotton was stowed beyond the sheds toward the river, close to the railroad track, and was unprotected by any covering; that the sheds were blocked; and that, while there were gangways across the sheds, there were no gangways lengthwise of the sheds and parallel with the river. There was also evidence to the effect that the only appliances provided for use in case of fire consisted of a tank connected with hydrants, three in each shed having a coil of hose, and a row of barrels with buckets, and some fire buckets, and that no instructions had been given to the men in charge of the dock as to their use, and no fire drill had ever taken place, and that on the night of the fire the hydrant nearest to the place where the fire broke out was blocked with cotton. Although the defendant had been notified of a fire smouldering in some bales of cotton a short time before, and of the increased danger of fire owing to labor troubles, and of the great accumulation of cotton at this point, it had reduced the number of its watchmen in charge so that on the night in question there were but four men in charge of this whole property. The head watchman had had no instructions or experience in the use of fire apparatus, and was confessedly incompetent for the duties of his position.

Upon the trial of a former case, *Marande* against this defendant (184 U. S. 192, 22 Sup. Ct. 340, 46 L. Ed. 487), the Supreme Court reversed the decision of this court, which had affirmed the action of the court below in directing a verdict for the defendant and refusing to permit the plaintiff to go to the jury on the question of the negligence of the defendant. The grounds on which the Supreme Court rested its opinion were as follows: (1) That the manner in which the cotton was stored, in connection with the operation of the locomotives in the immediate neighborhood of the cotton, which was unprotected by any covering, afforded sufficient proof to go to the jury that it was such as to prevent prompt detection of a fire in season to prevent conflagration. The Supreme Court took the view that, in view of the evidence, a fire might have smouldered for a considerable period prior to its breaking out into flames; that the jury would have been justified in drawing the inference that the sparks from the locomotives falling upon the unprotected cotton might have caused it to ignite; and that the manner in which the cotton was stored, without having gangways extending lengthwise through it, so that the presence of fire might be promptly detected, would afford ground for the jury to find that such negligent storage prevented the seasonable discovery of the fire, because of the absence of such gangways, through which it might have been properly

inspected. (2) That the evidence as to the presence of three watchmen only to care for such a vast accumulation of cotton was sufficient to go to the jury on the question whether, if an adequate force of watchmen had been on hand, the fire might have been detected in time to save the cotton from destruction. (3) That the evidence that cotton was piled up around the posts where the hydrants were situated, and above the coil of hose, so that neither was visible nor accessible from the gangway, and that no systematic inspection of the fire apparatus and no rules for its use had ever been promulgated, furnished reasonable grounds from which the jury would be entitled to infer negligence, creating such a condition as to conduce to error of judgment, for which the defendant should be held responsible.

The first assignments of error argued relate to the admission of evidence as to the intemperate habits of one Wilkinson, who was the superintendent in charge of defendant's wharf at Westwego. It was his business to inspect the hydrants and hose daily, and to keep the gangways clear. One of his clerks testified as follows:

"Q. Did you notice how Wilkinson attended to his duties? A. Well, he was all right in the first part of the day, but in the latter part he was not so good. Used to booze a little too much. Q. Where did he booze? A. Well, that I could not say. He used to go off. Of course, I was attending to my duties. \* \* \* Q. How early in the day did Wilkinson begin to booze, on the average? A. Well, about 11 o'clock he was pretty well loaded. Q. You mean by that he drank heavily? A. Yes, sir. \* \* \* Q. After 11 o'clock in the day, when you say he was pretty well loaded, did you see him about there attending to his duties? A. He would walk around sometimes, making a little fuss. That is about all."

Another clerk testified as follows:

"Q. Do you know what Mr. Wilkinson's habits were as to drinking? A. Yes; I have seen him under the influence of liquor many times during the day."

Other testimony to the same effect was admitted, to all of which defendant duly excepted.

It is unnecessary to discuss the general rule of law as stated by counsel for defendant, "that evidence of past habits or occurrences is inadmissible to prove negligence on the part of the defendant." We are not here concerned with the class of cases where injury has resulted from a single specific act of negligence of a servant on a specified occasion, and where the sole question is as to the conduct of the servant on such occasion. Here the negligence complained of in this particular consisted, *inter alia*, not in a specific act or neglect, but in a course of business; not in anything done or left undone at the moment when the fire was discovered, but in a situation, claimed to have been produced by continuous negligent acts and omissions, involving a combination of blocked alleyways, hydrants obstructed by bales of cotton, unconnected hose, lack of proper supervision, incompetent servants, etc. The evidence as to Wilkinson's previous habits and condition does not relate to the question as to whether he was drunk when the fire broke out, but was introduced to show that the situation complained of, which prevented the use of proper means for seasonably discovering and extinguishing the fire, was due to his negligence. We think the admissibility of this evidence may be tested by a con-



sideration of the question as to whether, in view of the existing facts, it would have been admissible to show that no one had been employed to superintend the wharf, or that the person employed as superintendent had been absent and had neglected his duties during a period prior to the fire, or that he was insane, infirm, or otherwise manifestly incapacitated for such position, or that he had in fact negligently caused or directed the care and stowage of the cotton, or had negligently supervised its location, and the means of discovering and extinguishing fires. "The question is, did the servant exercise ordinary care in the exercise of his duties?" Barrows on Negligence, 100. And we think it was proper to submit to the jury the facts as to his condition during the time while such alleged improper stowage and blocking was going on, in order that they might determine whether his condition was such that he could not have properly discharged his duties. The general rule is well stated as follows:

"Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted not because it is shown to be competent, but because it is not shown to be incompetent. No precise and universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience. Thayer's Cases on Evidence, 2, 3. 'If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.' Insurance Company v. Weide, 11 Wall. 438, 440, 20 L. Ed. 197. The question as to its admission or rejection addresses itself to the court as one to be answered with a view to practical rather than theoretical considerations. The guiding principle is well stated in Stephen's Digest of the Law of Evidence, c. 1, p. 36, in these words: 'The word "relevant" means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or nonexistence of the other.' Plumb v. Curtis, 66 Conn. 154, 166, 33 Atl. 998.

Error is next assigned to the admission of the following testimony:

John C. Trainor, a check clerk, who had been in the employ of the railroad company for about two months prior to the fire, testified by deposition as follows:

"Q. Were the gangways that you have stated ran across the shed— Were they straight, or how were they? A. They were usually straight. Sometimes the cotton might happen to fall off and block them a little."

Counsel for the railroad company moved to strike out the last half of the answer, as not responsive to the question. It appearing that no objection was taken to the question or answer when the deposition was given, the court overruled the objection, and counsel duly excepted. Irrespective of the claim that the objection should have been made at the taking of the deposition, we think the ruling was correct. The question was as to the condition of the gangways—"how they were"—and the first part of the answer, as to their usual condition, was not complete without the further statement as to their condition when bales of cotton blocked the gangways. The motion to strike out was not based upon

the remoteness, incompetency, or immateriality of the answer, but solely on the ground that it was not responsive.

The deposition of one Paul Lecorgne, another check clerk for the railroad company, was read, and the following questions and answers were admitted against objection:

"Q. Did you at any time ever notice how the cotton was piled around any of the hydrants? A. Well, it was piled all around about nine tiers high. The cotton was piled higher than the hydrants. Q. Where, in relation to the gangways, were the posts at which the hydrants were? Do you recollect? A. The hydrants were situated in the center of the shed. Those hydrants were supposed to be left in a gangway. Some were, and others were not."

No ground of objection to the first question was stated. The exception to its admission, therefore, need not be considered. The second question was objected to on the ground that it was immaterial and irrelevant. The contention now made in support of these objections is that the testimony was irrelevant because it "was not limited to the time of the fire; but the questions themselves in the last two cases, and the answer in the first, showed that it related to conditions at any time during the time of the witness' employment upon the wharf, and not to the time of the fire, or immediately anterior thereto, and therefore was prejudicial to the defendant." It appears, however, that the first witness had only been in the employ of the railroad for about two months preceding the fire. The date of employment of Trainor, and Lecorgne's statement, "I worked at this checking business all the time during October and November, 1894," would indicate that they were only testifying to the condition of affairs on the dock shortly prior to the fire—the general situation alleged to be due to the continuous negligence of the railroad company, and which it was claimed directly caused or contributed to the loss. In the absence of any statement of objection at the time of taking the deposition on the ground of remoteness, and of any motion to strike out on said ground, we think the testimony was properly admitted, or at least that the general objection taken was properly overruled. *New York Electric Equipment Co. v. Blair*, 79 Fed. 896, 25 C. C. A. 216; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306.

Error is further assigned to the admission of correspondence between Mr. Saterlee, the secretary and treasurer of the defendant, and its general manager, and to the examination of said Saterlee in connection therewith. Said evidence was objected to as immaterial and irrelevant. The objection was overruled, and the defendant duly excepted. An examination of this correspondence shows that all of the letters related in part to the situation of the cotton at Westwego, and to its accumulation there. This portion was certainly competent to show the knowledge on the part of defendant's officers of the increasingly dangerous conditions prevailing at Westwego, in connection with the evidence of its failure to take proper steps to remedy the situation. It is true that some of the correspondence related to other matters, but, inasmuch as no motion was made to strike out the relevant portions, the exception cannot be here taken to the correspondence on the ground that it was in-

competent and immaterial. *Noonan v. Caledonia Mining Co.*, 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061.

Error is next assigned to the admission of certain correspondence between the principal of a detective agency and the defendant's freight agent in regard to the outbreak of a fire on the wharf at Westwego on October 23d, prior to the present fire. This evidence contained a number of irrelevant hearsay statements, which were not proper for the consideration of the jury. Otherwise the letters were competent to show the knowledge of the defendant as to this prior fire. The admission of said correspondence was objected to, but no ground of objection was stated, and no motion was made to strike out the irrelevant testimony. The objection, therefore, need not be considered. *Noonan v. Caledonia Mining Co.*, *supra*; *Burton v. Driggs*, *supra*.

Furthermore the court charged the jury on this point as follows:

"The statements made in the Boylan report regarding the fire at Westwego on October 24th, which were read to you by Mr. Cleveland, are not to be taken as proof of the facts therein stated. The report was admitted simply as evidence of notice to the defendant respecting that fire, and you must disregard the statements therein contained in making up your verdict."

The exception must therefore be overruled.

Error is next assigned to the admission of evidence as to labor disturbances at New Orleans, on the ground that these disturbances had nothing to do with the laborers employed at Westwego. Westwego is, however, situated opposite the city of New Orleans. There was evidence to show that these labor troubles had been caused by the employment of colored men on the ships, and that these ships were constantly docked and loading at Westwego. This testimony was introduced for the purpose, as stated by counsel, of raising the question whether, in view of said labor troubles, the defendant should not have increased the number of watchmen after the first fire. Upon motion of counsel for defendant that the testimony in regard to the labor troubles be stricken from the record, the court said as follows:

"It hardly strikes me that the testimony in reference to the labor riots should be expunged from the record, following the suggestion that the gentleman has just made. To a certain extent, it has a bearing upon the precautions which your clients should have taken in the preservation of the cotton—the fact that they knew."

The admission of the evidence as thus limited was proper, and the exception is overruled.

Error is further assigned to various refusals of the court to charge as requested by the defendant.

Under the exceptions to the refusal to charge requests 4, 13, 14, and 14a, the preliminary objection is made "that there is an entire absence of any definition of direct or proximate cause," and "that the court did not in its charge in any way convey to the jury any idea as to this distinction between a proximate and a remote cause." No statement of the distinction between a proximate and a remote cause was formulated in the requests presented, and no request for such definition was embodied in the requests to charge. No defini-

tion of proximate cause was included in the requests, except such as is contained in request No. 13, which was as follows:

"(13) You are instructed that not only must the plaintiff herein prove negligence upon the part of the defendant company in caring for the protection of said cotton against fire, but said plaintiff must show by a preponderance of evidence that the negligent act was the proximate or direct cause of the loss of said cotton by fire. The mere proof of a negligent act, without showing that said act was directly connected with, and was the immediate or proximate cause of, said fire, would not be sufficient evidence of the negligence of the defendant, for which it would be liable in this case. Within the meaning of the law, the proximate or direct cause of a loss is such a cause as that without such cause the loss could not have occurred."

In this request, and in requests 1 and 5, the words "proximate" and "direct" are treated as synonymous or equivalent words, or, taken together, as in the first request, are used as a mutually qualifying and explanatory term.

In conformity to said requests, the court charged the jury as follows:

"Was the defendant negligent in regard to its care and custody of the cotton in suit? And if you shall determine that it was so negligent, was that negligence the direct, proximate cause of the loss of the cotton? \* \* \* The question for the jury to consider here is the situation in its entirety. Was the defendant, under all the existing circumstances and surrounding circumstances, on the night of November 12, 1894, guilty of negligence which directly resulted in the destruction of the cotton? Is the question for the jury to consider. \* \* \* In order to determine whether or not the defendant has been negligent in this case, and whether that negligence was the direct cause of the loss, you must first determine what the facts are. \* \* \* The burden of proof to establish the liability of the defendant for the loss of the cotton in suit is at all times upon the plaintiff, and it is incumbent upon the plaintiff to prove by a preponderance of evidence the act or acts of negligence complained of against the defendant, and to show that such act or acts of negligence—some or all of them—contributed directly to the loss of the cotton. \* \* \* Other negligent acts must be coupled therewith before the jury is entitled to find that the negligence directly contributed to the loss of the cotton. \* \* \* The plaintiff was under no obligation to show the origin of the fire. He must, however, establish such facts as will warrant the inference that the defendant was negligent in respect to the cotton, and the further inference that because of that negligence the fire either originated or was allowed to spread, and thus to destroy plaintiff's cotton; \* \* \* and, if from these facts you are enabled to draw the conclusion that the defendant was guilty of such negligence as directly and proximately contributed to the loss of the cotton in suit, your verdict should be for the plaintiff."

Also, in the portion of the charge quoted above, the court, after reviewing the specific allegations of negligence, said:

"Whether all or any of such facts, if they show negligence, show that kind of negligence which contributed directly and proximately to the loss of the cotton."

An examination of text-books and decisions on this question shows the difficulties in the way of framing such a definition of proximate cause as would have enlightened the jury and helped them in the decision of this case.

The Supreme Court of the United States says:

"And we have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examina-

tion of these cases. If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discrimination." *Insurance Company v. Tweed*, 7 Wall. 44, 52, 19 L. Ed. 65.

"No general rule for determining when causes are proximate, and when remote, has yet been formulated." 7 *American & English Encyc. of Law* (2d Ed.) 382; *Spaulding v. Winslow*, 74 Me. 534.

In *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664, the court says:

"Many cases illustrate, but none define, what is an immediate or what is remote cause. Indeed, such a cause seems to be incapable of any strict definition which will suit in every case."

Judge Cooley, in his work on Torts, devotes several pages to propositions illustrating the principle, and approves the following definition from Addison on Torts:

"If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

"Proximate" is defined as "lying or being in immediate relation with something else," and as synonymous with "direct" or "immediate." "Proximate cause: The nearest, the immediate, the direct cause; the efficient cause." *Anderson's Dictionary of Law*, 155. The word "direct" is defined as meaning "free from intervening agencies or conditions; hence characterized by immediateness of relation or of action." *Standard Dictionary*. And this is the meaning of a proximate cause, as stated by the Supreme Court in *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, where the court says:

"The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury."

A proximate cause is one from which the injury follows as a direct and immediate consequence. It is the dominant cause—the one that necessarily sets the other causes in operation. Cooley on Torts, 73; *Insurance Company v. Boon*, 95 U. S. 117, 24 L. Ed. 395.

If the court had seen fit thus to define proximate cause, and had further explained to the jury that it was not necessarily the nearest in time or place to the catastrophe, and that merely incidental causes are not proximate, or that, when "the wrong and damage are not sufficiently conjoined or concatenated as cause and effect to support an action," the cause is remote, or had stated the law still more elaborately as laid down in text-books and decisions, the objection now under consideration would have been obviated. But the object of a charge is to state the law applicable to the facts in such plain and simple language that it may be fully understood and intelligently applied by the average juror. And we think it is at least doubtful whether the jury in the case at bar would have derived any clearer idea of the law from such elaborate definitions in a charge, qualified as they must be by a statement of

the elements of time, conjunction of wrong and damage, intervening agencies, efficient as distinguished from instrumental causes, etc. If the court had further stated or illustrated the doctrine in its charge, it is doubtful whether such statement would have been sufficiently comprehended to be accurately applied, if sufficiently comprehensive to be accurate. We think, under the circumstances, that its failure so to do was not reversible error. The kind of negligence which contributed directly and proximately to the loss of the cotton, and "was the direct cause of the loss," and "directly resulted in the destruction of the cotton," would be to the mind of the average juror the immediate and efficient cause, without intervening causes, and therefore the proximate cause. If the court had charged the jury in the language of the Supreme Court in *Scheffer v. R. Co.*, 105 U. S. 249, 26 L. Ed. 1070, the defendant would have had no ground of exception to the failure to define proximate cause. Said language is as follows:

"In order to warrant a finding that negligence or an act amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

But the court went further than this, and charged, in effect, that, in order to establish liability on the part of the defendant, it must appear that the negligence directly and proximately contributed to cause the loss.

We think, on the whole, that the language of the charge was quite as favorable to defendant as was required, under the circumstances.

But it is argued that counsel were entitled to have the jury instructed as to whether certain specific things were proximate or remote causes, as requested in requests 4, 14, and 14a. These requests cover the alleged negligence in the management of the wharf, the stowing and protection of cotton, the inadequacy of the force of watchmen, and the insufficiency of the apparatus for extinguishing fires. The charge of the court had fully covered the general propositions of law applicable to the case, and had instructed the jury to consider the situation in its entirety, and to determine the question of defendant's negligence, and whether such negligence, if found, was the direct and proximate cause of the loss. The court was not bound to charge, as requested, 4, 14, 14a, and 19, assuming those requests to be technically correct, because they singled out particular circumstances, omitting others of equal importance, when the general charge of the court had sufficiently covered the whole situation. The general rule applicable to this subject is well settled by the decisions of this court and of the United States Supreme Court:

"It is much the better practice to refuse to give instructions to the jury, the substance of which has already been stated in the general charge, than to repeat the same charge in different language, although the charge requested may be technically correct as an abstract proposition of law, for a multitude of instructions, all stated in different language and meaning the same thing,

tends rather to confuse than to enlighten the minds of the jury." *New York, Lake Erie & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 75, 12 Sup. Ct. 356, 36 L. Ed. 71.

*Rio Grande Western Railway Co. v. Leak*, 163 U. S. 280, 16 Sup. Ct. 1020, 41 L. Ed. 160; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Texas & Pacific Railway Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; *Pennsylvania R. Co. v. Palmer*, 127 Fed. 956, 62 C. C. A. 588.

The fifth request to charge, which was refused, is as follows:

"(5) If the jury find that there was any delay in forwarding the cotton from Westwego by reason of the negligence of the defendant railway company, or by reason of the failure of the ocean carriers to send for and take away the cotton as it was received at Westwego, and that but for the defendant's negligence in failing to forward the cotton from Westwego, or the ocean carrier's failure to receive and take it away, it would not have been in the cars or under the sheds at the time the fire occurred, such negligent delay in forwarding would not make the defendant liable in this case, for the reason that such negligent delay would, in law, be the remote, and not the direct and proximate, cause of the destruction of the cotton."

We think defendant was entitled to this charge. It states the law as laid down by the Supreme Court of the United States in *Railroad Company v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; and inasmuch as the jury might, on the evidence, have found negligent delay, without instructions that such delay was not the proximate cause, they might have been misled into rendering a verdict for plaintiff on the ground of delay. The question is whether this request was practically covered by the charge of the court. The court charged the jury, *inter alia*, as follows:

"All the various questions relating to the accumulation of cotton on the Westwego wharf just prior to the fire; the sufficiency and efficiency of the care and custody of the cotton by day and by night; whether the watchmen at night, if sufficient, were competent, as firemen, to protect the cotton from fire; whether it was necessary that those in charge of the cotton should have been given reasonable instructions, at least, in the way of managing the fire apparatus; whether the various appliances for extinguishing the fire were such as should have been provided under the circumstances as they then existed; whether access to the appliances was rendered difficult by the manner in which the cotton was piled; whether the appliances themselves could be properly handled, under the circumstances of the case, by those within reach of the cotton on the night of the fire; whether any other facts upon which the plaintiff may rely to establish negligence on the part of the defendant do, in your minds, accomplish that result; and further whether all or any of such facts, if they show negligence, show that kind of negligence which contributed directly and proximately to the loss of the cotton. All these questions, as I said a minute ago, are for you to decide, and upon that decision your verdict will rest."

If this were all that the court had said upon this question, there might be ground for holding the exception well taken. But in its charge the court, after having fully explained to the jury the rule as to reasonable care, also said as follows:

"In order to find the defendant free from negligence, the jury must find that the degree of care exercised on the night of November 12, 1894, was commensurate with the risk as it then existed. The accumulation of cotton on the Westwego wharf at the time of the fire, no matter for what reason it had accumulated, is not alone and by itself enough, even if found to be an act of

negligence, upon which to base a verdict for the plaintiff. Other negligent acts must be coupled therewith before the jury is entitled to find that the negligence directly contributed to the loss of the cotton."

The exception is therefore overruled.

The sixteenth request is sufficiently covered by the charge of the court.

The eighteenth request to charge is as follows:

"(18) Defendant's servants engaged upon said wharf were only called upon to exercise and use ordinary care, and when suddenly called upon in an emergency of the discovery of a fire in the cotton they are not to be held to the exercise of the same degree of caution as in other cases, nor is the defendant to be held liable because of a failure to exercise the best judgment which the case rendered possible. If, when confronted with the sudden emergency of the discovery of the fire, the watchmen employed by the defendant used their judgment, and undertook by the aid of the appliances furnished by it to extinguish the fire, the defendant would not be liable, even if you find that the watchmen did not employ the fire extinguishing apparatus to the best advantage, or exercise the best judgment in using the same."

We think this request was properly refused because it failed to contain any reference to the fact that, if the condition which conduced to the alleged error of judgment was the direct result of the negligence of the defendant, then it would be liable therefor. *Marande v. Texas & Pacific Railway Co.*, supra.

The judgment is affirmed, with costs.

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#### COOPER v. BRAZELTON et al.

(Circuit Court of Appeals, Fifth Circuit. March 7, 1905.)

No. 1,358.

#### 1. CORPORATIONS—ACTIONS—FOREIGN CORPORATIONS—SERVICE OF PROCESS—AGENTS.

A president of a bank to which borrowing members of a foreign building and loan association were accustomed to pay dues and other charges to be forwarded to the home office of the association, but which was without authority from the association to make collections and remittances, and merely performed the work in the course of a general banking business, was not, after the association was in course of liquidation and the bank was transacting no business for it, the agent of the association for the purposes of service of process.

[Ed. Note.—Service of process on foreign corporations, see note to *In re Eggert*, 43 C. C. A. 3.]

#### 2. JUDGMENTS—FOREIGN JUDGMENTS—JURISDICTIONAL RECITALS—CONTRADICTION.

Neither the constitutional provision requiring full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents inquiry in the courts of one state into the jurisdiction of a court of another state by which a judgment was rendered; but the record of such judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist either as to the subject-matter or the person or thing involved in the litigation, the record of the judgment will be a nullity, although it may recite that such facts did exist.



**3. SAME—ATTACK IN FEDERAL COURT.**

The jurisdiction of a state court to render a judgment offered in evidence in a federal court sitting in the same state is open to attack.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1505.]

**4. BUILDING AND LOAN ASSOCIATIONS—STOCKHOLDERS AND BORROWERS—CONSTRUCTION OF CONTRACT.**

Defendant subscribed for shares of stock in a building and loan association, to be paid in monthly installments, and received a certificate therefor. About a month after making this subscription he borrowed a sum of money from the association, giving a bond bearing 10 per cent. interest per annum, payable monthly in advance, to evidence the indebtedness which was secured by an assignment of the stock. *Held*, that the transactions were independent and distinct, and, in the absence of fraud or other vitiating circumstance, were to be performed according to their terms, and defendant could not complain of the application of payments made by him to his liability on his stock dues in accordance with the terms of his subscription and the loan contract, and contend that they should be credited on the bond.

**5. USURY—COLORABLE TRANSACTIONS.**

A transaction in the form of a fictitious building contract, by which a house was to be constructed for \$1,200, but which was in fact a loan of \$900, made in consideration of a note for \$1,200, payable in 60 monthly installments, and providing that installments not paid when due should bear interest at 10 per cent. from the date due until paid, and that, if any installment became due and remained unpaid, the whole sum remaining should become due and payable—was usurious.

**6. ESTOPPEL—INDUCEMENT TO PURCHASE INCUMBRANCES—DENIAL OF VALIDITY OF SAME.**

Where borrowers, in applying for a loan to pay off incumbrances, induced the lender to purchase such incumbrances in reliance on representations as to their existence, they could not, as against the lender, claim that the incumbrances arose out of a usurious transaction, nor could they deny that the amount which they represented as due was actually due thereon.

**7. HOMESTEAD—LIENS—VALIDITY.**

Under Const. Tex. art. 16, § 50, providing that no mortgage or lien on a homestead shall be held valid except such as is created for purchase money and improvements a purported mechanic's lien on a homestead, given simply to secure a usurious loan of money, is void, notwithstanding recitals therein, stating that it is given for labor and material advanced by the lender for improvements on the borrower's homestead.

**8. ESTOPPEL—NOTICE OF DEFECTS.**

Const. Tex. art. 16, § 50, prohibits the creation of liens on a homestead other than for purchase money and improvements. A borrower, in applying for a loan on his homestead, in order to pay off a mechanic's lien, stated that the house on his homestead premises was erected in 1893. The contract which was supposed to create the lien recited that it was for the erection of the house, and was not executed until 1894. The lender examined this contract before making the loan or purchasing the lien. *Held*, that the lender was put on notice of the invalidity of the lien, and the borrower was not estopped to assert the same.

**9. HOMESTEAD—LIENS FOR IMPROVEMENTS—ATTORNEY'S FEES.**

Attorney's fees provided for in a note, secured by a mechanic's lien, for improvements on a homestead, cannot be enforced against the homestead.

Appeal from the Circuit Court of the United States for the Western District of Texas.

Le Roy A. Smith and Drew Pruit, for appellant.  
John B. Scarborough, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MEEK, District Judge.

MEEK, District Judge. Lawrence Cooper, receiver of the Southern Building & Loan Association, filed suit against J. S. Brazelton and his wife, Laura P. Brazelton, in the United States Circuit Court for the Western District of Texas, and asked a decree for certain indebtedness alleged to be due him as such receiver, and evidenced by a certain bond; and to establish and foreclose two certain mechanics' liens alleged to exist upon the homestead of the defendants, and given to secure an original indebtedness, now represented by the bond; also to establish and foreclose a lien upon certain shares of stock of the Southern Building & Loan Association, given as collateral security for the payment of the bond. The defendants answered, and, without setting forth their allegations and defenses in extenso, they may be summarized as follows: (1) By way of special answer a plea of *res adjudicata* was interposed; (2) payment was alleged; (3) that the contract of indebtedness was affected with usury; (4) that one of the mechanics' liens sought to be established and foreclosed on their homestead was invalid. The facts and the contentions of the respective parties will be stated in the course of the opinion.

The appellees' plea of *res adjudicata* interposed as an answer to appellant's cause of action stands at the threshold of the case, and should be first considered. The former adjudication relied upon by the appellees was the result of a suit instituted by them, as plaintiffs in the district court of McLennan county, Tex., against several defendants, one of the number being the Southern Association. The judgment in that case decreed the indebtedness represented by the bond which is the basis of this action to be fully paid and discharged. It also canceled, annulled, and avoided the liens sought by appellant's bill to be foreclosed. The Southern Association was a foreign corporation, organized under the laws and domiciled in the state of Alabama. Jurisdiction is alleged to have been acquired and exercised in this suit by virtue of the service of citation upon it by serving one W. W. Seely as its agent. The judgment recites that the Southern Association "had been duly and legally cited" in the action. No appearance or answer was made by the association, and judgment was taken against it by default.

The jurisdiction of the district court of McLennan county to render this judgment depended upon whether or not Seely was the agent of the association at the time of service, and the fact of his agency is controverted. W. W. Seely was the proprietor and president of the Waco State Bank. The Southern Association had a membership at Waco; that is, parties resided there who were shareholders in and borrowers from the association. At the instance and for the benefit of these the Waco State Bank received and remitted to the association at Huntsville, Ala., dues and other collections made from them. Whoever happened to be at the collection window in the bank received the money and receipted for the amount in a passbook held by the member. No authority had been given

by the association to Seely or the bank to make these collections and remittances, nor had instructions been given as to the handling of them. The work seems to have been performed simply in the course of a general banking business. But even this course of business had ceased prior to the time of the institution of this suit in the state court. The affairs and property of the association had theretofore been placed in the hands of appellant as receiver, and the association was not transacting any business of any character. Its officers and agents had been enjoined from representing it, or taking any action whatsoever with relation to its affairs. We do not believe, under these circumstances, service on the association by service on Seely as its agent could be considered effective and valid service, sufficient to support the jurisdiction the district court assumed and exercised in this case.

In the course of the opinion in *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808, Chief Justice Fuller says:

"In *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897, a leading case in this court, it was ruled that 'neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered'; that 'the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist'; and that 'want of jurisdiction may be shown either as to the subject-matter of the person, or, in proceedings in rem, as to the thing.'"

It is also a well-settled rule that the question of jurisdiction is open to inquiry when the judgment of a court of the state comes under consideration in a court of the United States sitting in the same state. *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. It is shown to our satisfaction that jurisdiction was not vested in the district court of McLennan county, Tex., to render this judgment against the Southern Association, and its action will therefore be considered as a nullity.

In February, 1896, J. S. Brazelton subscribed for 24 shares, of the par value of \$50 each, of the capital stock of the Southern Association, for which a certificate was issued to him. These shares were to be paid for in monthly installments of 35 cents per share. Subsequently, in March, 1896, he and his wife made written application to the association to purchase and carry for them certain outstanding indebtedness against their homestead, and represented such indebtedness to be secured by mechanics' liens. The association advanced \$1,000 for this purpose, and purchased such outstanding indebtedness and the liens securing same. In consideration of the advance of \$1,000 and the renewal of the indebtedness, the appellees gave their bond to the association in terms and figures as follows:

"\$1000.00.

Waco, Texas, March 28, 1896.

"Eight years after date we promise to pay to the Southern Building and Loan Association, a corporation organized under the laws of the State of

Alabama, the sum of one thousand (\$1,000.00) dollars, with interest thereon, at the rate of ten per cent per annum, from date, payable monthly, in advance, on the first day of each month; and in event default is made in the payment of this obligation when the same becomes payable, and it is placed in the hands of an attorney for collection, then an additional amount of ten per cent on the principal and interest of this obligation shall be added to same as attorney's fees; and we transfer and assign as collateral security certificate No. 12,859 in said association, issued to us for 24 shares.

"And it is hereby stipulated and agreed that in the event we fail to pay said interest on said indebtedness, or the instalments on said shares for a period of three months, then the said entire indebtedness shall become due and payable, and said shares shall become forfeited to said association, under its by-laws.

"It is expressly understood that this obligation is given as a renewal of certain indebtedness owing by us to said association, and secured by two mechanic's liens on certain real estate described in the deed of trust executed as collateral hereto.

"Witness our hands this the 28th day of March, 1896.

"J. S. Brazelton.

"Laura P. Brazelton."

In accordance with its provisions, the shares of stock were transferred and assigned to the association as collateral security for the payment of the bond. Subsequent to his purchase from it of the shares of stock and the making of this bond, Brazelton paid to the Southern Association the sum of \$1,304.45. This amount was applied by the association to payments of stock dues and to payments of interest and premium charges on the advance of \$1,000 made for him. Appellees contend that they are entitled to credit on their bond of the amount paid by Brazelton on his stock subscription; that Brazelton did not desire to become a bona fide shareholder in the association, and was compelled to subscribe for shares in order to secure a part of the loan or advance made on his behalf. This contention cannot be upheld. The subscription for the stock by Brazelton and the subsequent loan or advance of money in his behalf were two separate and independent transactions, and he cannot be heard to deny the validity or effectiveness of legal contracts entered into by him. It is neither alleged nor attempted to be shown that any fraud was perpetrated upon him, or that he is non compos mentis, and therefore must be held to a performance of his contracts. *Andrus v. People's Loan & Savings Association*, 94 Fed. 575, 36 C. C. A. 336; *Manship v. New South Building & Loan Association (C. C.)* 110 Fed. 854; *Association v. Abbott*, 85 Tex. 224, 20 S. W. 118. Only in event the subscription for shares of stock by Brazelton and the loan or advance to him and his wife were considered as one transaction, resulting in the amounts paid in stock subscriptions being applied as payments on the advance or loan, could the transaction be held to be usurious, as the bond for the advance or loan simply calls for 10 per cent. interest, payable monthly in advance, from the date of the making until the same is satisfied.

Six hundred of the \$1,000 advanced at the request of the appellees was used by the Southern Association in the purchase of an indebtedness and purported mechanic's lien held by the Texas Building & Loan Association of Corsicana, Tex., against the homestead of the appellees. It is the contention of the appellees that the transaction by which they became indebted to the Texas Association was tainted with usury, and

that their obligation in the hands of the appellant is affected with this vice. The facts of this transaction, as disclosed by the record, are as follows: In April, 1893, J. S. Brazelton and his wife, Laura P. Brazelton, purchased certain lots in the city of Waco for a homestead. A house was erected on these lots during the month of December, 1893, which was occupied as a residence by them on January 8, 1894. Subsequent to the erection of the house and the occupancy of the premises as a homestead, and on January 18, 1894, Brazelton and his wife, for the purpose of recouping his business for money withdrawn from it in making payments for the building, borrowed \$800 from the Texas Association. For and in consideration of this loan they gave their note to this association for \$1,200, in terms and figures, as follows:

"Homestead Lien. \$1,200.00.

Corsicana, Texas, January 18, 1894.

"For value received we promise to pay to the Texas Building & Loan Association, or order, at their office, in Corsicana, Texas, the sum of twelve hundred and no/100 dollars, payable in 60 monthly instalments of twenty and no/100 dollars each, the first instalment to be paid on the 18th day of February, 1894, and one instalment on the 18th day of each succeeding month thereafter until the whole sum is paid, conditioned that if any instalment becomes due and remains unpaid for ten days thereafter, then, at the option of the holder of this note, the whole sum remaining unpaid shall become immediately due and payable; instalments not paid when due shall in any and all events bear interest at the rate of ten per cent per annum from date due until paid; conditioned also, that we will pay ten per cent additional on the amount then due as attorney's fee if this note or any part of it is collected by suit. This note is given for labor and material advanced us by the Texas Building and Loan Association for the improvement of our homestead premises, and to secure the payment hereof we have this day executed to the said Texas Building and Loan Association a lien on said homestead premises superior to the homestead exemptions, which premises are described as follows, to-wit: All that certain lot of land being 100 x 165 feet in the city of Waco, McLennan Co., Texas, reference being made to said lien of even date herewith for more particular description.

"[Signed]

J. S. Brazelton.

"Laura P. Brazelton."

At the same time a building contract was entered into between Brazelton and his wife and the Texas Association by the terms of which a purported mechanic's lien was sought to be fixed on their homestead to secure this loan. The building contract also purported to provide for the erection of a house, which had in fact theretofore been erected on the lots purchased by the Brazeltons, and was at that time occupied by them as a home. It also recited that the Texas Association was to provide all material for the erection of the house, and was to perform all labor in its construction, and was to receive in consideration therefor the sum of \$1,200. This transaction was in fact a loan by the Texas Association to the Brazeltons of \$800 for and in consideration of which it received their note for \$1,200, 50 per cent. more than the actual principal of the loan. It was provided that installments not paid when due should bear interest at the rate of 10 per cent. per annum from date due until paid; also that, if any installment became due and remained unpaid, at the option of the holder of the note, the whole sum remaining should become immediately due and payable. This transaction was certainly usurious. The makers of the note could set up and take advantage of its usurious character as against the Texas Associa-

tion, but are they in position to urge the defense of usury against the appellant, the present holder? The Brazeltons made written application to the Southern Association for an advance or loan of \$1,000, with a part of which to take up the indebtedness and to purchase the lien held by the Texas Association. Certain questions and answers formed a part of the application, and among others are the following:

"(1) Main building—what material? Frame. When built? 1893." "(26) Is this your homestead? Yes. If so, how long have you lived on these premises? 18 months." "(30) Are there any unrecorded deeds, mortgages, judgments, mechanic's lien, or incumbrances on this property? Yes. If so, for what amount? \$600.00. In favor of whom? Texas Building & Loan Association."

As a part of and appended to the application for the loan is the following affidavit:

"State of Texas, McLennan County. J. S. Brazelton and wife, Laura P. Brazelton, being duly sworn, depose and say that they made, and have read the above statements; that they were made for the sole purpose of inducing the Southern Building & Loan Association to purchase the indebtedness and liens above mentioned, and that the statements herein made are true.

"Witness our hands at Waco, Texas, this the 16th day of March, 1893.

"J. S. Brazelton.

"Laura P. Brazelton."

The Southern Association made examination of the building contract entered into between the Brazeltons and the Texas Association and of the note for \$1,200 given the latter, and believing the recitations contained in the contract and note, and believing and relying on the representations that there were \$600 still due and owing upon the mechanic's lien contract and note, advanced this sum for the defendants to the Texas Association, thus purchasing the note and lien. The Brazeltons, parties to this usurious contract, by their affirmative representations made to the Southern Association, induced it to rely upon the validity of the contract, and have in conscience estopped themselves from taking advantage of the usury therein. Webb on Usury, § 439; Jones on Mortgages (4th Ed.) vol. 1, § 631; Pomeroy on Equity, vol. 2, § 804. They are also estopped from denying that there were \$600 still due and owing upon the mechanic's lien contract and note at the time of its purchase by the Southern Association, because of their representations to that effect.

It is also contended by appellees that the purported mechanic's lien given to secure the debt to the Texas Association is void and of no effect, and should be so declared and held. The Constitution of the state of Texas provides that "no mortgage, trust deed or other lien on a homestead shall ever be held to be valid except for the purchase money therefor and improvements made thereon, \* \* \* whether said mortgage or trust deed or other lien shall have been created by the husband alone, or together with his wife." Article 16, § 50. The purported mechanic's lien on their homestead given by Brazelton and his wife to the Texas Association was not given for improvements made thereon, but for what was in fact simply a usurious loan of money. Chief Justice Stayton, in *Texas Land & Loan Company v. Blalock*, 76 Tex. 87, 13 S. W. 13, says:

"The Constitution forbidding the fixing on the homestead of liens other than such as are thereby expressly permitted, no estoppel can arise in favor of a lender who has attempted to secure a lien on homestead in actual use and possession of the family, based on declarations of the husband and wife made orally or in writing contrary to the fact. To hold otherwise would practically abrogate the Constitution. If property be homestead in fact and law, lenders must understand that liens cannot be fixed upon it, and that declarations of husband and wife to the contrary, however made, must not be relied upon. They must further understand that no designation of homestead contrary to the fact will enable parties to evade the law and incumber homesteads with liens forbidden by the Constitution. *Mortgage Co. v. Norton*, 71 Tex. 683, 10 S. W. 301; *Pellat v. Decker*, 72 Tex. 581, 10 S. W. 696; *Kempner v. Comer*, 73 Tex. 208, 11 S. W. 194."

The pretended mechanic's lien is therefore void, notwithstanding the recitations and representations, which, if in fact true, would render it a valid lien. But appellant says that, even if this lien was void between the original parties, the Southern Association was induced by appellees to purchase it in good faith, and for a valuable consideration, and they cannot, therefore, be heard to contend that it is invalid. While the recitals in the mechanic's lien contract between these parties and the Texas Association were false, and calculated to mislead, yet in the written application for the loan or advance of \$1,000 the Brazeltons, in response to the question put to them by the association, revealed the fact that the house was erected on the homestead in 1893. The purported contract for its erection entered into with the Texas Association, and by which it was sought to fix the mechanic's lien, was not executed until January 18, 1894. This contract came into the possession of the Southern association, and was examined by it before the debt and the lien securing it were purchased. So that the association was put on notice that the lien was sought to be fixed on the homestead at a date when, under the law, it could not be so fixed. We therefore deem it unnecessary to further discuss complainant's contention of estoppel.

In March, 1896, the Brazeltons, being desirous of improving their homestead by the erection of an addition thereto, entered into a contract with Alex McKechney, contractor, to make the improvements. In consideration for furnishing material, supplying labor, and completing the improvements, they gave him their note for \$400, in terms and figures as follows:

"\$400.00.

Waco, Texas, March 27th, 1896.

"Sixty days after date, for value received, we promise to pay to Alex McKechney or order, Four Hundred Dollars, at Waco, Texas. To bear interest at the rate of 10 per cent per annum from maturity. And further hereby agree that if said note is not paid when due, to pay all costs necessary for collection, including ten per cent for attorney's fees. Secured by mechanic's lien on our homestead.

"Due ———, No. ———,

J. S. Brazelton,  
"Laura P. Brazelton."

A mechanic's lien was duly given to secure this note. Upon application of the Brazeltons, the note and lien were purchased by the Southern Association. The lien was held by it as security for the payment of the bond of \$1,000 executed by the Brazeltons in extension and renewal of their indebtedness. No contention is made that this is not a valid and effective lien. It is contended, however, that the lien cannot

be held to secure the payment of the attorney's fee provided for in the note. On the authority of the case of *Harn v. Building Association*, 95 Tex. 79, 65 S. W. 176, we so hold.

The views herein expressed being held by a majority of the court, the decree rendered in the court below will be reversed, and a decree will be entered awarding appellant judgment for the principal sum of the bond, with interest thereon at the rate of 10 per cent. per annum from September 28, 1902, and attorney's fees as provided in the bond; decreeing the establishment and foreclosure of the mechanic's lien originally given to McKechney for \$400 and interest upon the premises described; and also decreeing the establishment and foreclosure of the lien on the shares of stock given as collateral security to the bond. Costs against appellees.

### INDIAN LAND & TRUST CO. v. SHOENFELT et al.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1905.)

No. 2,077.

#### 1. EQUITY—JURISDICTION—FEDERAL COURTS—REMEDY AT LAW ADEQUATE.

The Constitution and act of Congress deny the national courts' jurisdiction in equity where the complainant has a plain, adequate, and complete remedy at law.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 121-166.]

#### 2. SAME—NO JURISDICTION TO ENJOIN SINGLE TRESPASS.

A court of equity has no jurisdiction to enjoin a single trespass upon agricultural land where the probable injury is not shown to be destructive of any part of the real property or irremediable, because an action at law for damages will afford adequate satisfaction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 98.]

#### 3. SAME—PLEADING—AVERMENT OF IRREPARABLE INJURY.

The averment of irreparable injury is futile, in the absence of allegations of facts from which the court can see that irremediable mischief may be apprehended from the threatened wrong.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 232.]

#### 4. SAME—FACTS AND DECISION.

Averments in a bill that the owner of a leasehold estate for five years in 200 acres of agricultural land, upon which its tenant had planted a crop, is, with his tenant, about to be removed from 80 acres of the land by one without right, that the complainant paid \$150 for the leasehold and \$80 for the improvements on the premises, and that it will suffer irreparable injury from the threatened eviction, state no ground of equitable cognizance.

#### 5. SAME—PRACTICE—DISMISSAL FOR WANT OF JURISDICTION.

Where a court of equity has no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered upon that ground, or must expressly provide that it is made without prejudice.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 771.]

A general decree of dismissal, without more, renders all the issues presented in the case res adjudicata, and constitutes a bar to an action at law for the same cause.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1028-1045.]

(Syllabus by the Court.)



Appeal from the United States Court of Appeals in the Indian Territory.

The Indian Land & Trust Company, a corporation, exhibited its bill in equity against J. Blair Shoenfelt, United States Indian agent, Samantha Barnett, and T. A. Barnett, the guardian of Sally Hodge, a minor, in the United States Court in the Indian Territory, in the Western District at Muskogee. The material averments of the bill disclosed these facts: In August, 1902, Samantha Barnett, the mother of the minor, Sally Hodge, and one Luke Nevins, her stepfather, leased to the complainant, a corporation, for the term of five years from January 1, 1903, and for a rental of \$150, and any improvements there might be upon the premises at the end of the term, 200 acres of land, 80 acres of which were owned by Sally Hodge and 120 by Samantha Barnett. Barnett claimed to have some improvements upon this land, and the complainant paid him \$80 for them. Thereupon the trust company leased the land to one Heytz, who planted a crop upon it. At the instance of Samantha Barnett, letters of guardianship of Sally Hodge, the minor, were issued by the court to Barnett. Barnett and Samantha Barnett were insolvent. Shoenfelt, the United States Indian agent, threatened to remove the complainant and its tenant from the 80 acres of land owned by Sally Hodge at the instigation of Barnett and Samantha Barnett, and such a removal would irreparably injure the complainant. Samantha Barnett and Sally Hodge were Creek Indians, who had been in possession of the land as their allotments for more than a year, and Shoenfelt, as Indian agent, had no jurisdiction or authority to remove the complainant or its tenant therefrom. The prayer of the trust company was that the defendants should be enjoined from interfering with the possession of the land, and that Shoenfelt, the Indian agent, should be forbidden from taking the possession of it from the complainant and delivering it to the defendant Barnett, as the guardian of Sally Hodge, the minor. A general demurrer to this bill was sustained, and the suit was dismissed. The United States Court of Appeals for the Indian Territory affirmed this decree, and its decree of affirmance is here challenged by appeal.

Preston C. West, for appellant.

Horace L. Dyer (David P. Dyer and Bert D. Nortoni, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The seventh amendment to the Constitution of the United States, which has been extended over the Indian Territory by act of Congress (26 Stat. pp. 81-96, c. 182, § 31), provides that "in suits at common law where the value in controversy exceeds twenty dollars the right to trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined by any court in the United States than according to the rules of the common law." Congress has enacted that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." Rev. St. § 723 [U. S. Comp. St. 1901, p. 583]. In *Hipp v. Babin*, 19 How. 271, 278, 15 L. Ed. 633, the Supreme Court, declared that "whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." *Thomas v. Council Bluffs*

Canning Co., 34 C. C. A. 428, 431, 92 Fed. 422, 424. Although this objection to the jurisdiction in equity of a national court is not made by demurrer, plea, or answer, or suggested by counsel, it is the duty of the court, where it clearly exists, to recognize it of its own motion and to give it effect. *Lewis v. Cocks*, 23 Wall. 466, 470, 23 L. Ed. 70; *Hipp v. Babin*, 19 How. 271, 278, 15 L. Ed. 633.

A court of equity has no jurisdiction to enjoin a single trespass upon agricultural land where the probable injury is not shown to be destructive of any part of the real property, or irremediable, and an action at law for damages will afford adequate satisfaction. *Jerome v. Ross*, 7 Johns. Ch. 315, 331, 332, 11 Am. Dec. 484; *Troy & B. R. Co. v. B. H. T. & W. R. Co.*, 86 N. Y. 107, 126; *Hart v. The Mayor*, 8 Paige, Ch. 213, 214; *Akrill v. Selden*, 1 Barb. 316, 317; *Beach on Injunctions*, § 34.

The averment of irreparable injury in a bill is futile, in the absence of allegations of facts from which the court can see that irremediable mischief may be reasonably apprehended from the threatened wrong. *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 603, 17 Pac. 703; *McHenry v. Jewett*, 90 N. Y. 58, 62; 1 High on Injunctions, § 722; *Beach on Injunctions*, § 34.

The threatened wrong the perpetration of which the complainant seeks to enjoin is the removal of itself and its tenant from 80 acres of agricultural land by the defendant Shoenfelt, the United States Indian agent to the Five Civilized Tribes. There is no allegation in the bill that Shoenfelt is unable to respond to any damages which he may inflict by this removal, or that he is insolvent. The bill contains a bald averment that irreparable injury will be inflicted upon the complainant by its removal from the land, but it contains no allegation of any facts from which the court can see or infer that any irremediable mischief will result. On the other hand, it contains averments which disclose the fact that the only legal injury which could be caused by the threatened wrong would be the loss by the complainant and its tenant of the value of the leasehold estate they claim to own for the remainder of its term, and this loss is perfectly capable of ascertainment and compensation in damages. If Shoenfelt, the Indian agent, has the jurisdiction and lawful authority to remove the complainant and its tenant from the land of the minor, the damages that may result to the complainant from that act will inflict upon it no legal injury, and will afford no ground for an action at law, and the threat of that removal presents no basis for the maintenance of a suit in equity. If, on the other hand, as the complainant avers, Shoenfelt, as Indian agent, has no lawful right or authority to effect such a removal, he will be personally liable to the complainant for all the injury the removal inflicts (*Bates v. Clark*, 95 U. S. 204, 209, 24 L. Ed. 471), and an action against him for the damages resulting will afford to the complainant a plain, adequate, and complete remedy at law. For this reason the United States Court for the Western District of the Indian Territory had no jurisdiction of this suit in equity, and it should have been dismissed without prejudice to an action at law, or upon the express ground that the court was forbidden by the Constitution and the act of Congress to take jurisdiction of it in equity.

Because the trial court had no jurisdiction of this suit, this case does not present for the consideration of this court the question whether or not a lease for five years by the parent or natural guardian of a Creek Indian, who is a minor, of her allotment of agricultural land, is valid, and it is believed to be unwise to consider or determine that question until a case arises which fairly presents it, in view of the fact that so many other questions necessarily involved in other suits pending here are awaiting the consideration and decision of this court.

The record in this case does not disclose whether the decree of dismissal of the court below contains a provision which clearly shows that the suit was dismissed because the court had no jurisdiction of it in equity, or a provision that it was dismissed without prejudice. It does, however, contain an opinion upon the merits of the case, from which it is inferred that the decree evidences a dismissal upon the merits. A general decree of dismissal of a suit in equity, without more, renders all the issues in the case *res adjudicata*, and constitutes a bar to an action at law for the same cause. Hence, when a court of equity has no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law for any damages he may sustain if he is so advised. *Mitchell v. Dowell*, 105 U. S. 430, 26 L. Ed. 1142; *Cecil National Bank v. Thurber*, 59 Fed. 913, 914, 8 C. C. A. 365, 367; *Russell v. Clark*, 7 Cranch, 69, 90, 3 L. Ed. 271; *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 49 C. C. A. 229, 233, 111 Fed. 81, 85; *House v. Mullen*, 22 Wall. 42, 46, 22 L. Ed. 838; *U. S. v. Pine River Logging & Improvement Co.*, 78 Fed. 319, 325, 24 C. C. A. 101, 107; *Speer v. Board of County Commissioners*, 88 Fed. 749, 752, 32 C. C. A. 101, 105.

The decrees of the courts in the Indian Territory are reversed, and the case is remanded with directions to the United States Court in the Western District of the Indian Territory, at Muskogee, to enter a decree of dismissal of the suit which shall adjudge in the decree that the suit is dismissed because the court has no jurisdiction in equity of the alleged cause of action, or which shall adjudge that the suit is dismissed without prejudice to an action at law for the same cause presented in this suit.

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AMERICAN SURETY CO. v. CHOCTAW CONST. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1905.)

No. 1,962.

1. TRIAL—INSTRUCTIONS—BASIS IN EVIDENCE.

A trial court is not required to instruct a jury, at the instance of defendant, concerning a defense which, as a matter of law, is insufficiently supported by the evidence.

2. PRINCIPAL AND SURETY—ALTERATION OF CONTRACT—RIGHTS OF OBLIGEE.

Where a contract for materials to be furnished for the construction of a railroad did not refer to any survey, plat, or map, nor to any specific intermediate route which the railroad would follow, it was open to the

construction company to make any reasonable selection of routes between the designated termini; and the selection of one route instead of another did not constitute a change in the contract for materials, in such sense as to relieve the materialman's surety from liability for the materialman's default.

**4. CONTRACTS—ACTIONS—DEFENSES—EVIDENCE—SUFFICIENCY.**

In an action for the failure of a contractor to furnish railroad ties in accordance with his contract, evidence *held* sufficient to present for the consideration of the jury the defense of plaintiff's violation of its obligation under the same contract to furnish the motive power for the transportation of other ties.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

The Choctaw Construction Company and the Choctaw, Oklahoma & Gulf Railroad Company sued the American Surety Company to recover damages alleged to have been sustained by the failure of certain contractors, for whom the defendant was surety, to fulfill a contract for the sale and delivery of railroad ties. The construction company was engaged in building a railroad in Arkansas, and the railroad company was engaged in building one in the Indian Territory. They contemplated a connection of their lines by building from Howe Junction, in the territory, to within five miles of Little Rock, Ark., a distance of about 160 miles. With this in view, they jointly contracted with Graham & Miller, who were termed the contractors, for the ties that were necessary for the new construction. The contract, which was in writing, specified the prices of the several kinds of ties, and contained a clause providing that, if the contractors failed to perform their obligations, the Choctaw Companies might procure the ties elsewhere, and collect from them any additional expense thereby incurred. There was also a provision that the contractors should, within a fixed period, ship over the railroad lines of those companies, when completed, to South McAlester, in the Indian Territory, not less than 250,000 ties for commercial use, at an agreed freight rate of 12 cents per tie. For a better understanding of this provision, it should be stated that Graham & Miller had a contract to furnish another railroad company the ties which would be shipped to South McAlester at a price which would produce a net profit to them of 5 cents per tie, and it was claimed that the 12-cent freight rate was a concession, and one of the principal inducements which led them to enter into the contract before us. Graham & Miller, as principals, and the American Surety Company, as surety, executed to the Choctaw Companies a bond in the penal sum of \$15,000, conditioned that the principals should perform all of their undertakings under the contract.

The contractors failed to fully comply with their contract, and the suit against the surety company was for the damages alleged to have been caused by their default, which were laid at the sum of \$14,785.69. During the trial the surety company withdrew its denials of the correctness of the items composing the plaintiffs' claim and rested its defense upon three affirmative propositions: (1) Fraud practiced by the plaintiffs upon Graham & Miller in inducing them to enter into the contract; (2) a change in the contract, operating to release the surety on the bond; (3) damages sustained by Graham & Miller by reason of the refusal of the Choctaw Companies to transport the 250,000 commercial ties to South McAlester, thereby depriving the former of a large profit in their sale.

The defense of fraud was based upon the following contentions: For a part of the distance between the termini of the new line to be constructed, the Choctaw Companies had under consideration three routes, of which they made preliminary surveys. The first, known as the Dutch Creek route, was soon discarded. The other two were known as the Sugar Creek and the Booneville routes. They covered about 60 or 70 miles of an intermediate portion of the contemplated line. There was evidence tending to show that along the Sugar Creek route there was an abundance of timber, within the usual hauling distance, from which ties could be cut, and that there was a scarcity of such timber along a portion of the Booneville route. It was claimed that, before Gra-

ham & Miller made their bid to furnish ties, they were informed by an authorized official of the Choctaw Companies that the Sugar Creek route had been adopted, and that they entered into the contract upon the faith of that information, and after an examination of the timber along the line of survey, although, as a matter of fact, when they signed the contract the Booneville route had been officially selected as the permanent location. It was also claimed that the deficiency of the timber along the line of the latter route was the cause of the default of the contractors, and that the official of the Choctaw Companies who had to do with the matter perpetrated a fraud upon them by a false representation as to the line on which the road would be built.

The defense that the contract with Graham & Miller had been altered, and that the surety was thereby released, was based substantially upon the contention that there had been a change of the route which was in contemplation when the contract was made.

The Circuit Court refused to instruct the jury upon the question of fraud, and also declined to submit to the jury the defense of damage to the contractors growing out of the refusal to transport the commercial ties. The question concerning a change in the contract was submitted to the jury under the instructions of the court, and was determined by them in favor of the plaintiffs. A verdict was returned against the surety company for the sum of \$15,123.63; being the amount of the plaintiffs' claim, and presumably accrued interest. From the judgment thereon this proceeding in error was prosecuted.

G. B. Rose and Charles Claflin Allen (John D. Johnson and Eben Richards, on the brief), for plaintiff in error.

J. M. Moore (W. B. Smith, on the brief), for defendants in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

1. The Circuit Court properly declined to give the instruction upon the question of fraud which was tendered by the surety company. A thorough examination of the record discloses no warrant for that ground of contention, and a trial court is not required to instruct a jury, at the instance of a defendant, concerning a defense which, as matter of law, is insufficiently supported by the evidence.

2. Much of the charge of the court and the briefs of counsel is devoted to a consideration of the defense that the contract, for the faithful performance of which the surety company obligated itself, was changed, and that the surety company was thereby released from liability upon the bond. We are unable to perceive any merit in this defense. The contractors knew when they went over the Sugar Creek route that the survey was merely preliminary, and that there had been no permanent location of the line. There was no contract or agreement, either express or implied, binding the constructing companies to the selection of that particular route. The Booneville or northern route was finally selected as the permanent line on October 29, 1898, and the contract and bond now in controversy were executed on the 12th of the following December. There is nothing whatever in either of those instruments even remotely indicating that the Sugar Creek route was intended. The termini of the contemplated line of railroad as specified in the contract were not changed. The Booneville and Sugar Creek surveys covered but an intermediate portion of the contemplated line of railroad,

and both of them ran in the same general direction. In a railroad sense, they were parallel, being at their point of widest separation but a few miles apart. They diverged and came together at common points. The Booneville route was in the general line of connection between the termini specified in the contract, and, under the terms of that instrument, its selection was open to the constructing companies, in the fair fulfillment of their obligations under the contract. Had the contractors desired to restrict the companies to any particular line or route, they should have caused a stipulation to that effect to be inserted in the contract, or have made suitable reference to some map, plat, or other accompanying instrument to accomplish the same result. The problem of selection between the two routes, as presented to the railroad officials, was simply one of expediency, which to a greater or less degree presents itself in the construction of every railroad of appreciable length. If one contracting to furnish materials for the construction of a railroad does not limit it to a certain line, route, or survey, the option of reasonable selection between the termini is open to the constructing company. Of course, this does not mean, as counsel contend, that a surety for the faithful performance of a contract to construct a railroad between two specified cities could be held responsible for a failure of his principals to construct a railroad between other cities widely distant from those mentioned. There was no reference in the contract before us to any survey, plat, map, or to any specific intermediate route; and the line which was actually adopted, and on which the road was finally constructed, was fully within the letter of the contract. We are unable to see that, under the facts in the case which were either conceded or fully proved, the contract was changed at all; and this makes unnecessary a consideration of the question whether a change in a contract must be a material one, to effect a release of a surety.

3. There was evidence which tended to show that Graham & Miller had a contract to furnish the Missouri, Kansas & Texas Railway Company with ties at a price which, after deducting the cost of production, transportation, and delivery, would have yielded them a profit of 5 cents per tie; that, after the completion of the railroad of the Choctaw Companies, there were certain ties along the line which were cut by subcontractors of Graham & Miller, and were available for use under that contract; that, although Graham & Miller were embarrassed by lack of funds of their own to pay for the ties, the Missouri, Kansas & Texas Company stood ready to pay for them when they were inspected and loaded upon the cars, and that difficulty would thereby have been avoided; that the last-mentioned company was also ready to furnish the cars for the transportation of the ties to South McAlester, the place of delivery, but the Choctaw Companies, in violation of their express obligation, refused to furnish the motive power for their movement. The evidence upon this subject was sufficient to require its submission to the jury, and the Circuit Court should not have withdrawn that defense from their consideration. It should be observed, however, that, viewing the evidence in a light most favorable to the surety

company, the damage proved to have been sustained by their principals by reason of the default of the Choctaw Companies might have amounted to, but could not have exceeded, the sum of \$2,000.

The order will therefore be that if, within 30 days after this date, the defendants in error shall file in the Circuit Court a remittitur and satisfaction in the sum of \$2,000, and shall file a certified copy of such remittitur and satisfaction in this court, the judgment as so reduced will be affirmed; otherwise it will be reversed, and a new trial awarded. In either event the defendants in error shall pay the costs of this proceeding in error.

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KINNEY et al. v. MANITOWOC COUNTY, WIS.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1905.)

No. 1,083.

1. COUNTY BOARD—COMMITTEES—AUTHORITY—CONTRACTS.

Where a county board empowered a committee to investigate and report regarding "the best manner of raising funds" for the construction of a new courthouse, and to make recommendations, and a report in writing, together with plans and specifications, on or before a specified date, such committee had no authority to decide to build the courthouse, nor to employ architects to prepare "working plans and specifications," but only preliminary plans and specifications for the information of the board.

2. SAME—PERFORMANCE OF AUTHORITY.

Where a resolution of a county board appointed a committee to procure plans for a courthouse at a cost not exceeding \$100,000, the committee had no authority to contract with architects for plans for a courthouse costing \$100,000, "exclusive of heating and plumbing."

3. SAME—EXTENSION OF TIME.

Where a resolution of a county board for the construction of a courthouse empowered a committee to prepare and submit plans by April 1, 1903, the committee had no authority to extend the time within which architects contracted with might prepare plans for submission to April 21, 1903.

4. SAME—CONTRACT—PERFORMANCE.

Where plaintiffs alleged that they contracted to furnish seven sets of working plans for the construction of a courthouse, other than preliminary plans and specifications which architects furnish gratuitously, and only four sets of plans and specifications were furnished, which in twenty different particulars failed to give such detailed drawings and specifications as were required for a builder's guidance, without plans for heating, lighting, or plumbing, and plaintiffs only claimed that the plans furnished were sufficient to enable a contractor to bid on the building, there was no performance of the contract sufficient to entitle plaintiffs to recover thereon.

5. SAME—QUANTUM VALEBAT.

Where plaintiffs contracted to furnish working plans and specifications for a courthouse, but they were not entitled to recover on the contract, both by reason of its invalidity and for their failure to perform, they could not recover the value of the use of plans and specifications furnished, which were not used except to enable the county board to abandon the project of erecting the building, in the absence of proof of the value of such use.

6. SAME—CONTRACT PRICE.

The contract price for such plans was no evidence of the fair value of the use made of the plans so furnished.

**In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.**

At the conclusion of the evidence offered by plaintiffs in error in support of the two counts of their declaration, the court directed the jury to return a verdict for the defendant.

The first count set forth that on March 7, 1903, the parties entered into a written contract whereby the plaintiffs agreed to furnish the defendant seven sets of plans, specifications, and detailed drawings for a courthouse building to be erected at Manitowoc, Manitowoc county, Wis., and the defendant agreed to pay the plaintiffs therefor \$3,500 on or before June 5, 1903; that the plaintiffs performed their part of the contract, and that the defendant accepted their plans, specifications, and detailed drawings, but failed and refused to pay.

The second count averred that the defendant was empowered by the statutes of the state to construct and maintain a courthouse; that to exercise such power it is convenient and reasonably necessary that plans, specifications, and detailed drawings be provided; that plaintiffs, at the special instance and request of the defendant, through its county board, furnished to the defendant plans, specifications, and detailed drawings, which the defendant accepted, retained, and used; that the defendant failed and refused to pay therefor; and that the true and fair value thereof was \$3,500.

The evidence was this:

On November 18, 1902, the county board adopted the following resolution: "Whereas, the courthouse of Manitowoc county is old, inconvenient and unsanitary; and

"Whereas, the vaults of the various county offices are crowded and inconvenient on account of lack of space; and

"Whereas, the interests of the people of Manitowoc county demand better and more convenient county offices. Now, therefore,

"Be it resolved, by the county board of supervisors of Manitowoc county, that it is the sense of this board that said county should immediately proceed to the erection of a more commodious and convenient courthouse, at a cost not exceeding one hundred thousand dollars (\$100,000); be it

"Further resolved, that the chairman of said board be and he hereby is directed to appoint a committee of five members from said board to procure plans and specifications of a suitable courthouse for Manitowoc county, and to investigate and report as to what would be the best manner of raising funds wherewith to erect a new courthouse, and to make such further recommendations relative to the matter of erecting a courthouse building as they may deem of value to the county board of supervisors of said county; be it

"Further resolved, that said committee make and file its report in writing, together with plans and specifications, with the county clerk of said county, on or before the 1st day of April, 1903."

The special committee of five was appointed, and, after examining several preliminary plans and specifications submitted by various architects, they entered into the following contract with the plaintiffs: "This agreement, made the 7th day of March, 1903, between Kinney & Detweiler, architects, of Minneapolis, Minnesota, parties of the first part, and the committee on plans and specifications as appointed by the county board of supervisors of Manitowoc County, Wis., as per resolution adopted by the board of county supervisors of Manitowoc County, Nov. 18th, 1902, party of the second part,

"Witnesseth: That the said parties of the first part, for and in consideration of the covenants and agreements hereinafter contained and agreed to be performed by and on the part of said party of the second part, hereby covenant, contract, promise and agree to furnish and provide seven sets of plans and specifications and detail drawings for a courthouse building, to be erected at Manitowoc, Manitowoc County, Wis., on lots 1, 2, 3, 4, 9, 10, 11 and 12 in block No. 273, and agree to have plans and specifications completed on or before April 21, 1903.

"The party of the second part will, upon the full and complete and faithful performance of the said parties of the first part, of all the covenants and agreements hereinbefore contained and by them agreed to be performed, pay



to said parties of the first part a commission of  $8\frac{1}{2}$  per cent on all plans and specifications for the said courthouse building furnished by the said parties of the first part.

"Said  $8\frac{1}{2}$  per cent shall be based on a building costing \$100,000.00 not including any fixtures, that is, heating or plumbing in building. Said  $8\frac{1}{2}$  per cent commission shall be paid by the County of Manitowoc on or before June 5th, 1903. It is also further agreed upon by the party of the second part, should the cost of building upon the letting of contract go beyond the \$100,000.00, then the parties of the first part are to receive their  $8\frac{1}{2}$  per cent commission on all work as contracted for under their plans and specifications. Said payments of percentage are to become due when contracts are let."

The county board did not meet until May 18, 1903. At that time the special committee submitted two reports. In the first, dated March 25, 1903, they stated that they would have no plans nor recommendations ready to submit on April 1, 1903, the day fixed in the board's resolution, but at some later date would be ready. In the second, dated May 14, 1903, they reported their actions fully, and recommended that the plans and specifications prepared by plaintiffs be accepted and adopted.

On May 22, 1903, plaintiff Kinney addressed the board regarding his plans and specifications. On that day, by a resolution duly adopted, the board indefinitely postponed action on the reports of the special committee, and rejected plaintiffs' plans and specifications without giving any reasons therefor. At the same time the board assigned to another committee the duty of collecting information respecting a courthouse, the cost of which should not exceed \$150,000. This committee thought more ground was needed, and thereupon the whole matter of building a new courthouse was dropped.

Plaintiff Kinney was the only witness examined. He read the resolution of November 18, 1902, before making the contract of March 7, 1903. He furnished only four sets of plans and specifications. In twenty different particulars there was a failure to give such detailed drawings and specifications as are required for a builder's guidance. He claimed, however, that what he did submit was sufficient to enable a contractor to bid on the building. His plans did not include heating, lighting, or plumbing; but contained provisions for a heating plant in the basement, and spaces for closets in various parts of the building. In his opinion, "bids could be received under said plans and specifications at \$100,000, exclusive of heating, plumbing, lighting, ventilation, and waterworks fixtures." He thought bids should run from \$90,000 to \$130,000 for the building exclusive of the items aforesaid, which items would cost \$15,000 additional. Bids of contractors usually do not vary more than from 10 per cent. lower to 10 per cent. higher than the architect's estimate. Sketches or preliminary plans, accompanied by a preliminary specification giving a description of the building, the materials to be used, and the main features of the construction, are called plans both by architects and laymen. Such plans are usually furnished without charge.

A. L. Sanborn, for plaintiffs in error.

A. L. Hougén, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, after stating the facts, delivered the opinion of the court.

1. The first count was not sustained by the evidence.

The county is a territorial subdivision of the state. As a municipal corporation, it is an involuntary one, created by the Legislature without regard to the will of the inhabitants, who constitute the corporation, and whose property, through taxation, is liable for the debts of the corporation. It is right, therefore, that the debt-making power be limited to action taken by the county board in lawful session, or to action of a committee of the board taken in pursuance of a resolution or ordinance of the board adopted in lawful session.

The board, by its resolution, did not lay upon the special committee the duty of building a courthouse. The resolution, as a whole, shows that the board believed a new courthouse desirable, and that a committee should investigate and report regarding "the best manner of raising funds," and should submit "recommendations relative to the matter of erecting a courthouse"; but the decision to build or not to build was clearly with the board. Now, what meaning, in connection with the committee's duty to investigate the building question and the matter of funds and to submit their recommendations, should be assigned to the words "procure plans and specifications"? If the committee had been authorized to go ahead and erect a courthouse, undoubtedly the words would have justified them in engaging architects to furnish complete, detailed working plans and specifications. But when the board reserved to themselves the decision to build or not, as they might think best, after hearing the report of their committee, what right had the committee and the plaintiffs to suppose that the board were ordering working plans? The selection of an architect to furnish working plans means that the competition between architects on their preliminary plans is at an end. The builder—in this case the board—wants to see the competitive preliminary plans, and, after he has decided to go ahead, it is time enough to procure the working plans. To hold that the board intended that the committee should procure working plans is to convict the board of the foolish extravagance of ordering working plans without knowing whether they would want the work done. We think the words "plans and specifications" in the resolution meant and were intended to mean the preliminary plans and preliminary specifications described in Kinney's testimony—a meaning in which the words, in a proper context, are commonly taken by architects and laymen alike. The contract sued upon, being for working plans, was beyond the power of the committee to make. Compare with *French v. Dunn County*, 58 Wis. 402, 17 N. W. 1, where the committee acted strictly within the letter of the board's resolution.

The resolution recognizes the desirability of a new courthouse at a cost not exceeding \$100,000. The contract calls for plans for a building to cost \$100,000, exclusive of heating and plumbing. Thus the contract makes an exception that is not named in the resolution. And the plans themselves indicate that the courthouse would not be a finished structure without the inclusion of the heating and plumbing appliances. Why should a great stack be built unless the heating plant was to be installed, for which room was made in the basement? If a complete building without the heating plant was intended, why were not chimneys for stoves provided in each room? If plaintiffs intended a building complete without plumbing, and if they did not expect the plumbing to be built into and with the building, why did they provide rooms on the various floors, which would stand unfinished and useless unless the plumbing was installed? We believe, therefore, that plaintiffs understood that the board had in mind in their resolution a courthouse that should include the heating, lighting, and plumbing appliances that are cus-

tomarily built into a courthouse at this day. But, if plaintiffs did not actually so understand the resolution, they should have done so, for that is its meaning. *Turney v. Town of Bridgeport*, 55 Conn. 412, 12 Atl. 520. The contract sued upon, being for plans for a courthouse which would cost materially more than \$100,000 to finish, was beyond the power of the committee to make.

The resolution required the committee to file their report of recommendations and plans by April 1st. They could not enlarge their own commission. The contract extending the time for plaintiffs to prepare plans to April 21st was beyond the power of the committee to make.

Plaintiffs did not perform their part of the contract. If plaintiffs furnished something more than the preliminary plans and specifications which architects provide gratuitously in the hope of being engaged to make the working plans, they confessedly failed to deliver plans from which a builder could erect a courthouse.

2. The evidence fails to support the second count.

The plans were not accepted. They were not used in erecting a building. No use of them by the board is shown. If individual members learned therefrom anything respecting the character and cost of a suitable courthouse for Manitowoc county, there is no evidence that the county, through the board, received and used any such information.

But, furthermore, there is an absolute want of proof of the fair value of any use made of the plans, if the county could be charged with the use above mentioned. The \$3,500 stated in the contract is no evidence of the fair value of such use. The \$3,500 was the agreed price for complete, detailed working plans and specifications. Such were neither furnished nor used.

The judgment is affirmed.

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In re DRESSER et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1905.)

No. 96.

1. **BANKRUPTCY—CLAIMS—WRITTEN INSTRUMENTS—FAILURE TO FILE.**

Failure to file a written instrument, the basis of a claim against a bankrupt's estate, as required by Bankr. Act, § 57b (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3448]), or to attach the same to the proof of claim, does not raise a presumption against the existence of the writing.

2. **SAME—STATUTE OF FRAUDS.**

Where securities had been loaned by a claimant to D., who pledged them to secure loans, and thereafter the bankrupts, a firm of which D. was a member, took over his entire property, including claimant's securities, and the moneys obtained from the loans, and assumed all his liabilities, the benefits derived from claimant's property were thereby transferred to the bankrupt firm, constituting a new consideration to support its original promise to return or account for the securities, which was therefore not within the statute of frauds.

**2. SAME—PROOF OF CLAIM—VALIDITY—PRIMA FACIE EVIDENCE.**

Under Bankr. Act July 1, 1898, c. 541, § 57 "a," "b," "d," "f," 80 Stat. 560 [U. S. Comp. St. 1901, p. 3443], requiring verified proof of claims against a bankrupt's estate, and declaring that claims which had been duly proved should be allowed on presentation to the court, unless objected to, or unless their consideration is continued for cause, etc., the proof of a claim valid on its face, and properly verified, is prima facie evidence of the indebtedness of the bankrupts thereon, sufficient to justify an allowance of the claim, unless disproved by evidence, the probative force of which is equal to or greater than that offered by the claimant.

Appeal from the District Court of the United States for the Southern District of New York.

See 124 Fed. 915.

This is an appeal by the trustee of the above-named bankrupts from an order of the District Court of the Southern District of New York, affirming the decision of the referee in bankruptcy which dismissed the objections of the trustee to the proof of claim filed by Emma B. Dresser and allowed the said claim. The claim was filed originally August 26, 1903. January 21, 1904, the trustee filed objections. March 8, 1904, the claimant filed an amended proof of claim. No objections were filed to the amended proof. It is, however, conceded by all that the objections filed to the original proof were considered as applying to the amended proof although there is no stipulation to this effect appearing in the record. The amended proof of claim alleges that the bankrupts composing the firm of Dresser & Co., were at and before the filing of the petition in bankruptcy and still are indebted to the claimant in the sum of \$88,145. That the consideration for this debt was as follows: Prior to May, 1896, the bankrupt Dresser and his then partner E. R. Goodrich requested claimant to loan said copartnership of Dresser & Goodrich certain securities (which are described), for the purpose of enabling said firm to borrow money thereon and for other purposes. That these securities were deposited by Dresser & Goodrich as collateral for loans, the proceeds of which were turned over to the said firm and used by it. That in May, 1896, the firm of Dresser & Goodrich was dissolved, the bankrupt Dresser succeeding to the business, taking all its assets and assuming all its liabilities, including the debt due to the claimant. That this transfer was made at the request of Dresser with the knowledge and consent of claimant, Dresser assuming the liability of the firm of Dresser & Goodrich for a return of the said securities, the proceeds of the loans for which the securities were pledged having been turned over to Dresser and used by him in his business. That in May, 1897, the copartnership between the bankrupts was formed under the name of Dresser & Co., which succeeded to the business of Dresser, taking all his assets and assuming all his liabilities including claimant's said claim against him. That at the request of Dresser & Co., and with the consent and knowledge of claimant, the liability of Dresser for a return of said securities to claimant was assumed by Dresser & Co., the proceeds of the loans being used by the firm in its business. The proof of claim proceeds to state in detail the amounts of the loans for which the claimant's securities were deposited as collateral and the value of such securities on March 7, 1903, when the petition in bankruptcy was filed. The proof concludes with the statement that no part of the debt has been paid, that there are no set-offs or counterclaims and that there is no security of any kind for the said debt.

The objections of the trustee, which it will be remembered relate to the original and not to the amended proof, are, in substance, as follows: First, that it appears on the face of the proof that the claimant's securities were loaned to Dresser individually and not to Dresser & Co. Second, that the debt is unliquidated, the proof showing certain equities, the amount of which is unknown. Third, that if claimant is a creditor of Dresser & Co. for any amount it is only to the extent of the moneys actually received by the said firm as the proceeds of loans. That the amount of the said loans is not stated, and, therefore, the amount of the said debt cannot be liquidated. Fourth, that the value of the securities as set forth in said proof is in excess of their

actual value. Fifth, that the securities alleged in said proof of claim were loaned to Dresser individually and not to the firm of Dresser & Co., and claimant is, therefore, not entitled to prove said claim against the firm of Dresser & Co., or share in the assets of the firm until all the firm creditors have been paid in full.

Upon the issue thus framed the trustee assumed the burden and introduced evidence tending to show that the loans in question were negotiated by and the proceeds delivered to Dresser. There was nothing to show that the proceeds did not go into the firm business, indeed the indorsement of Dresser & Co. on one of the checks for \$35,000 indicates that it was deposited to the credit of the firm and was used in the firm's business.

At the close of the trustee's testimony claimant's counsel moved to strike out the objections and allow the claim. After consideration the motion was granted, the referee ruling that "the verified amended proof of claim filed by the claimant is, on its face, prima facie proof of the indebtedness of Dresser & Co. to claimant and the testimony taken herein is insufficient to rebut such proof."

Upon certificate to the District Judge the decision of the referee was affirmed and the trustee appealed to this court.

The assignments of error are substantially as follows: That the court erred (1) in allowing the claim of Emma B. Dresser; (2) in not adjudging the claim insufficient upon its face; (3) in not adjudging that the proof and objections raised an issue as to which the burden was on the claimant; (4) in that it did not adjudge that the prima facie effect of said proof of claim was met by the testimony offered; (5) in that the judgment was contrary to the evidence.

There is no question as to the value of the securities or the amount of the claim, the trustee conceding that it is a valid claim against the individual estate of the bankrupt Dresser.

George H. Gilman, for appellant.

Adrian H. Joline, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts). Several of the objections urged against the original proof were obviated by the amended proof, and it is manifest that the issue now arises on the amended proof and objections thereto. It is, at least, doubtful whether the objections are sufficient to present any of the questions now discussed, but as the point has not been seriously pressed we shall regard them as presenting fairly the following questions:

First. Does the amended proof, upon its face, state a claim against Dresser & Co.? And

Second. Is it prima facie evidence of the indebtedness as therein stated?

It is contended by the appellant that the agreement of the firm of Dresser & Co. to be valid must be in writing, and as no written agreement is filed with the proof, pursuant to section 57b of the law (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), it must be presumed that no such writing exists and, therefore, the proof is invalid on its face. The paper is, no doubt, evidence to establish the allegations of the proof of claim, but failure to plead it raises no presumption against its existence. Non constat the writing which the appellant considers necessary may be in the possession of the claimant to be produced when an issue is presented requiring its production.

But the transaction is not, we think, within the statute of frauds. In *Booth v. Eighmie*, 60 N. Y. 238, 19 Am. Rep. 171, the court says:

"The test to be applied under the statute in every case, is whether the party sought to be charged is the principal debtor primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor."

In *Bank v. Chalmers*, 144 N. Y. 432, 39 N. E. 331, the court says:

"Wherever the facts show that the debtor has transferred or delivered to the promisor, for his own use and benefit, money or property in consideration of the latter's agreement to assume and pay the outstanding debt, and he, thereupon has promised the creditor to pay, that promise is original upon the ground that by the acceptance of the fund or property under an agreement to assume and pay the debt the promisor has made that debt his own, has become primarily liable for its discharge, and has assumed an independent duty of payment irrespective of the liability of the principal debtor."

See, also, as bearing on the question involved: *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855; *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. Ed. 613; *Barlow v. Meyers*, 64 N. Y. 41, 21 Am. Rep. 582; *Coster v. The Mayor*, 43 N. Y. 399.

The language quoted above is applicable to the present situation. The bankrupts took over the entire property of Dresser, including the claimant's securities and the moneys obtained from the loans, and assumed all his liabilities. The benefits to be derived from the claimant's property were transferred to the firm and this constituted a new and sufficient consideration to support its promise and obligation to return or account for the securities. The averments of the proof leave no doubt as to the true nature of the transaction. The claimant has lost the possession of her securities, the bankrupts took them, obtained money thereon, which they used in their business, and agreed to return them to the claimant.

There is some obscurity in the allegation that the money derived from the loans was turned over to the bankrupts, but it is evidently due to a clerical omission, and is not fatal to a document which need not necessarily conform to the strict rules of pleading. The amended proof of claim being properly verified and valid upon its face is *prima facie* evidence of the indebtedness of the bankrupts.

We are dealing here with a statute the primary object of which is to collect the property of the bankrupt speedily and divide it equally among his creditors. Analogies drawn from pleadings in actions at common law and in equity furnish little assistance in the interpretation of such a law. If the doctrine be once established that a proof of claim in bankruptcy is entitled to no greater weight than a complaint in an ordinary action at law the most serious results will follow. Any vindictive or contumacious creditor can, by filing objections, compel creditors to come from distant states and even from foreign countries to testify in support of their claims before a word of testimony impeaching their validity has been adduced. No one disputes that in the absence of objection the proof of claim stands as sufficient warrant for the payment of a dividend based thereon. It is not then a mere pleading, confessedly it possesses some probative force. This being

so it is not easy to approve the logic which deprives it of all weight as evidence upon the mere filing of an objection. If the appellant's contention be sustained an efficient administration of the law might, as we have seen, be made difficult, if not impossible. We see no reason or necessity for such an interpretation of the law. On the other hand a construction which requires the objector to offer some proof before subjecting the creditor to the expense and annoyance of presenting sustaining evidence seems to be in accord with the intent and purpose of the act and to present a simple, efficient and perfectly fair rule of procedure. In a vast majority of instances the claims of creditors are susceptible of the most simple verification. The trustee has the bankrupt's books at his disposal and can at any time call upon the bankrupt for assistance. In cases where exaggerated or fraudulent claims are filed there is no difficulty in ascertaining and proving facts sufficient to establish the true character of the claim, thus putting the claimant upon his proof.

The subject was carefully examined in *Re Sumner* (D. C.) 101 Fed. 224, and the conclusion was reached that under section 57 "a," "b," "d," and "f" of the act the objector, though not required to disprove the claim, must produce "evidence whose probative force shall be equal to, or greater than, the evidence offered in the first instance by the claimant." This, we think, is a correct statement of the law and is in accord with general order 21 (6), 89 Fed. x, which seems to indicate that the claim must stand until evidence has been adduced which authorizes the referee to expunge or reduce it. See, also, *In re Shaw* (D. C.) 109 Fed. 780; *In re Felter* (D. C.) 7 Fed. 904.

The order of the District Court is affirmed.

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### ST. LOUIS SOUTHWESTERN RY. CO. v. PURCELL\*

(Circuit Court of Appeals, Fifth Circuit. February 15, 1905.)

No. 1,354.

#### 1. BILL OF EXCEPTIONS—GROUNDS FOR STRIKING OUT—INCORPORATING EVIDENCE TAKEN BY PRIVATE STENOGRAPHER.

Where the evidence in a case is embodied in bills of exceptions duly allowed and certified by the trial judge, the fact that the testimony was not taken down by order of the court or by consent, but by a stenographer employed by one of the parties, is immaterial, and is not ground for striking it from the record.

#### 2. RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

A person who in the daytime, after walking for a distance beside a railroad track, stepped upon the track to cross a cattle guard, and, after crossing, but while still on the track, was struck and injured by a train coming from behind her, which could have been seen approaching for a distance of 300 yards, was guilty of contributory negligence which precludes a recovery for the injury, notwithstanding her testimony that before stepping on the track she looked and listened for a train and saw or heard none, where, as clearly shown by all the other evidence, the train was then within plain sight.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1235-1291, 1305-1307.]

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\* Rehearing denied March 21, 1905.

**3. SAME—NEGLIGENCE.**

A railroad company is not chargeable with negligence which renders it liable for the injury of a woman struck by a train, where the customary and required signals were given, and, when the woman was seen by the engineer and fireman, she was walking beside the track at a safe distance, and after she stepped upon the track all possible was done to stop the train before it reached her.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1279, 1280.]

**4. HUSBAND AND WIFE—RIGHT OF ACTION FOR INJURY OF WIFE—LOUISIANA STATUTES.**

Act No. 68, p. 95, Laws La. 1902, amending Rev. Civ. Code 1870, § 2402, by providing that "damages resulting from personal injuries to the wife shall not form part of this community but shall always be and remain the separate property of the wife and recoverable by herself alone," is not retroactive, and did not affect a right of action for an injury to a wife which had become fully vested in her husband prior to its passage.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Husband and Wife, §§ 739, 767.]

**In Error to the Circuit Court of the United States for the Western District of Louisiana.**

The defendant in error filed this suit June 24, 1902, in the Second Judicial District Court of Bossier Parish, state of Louisiana, charging that the plaintiff in error (defendant below) was a corporation organized under the laws of the state of Missouri, and owned and operated a line of road through said parish of Bossier, and that on its line near Bolinger is a heavy grade; that on March 21, 1902, his wife, in going over to Bolinger, passed along a pathway through his field until she came to the railroad track, about 400 feet "from which point she walked along the pathway by the side of the track toward Bolinger until she reached the cattle guard, where she stopped, looked, and listened for a train, and, not hearing or seeing any, she walked along the track constantly used by pedestrians, with the knowledge and acquiescence of defendant company, and crossed over the cattle guard, and just as she reached the opposite side a freight train coming from the south, and without any signals whatever, struck and knocked her 20 or 30 feet, throwing her violently upon the ground, breaking her collar bone," etc. He further charged "that his said wife was without fault, and that her injuries were due solely to the fault of the defendant company in not maintaining a lookout from said train, which was rushing into a populous village, and in the failure to sound the signal for the crossings and the stations, and as warning of danger." He asked for damages in the sum of \$6,200. On proper petition and bond, the case was removed by the defendant below to the United States Circuit Court for the Western District of Louisiana. The defendant below, by exception and answer, denied that the complaint set forth any cause of action or right in the plaintiff to bring suit. It denied that the injury to plaintiff's wife was caused by any negligence on its part, and charged that whatever injury she sustained was caused solely by her own negligence. It charged that she was a trespasser on its track, and her presence there was unknown to its servants in time to prevent the accident. After filing its answer, and before the case was tried, the plaintiff in error filed a plea in bar of his right to recover, and charged that he was without right to stand in judgment for, and without authority to sue for, the personal injuries done to his wife, under the laws of Louisiana, and she alone could stand in judgment for such injuries. This exception was tried and overruled, and the railway company duly excepted to the ruling of the court thereon. Thereafter Mrs. Purcell, the wife, appeared in the case, and averred that since the institution of the suit the Legislature of Louisiana had adopted Act No. 68, p. 95, of 1902, which limited the right of a married woman to sue for personal injuries received by her to her alone, and she asked to be permitted to intervene in the suit and substitute her own name as plaintiff in the case. Thereupon the defendant below filed a plea of prescription of one year in bar of her right to re-



cover, the accident having happened in March, 1902, and no suit having been brought by her until October 21, 1903. This plea of prescription was overruled by the court, to which ruling the plaintiff in error here duly excepted. The case was twice tried by a jury in the lower court, the first verdict being for one cent, and the last one for the sum of \$3,000. During the trial of the case, J. S. Purcell, the plaintiff and the husband of the injured party, was called as a witness, and gave material testimony in the case. Before he was sworn, counsel for the defendant below objected to his being sworn or testifying, on the ground that he was the husband of Mrs. Purcell, the injured party, and to whom the damages in the case are due, if any, on the ground that the husband could not be a witness for or against his wife under the laws of Louisiana. During the trial the defendant below called as a witness in its behalf John Crocker, who, having testified with reference to the written statement made to him soon after the accident by Mrs. Purcell and witnessed by her husband, stating how the accident occurred, and being unable from the lapse of time to state substantially what she said to him, but having stated that he took down the written statement as dictated to him by her, counsel for the railway company offered in evidence the paper, and asked for permission for the witness to read the paper in order to refresh his memory, all of which was refused by the court, and to which ruling a formal bill of exception was taken. After all the evidence was taken, counsel for the railroad company asked the court to direct a verdict for the defendant on all the evidence, which the court refused. The charge of the judge to the jury as given was duly excepted to in several particulars, but, in the view taken of the case, it is not necessary to specify. The assignment of errors covers all the questions raised on the trial. Defendant in error moves this court to strike out from the record all the purported written testimony included therein, for the reason that it was not taken by consent of parties nor by order of the court, but was taken by the stenographer employed by plaintiff in error for his own private use and benefit.

J. D. Wilkinson, for plaintiff in error.

A. J. Murff, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The motion to strike out the evidence in the record cannot prevail, because it is all found in bills of exception duly certified by the trial judge. Whether it was taken from the notes of a private or official stenographer or from the judge's own notes seems to be immaterial.

On the undisputed facts in the case, the railroad company was not in fault in regard to the injuries to Mrs. Purcell. When first seen by the engineer and fireman, Mrs. Purcell was approaching the railroad right of way, afterwards walking along the side of the track in "a pleasant, comfortable path," as described by herself. The engineer had given the usual and customary signals for stopping the train at Bolinger, near by, and the fireman was ringing the bell. Up to the time Mrs. Purcell went on the track to cross the cattle guard, the engineer and fireman had every reason to believe that, so far as the train was concerned, she would remain in a place of safety, and not venture on the track in front of the approaching train, and were therefore not required to either stop the train or give signals to prevent such trespass. See *Matthews v. Atlantic & N. C. R. Co.* (N. C.) 23 S. E. 177. As soon as she entered on the track to cross the cattle guard, both engineer and fireman resorted to all means in their power to stop the train and prevent injury.

On the evidence of Mrs. Purcell herself, it is difficult to acquit her of contributing to her own injury. She testified as follows:

"Q. You were hurt by one of the trains of the St. Louis Southwestern Railroad near Bolinger? A. Yes, sir. Q. When was that, do you remember? A. It was on the 21st day of March two years ago—the 21st of this month. Q. Mrs. Purcell, where were you going that morning? A. I was going to Bolinger. Q. What time of day was it? A. I do not know exactly. Q. Just estimate the time of day. About what time was it? A. It was somewhere between 9 and 11 o'clock. Q. In going down to Bolinger, which way were you in the habit of going? A. I always went just as I went that morning. Q. How were you going down—through the field? A. Yes, sir. Q. What other way was there to go to Bolinger? A. Not any other way except around the public road. Q. In going on the public road, you would have had to have gone through a considerable skirt of woods? A. Yes, sir; and it was further from our house to the public road than it was to the track. Q. Then it was a good deal further to go the public road than it was this way? A. Yes, sir; never went around the public road only in a vehicle. Q. Went the way you were going that morning? A. Yes, sir. Q. Your daughters were at Bolinger? A. Yes, sir; husband and daughters. I was not on the way to the boarding house; I was going to the commissary to buy some things, but I expected to stop at the boarding house. Q. In going from your house you come down the pathway? A. Yes, sir. Q. You know where that strikes the road. About how far from the cattle guard did you strike the railroad in this path? A. Yes, sir; but I did not take the railroad immediately. Q. The railway embankment was how far from the cattle guard when you came to the embankment? A. Forty or fifty yards. Q. Did you— When you came to that track, what did you do? A. I looked, and saw no one near; then I walked on down, as it was my custom. Q. You say that you saw no one near. Did you look out for the trains? A. Yes, sir; and there was no train; I heard none. Q. You looked up and down the track? A. Yes, sir. Q. What did you do then? A. I went on to the cattle gap, I reckon, in 10 or 15 feet. Of course, I did not notice the distance. Then I took the track and crossed the gap. Q. Then I understand you walked along the path? How close was that to the end of the ties? A. I do not know, sir; I reckon the path was four or five. I do not know, sir; it was a good wide path—a pleasant pathway. Q. Then how far from the cattle gap when you got on the railway track? A. I do not know; do not think it was more than eight or ten feet. Q. Eight or ten feet before you got there you stepped on the railway track? A. Yes, sir. Q. State to the jury, when you struck the railway track, whether you looked for any train? A. Yes, sir; of course, naturally I should do that, because I had the cattle gap to pass. Q. Did you see or hear any train? A. No, sir. Q. How far down the track could you see? Could you see the whistling post? A. Yes, sir. Q. You could see or hear no train? A. No, sir, nothing in view, because I noticed for that. Then after I took the track I felt perfectly safe, because I knew I had the whistling post between me and any danger. Q. When you stepped on the track, was the wind blowing? A. Yes, sir, blowing from the north. Q. How were you dressed that morning—have on a hat or bonnet? A. Bonnet. Q. Ordinary sunbonnet? A. Yes, sir. Q. Then the wind was blowing in your face? A. Yes, sir. Q. Do you remember where you were when the car struck you? A. No, sir; not exactly, but I think I was at least 15 or 20 feet or yards beyond the gap; I know I was beyond the gap. Q. What position were you in the last that you remember? A. We had to cross the cattle gap to get out of the field; then I took to the side until I could get a good stepping-off place. Q. There was an embankment there coming out of the cattle gap; could you step right off of the cattle gap? A. I walked out some distance after passing the cattle gap, because the wire fence was there, because it was low marshy place where drift had gathered there, and as I walked off of the cattle gap I gradually went to one side of the track. Q. You think you were somewhere about what distance from the cattle gap when it struck you? A. I was 20 feet or more, I know. Of course, I do not know exactly; I know that I was a good distance from the cattle gap. Q. Do you know whether or not you had started off of the track, or were you in

the middle of the track? A. No, sir; was not in the middle of the track. Q. Did you hear any bells ringing or signals given? A. No, sir; there was not any. Q. There was none? A. No, sir. Q. If the bell had been rung or whistle blown, could you have gotten off? A. Yes, sir; the gap is not a very wide one. Q. You were in the habit of going along there? A. Yes, sir. Q. You had not been in the habit of trying to beat trains across there? A. No, sir. Q. In going along that path there, would any one be in danger of being struck by the train? A. I do not know; I never tried it; I would not try it. I suppose I could have made it along there, but not on the cattle guard. Q. Would you have walked along there when a train was passing? A. No, sir; I have better sense than that. \* \* \* Q. What was there to have prevented you seeing a train along there after it got around the curve? Was there anything? A. No, sir; nothing to prevent seeing it. Q. Nothing to prevent you from seeing them or from their seeing you? A. No, sir. Q. No trees on the embankment that would prevent them from seeing you or you from seeing them? A. No, sir, no obstruction at all."

If, as she says, before entering on the track to cross the cattle guard, she "stopped and looked and listened," she must have seen the train imminently approaching, because, under her own and the other evidence, it is clear that for 300 yards or more the track was unobstructed. Her testimony under such circumstances ought not to be credited, or taken as raising a conflict in the evidence. See, on subject, *Chicago & N. W. Ry. Co. v. Andrews* (C. C. A.) 130 Fed. 71 et seq., and cases there cited.

If Mrs. Purcell is mistaken with regard to stopping and looking and listening before she entered on the track to cross the cattle guard, of course her negligence is apparent. For the lack of evidence showing negligence on the part of the agents of the defendant railway company, and for the negligence contributing to her own injury, as shown from the undisputed facts and Mrs. Purcell's own testimony, the jury should have been directed to return a verdict for the defendant, and the refusal of the requested instruction to that effect requires a reversal of the judgment below.

In our opinion, Act No. 68, p. 95, of the Laws of Louisiana, entitled "An act to amend and re-enact article 2402 of the Revised Civil Code of 1870," approved June 30, 1902, and providing "that damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone," was not intended to have any retroactive effect. The act contains no repealing nor saving clause, and, if given a retroactive effect, might affect rights and interests in communities of acquets and gains running back many years. The right of Purcell to recover from the railroad company for injuries to his wife was fully vested when Act No. 68 was passed. We cannot presume, in the absence of plain language to that effect, that there was any intention to divest the rights so vested, and perhaps take away all right to recover. See article 8, Rev. Civ. Code La., and article 166, Const. La. 1898. If we give the effect claimed by plaintiff in error to Act No. 68, we should have to hold in this present case that the husband could not recover because his right had been divested, and that the wife could not recover because she came too late. This disposes of the several assignments of error based upon Act No. 68, to wit, the right of Purcell to sue, his right to testify, and the prescription of one year against the wife's right to sue.

If Purcell was the proper plaintiff to recover, and if he signed the document produced by the witness John Crocker, it would seem that such document was admissible in evidence, although Purcell swore he signed it only as a witness, and did not know of its contents. The other assignments of error need not be considered.

The judgment of the Circuit Court is reversed, and the cause is remanded with instructions to set aside the verdict and otherwise proceed according to law and in accordance with the views herein expressed.

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In re HURLBUTT, HATCH & CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1905.)

**1. BANKRUPTCY—PARTNERSHIP—STOCK EXCHANGE SEAT—OWNERSHIP.**

Where the articles of a commission partnership provided that there should be contributed to the capital stock and for the carrying on of the firm by H. the seat in the New York Stock Exchange owned by him, free and clear of all incumbrances whatever, which, for the purpose of the agreement, was estimated at an agreed valuation of \$50,000, and the firm agreed to pay H. interest at 6 per cent. "on the capital so invested" by him, and thereafter paid all dues and assessments chargeable against the seat, which were charged on the firm's books as firm expense, the seat was a part of the assets of the firm in bankruptcy, and not the individual property of H.

[Ed. Note.—Seat in stock exchange as an asset in bankruptcy, see note to *Fisher v. Cushman*, 43 C. C. A. 389.]

**2. SAME—TRANSFER.**

Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], provides that the bankrupt's trustee shall be vested with the "title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is property which is exempt to all; \* \* \* (3) powers which he might have exercised for his own benefit; \* \* \* and (5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process." *Held* that, since a seat in the New York Stock Exchange was subject to transfer by the owner, and could be sold by him subject to transfer restrictions, title to such seat held by a firm passed to its trustee in bankruptcy.

**3. SAME—TRANSFER—EXECUTION—ENFORCEMENT—JURISDICTION.**

Bankr. Act July 1, 1898, c. 541, § 2 (7) 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], empowers courts of bankruptcy to cause the estates of bankrupts to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, except as otherwise provided. Section 2 (15) authorizes such courts to make orders, issue process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the act; and section 7 (4), 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], declares that the bankrupt shall execute and deliver such papers as shall be ordered by the court. *Held* that, where a member of the New York Stock Exchange contributed his membership to a firm which thereafter became bankrupt, the court of bankruptcy had jurisdiction to compel him to execute a transfer thereof for the benefit of the firm's trustee in bankruptcy.

**4. SAME—RESIGNATION.**

The bankrupt having lost his membership when the title to his seat vested in the trustee, it was no objection to the transfer that it was equivalent to resignation of the holder's personal membership in the exchange.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

John C. F. Gardiner, for petitioner.

Benj. N. Cardozo, for respondent.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The petitioner was a member of the firm of Hurlbutt, Hatch & Co., bankrupts. Henry B. Ketcham, trustee in bankruptcy of said firm, claimed that a seat in the New York Stock Exchange, standing in the name of said Hatch, was copartnership property, worth \$68,000, which passed to the trustee and could be sold by him, yet that, owing to the custom and rules of the stock exchange, it could not be advantageously sold so as to be available for the satisfaction of the claims of the firm's creditors, unless its sale should be requested by Hatch, but that, if he would execute and deliver to the stock exchange a paper directing it to sell his seat and to pay the proceeds to the trustee in bankruptcy, the exchange would obey his direction. It appeared that Hatch had refused to apply the said seat to the payment of the partnership debts, or to transfer it to the trustee, or to consent to its sale. The debts of the copartnership amount to about \$175,000; its assets, exclusive of said seat, are about \$34,000.

The trustee applied to the District Court for an order that Hatch be required to sign and deliver to the stock exchange such request and direction as would authorize an advantageous sale and make the proceeds thereof available for the payment of partnership debts.

Thereupon the court made the following order, namely:

"Ordered, that the said Edward Sanford Hatch forthwith sign and deliver to the said trustee in bankruptcy an instrument in the following form:

"To the Chairman of the Committee on Admissions of the New York Stock Exchange—Sir: I hereby request you to sell all my right, title and interest in and to my membership in the New York Stock Exchange, subject to the approval of the Committee on Admissions and the constitution of said Exchange; and I hereby authorize and direct you to pay over the proceeds realized from such sale to Henry B. Ketcham, as Trustee in Bankruptcy of the firm of Hurlbutt, Hatch & Company, after deducting therefrom any moneys due to creditors who are members of the Exchange, or firms registered thereon, upon claims arising from contracts subject to the rules of the Exchange, and after deducting any and all other charges or payments required by the constitution and by-laws of the Exchange to be deducted upon a transfer of membership therein;" and it is further

"Ordered, that the said Edward Sanford Hatch be and he hereby is directed, upon demand by the said trustee, to execute any and all other papers that may be required by the said New York Stock Exchange, or that may be necessary or proper for the purpose of signifying his consent to the transfer of the said seat to the person buying the same, pursuant to the direction aforesaid, and any and all other papers that may be necessary or proper for the purpose of vesting in such purchaser the full title to such seat, and of securing to the said trustee in bankruptcy the payment of the purchase price thereof; and it is further

"Ordered, that the said Edward Sanford Hatch be and he hereby is enjoined and restrained from the commission of any act intended to defeat or nullify his consent to the sale aforesaid, and from inducing the officers of the said Exchange to refuse to carry out the said directions, and from otherwise hindering or impeding the sale of his right of membership aforesaid and the transfer of the proceeds thereof to the said petitioner."

This petition seeks to review said order on the following grounds: (1) That the membership in the stock exchange was not the property of said firm, but was the individual property of the petitioner. (2) That it was a personal privilege of said Hatch, and not property which he could have transferred to the trustee. (3) That, in so far as it was property and transferable within the meaning of the bankrupt law, it had become the property of the trustee by the adjudication. (4) That the court had no authority or jurisdiction to compel the petitioner to execute such request, which was equivalent to a resignation of personal membership in said exchange. (5) That it was against public policy to thus exclude the petitioner from said means of livelihood.

That said membership was firm property was shown by the provision in the articles of partnership that there should be "contributed to the capital stock of said partnership for the uses and purposes thereof and for carrying on the same, \* \* \* by the said party hereto of the third part (Edward S. Hatch), the said seat upon the New York Stock Exchange, now owned by him, free and clear of all encumbrance whatsoever, which seat, for the purpose of this agreement, is estimated at an agreed valuation of Fifty thousand dollars (\$50,000)"; from the further provision for the payment of interest at 6 per cent. to Hatch "upon the capital so invested" by him, and estimated at \$50,000; by the provisions for division of losses and profits; and by the subsequent course of dealing between the partners, whereby the partnership paid all the dues and assessments chargeable against said seat, and said payments were charged in the firm's books as a firm expense.

The fifth ground for review, founded on public policy, need not be discussed.

The second, third, and fourth grounds may be considered together. That property in a stock exchange seat vests in a trustee in bankruptcy is expressly decided in *Page v. Edmunds*, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318. The facts in said case are strikingly like those herein. There the bankrupt was a member of the Philadelphia Stock Exchange. There, as in this case, when a seat in said exchange is transferred, the transfer is subject to the approval of a committee of the exchange, and in the event of the death of a member a sum would be paid to his family out of the gratuity fund; but if the seat is sold, such sum would go with the seat. The articles of the constitution provided for a committee on admissions, which should inquire into the standing of the applicant for membership and report to the governing committee, which determines by ballot whether a candidate should be elected, five adverse ballots preventing his election. Thus, the conditions in the two cases present the same legal questions. The Supreme Court said as follows:

"Section 70 of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3451]) provides that the trustee shall be vested with:

"The title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is property which is exempt, to all; \* \* \*

"(3) Powers which he might have exercised for his own benefit. \* \* \*

"(5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process.' \* \* \*

"We think it could have been transferred within the meaning of the statute. The appellant could have sold his membership, the purchaser taking it subject to election by the exchange, and some other conditions. It had decided value. \* \* \*

"A thing having such vendible value must be regarded as property, and, as it could have been transferred by some means by appellant (one of the conditions expressed in section 70), it passed to and vested in his trustee."

Hyde v. Woods, 94 U. S. 523, 525, 24 L. Ed. 264.

The decisions of the court of last resort of the state of New York are to the same effect. *People ex rel. Lemmon v. Feitner*, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698; *Matter of Hellman*, 174 N. Y. 254, 257, 66 N. E. 809, 95 Am. St. Rep. 609, 63 L. R. A. 92.

The contention of the bankrupt "that said membership is a personal privilege" is answered by the opinion of the Supreme Court in *Sparhawk v. Yerkes*, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915, where the court says:

"While the property is peculiar, and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors. *Ager v. Murray*, 105 U. S. 126 [26 L. Ed. 942]; *Stephens v. Cady*, 14 How. 528 [14 L. Ed. 528]; *Powell v. Waldron*, 89 N. Y. 328 [42 Am. Rep. 301]; *Belton v. Hatch*, 109 N. Y. 593 [17 N. E. 225, 4 Am. St. Rep. 495]; *Habenicht v. Lissak*, 78 Cal. 351 [20 Pac. 874, 5 L. R. A. 713, 12 Am. St. Rep. 63]; *Weaver v. Fisher*, 110 Ill. 146."

That the court had jurisdiction to compel the bankrupt to execute the papers necessary to effectuate the sale of said seat is equally clear.

It appears from the allegations of the trustee's petition that he could not compel the stock exchange to admit to membership the person to whom he might sell said seat. The decisions of the United States Supreme Court and of the Court of Appeals of the state of New York show that the stock exchange is not bound to admit a purchaser to membership, and that such purchaser takes the seat subject to the conditions imposed by the constitution and rules of the exchange. *Hyde v. Woods*, *supra*; *Page v. Edmunds*, *supra*; *People ex rel. Lemmon v. Feitner*, *supra*.

The general power of courts of equity to compel a transfer and sale of such personal privileges as patents and trade-marks is asserted in *Ager v. Murray*, 105 U. S. 126, 131, 26 L. Ed. 942. The power of the court to require a bankrupt to execute the instruments necessary to effectuate the sale of a personal and exclusive right has been exercised in the cases of the transfer of liquor licenses (*In re Fisher* [D. C.] 98 Fed. 89; *In re Becker* [D. C.] 98 Fed. 407), of a license of a stall in a market (*In re Emrich*, 101 Fed. 231), and of a seat in the New York Stock Exchange, under the bankruptcy act of 1867 (*In re Ketchum* [D. C.] 1 Fed. 840).

If there were any doubt as to the general power of the District Court to make such order, it would be resolved by the provisions of the bankruptcy act empowering courts of bankruptcy to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided" [section 2 (7)]; "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as

may be necessary for the enforcement of the provisions of this act" [section 2 (15)]; and by the further provision that "the bankrupt shall \* \* \* execute and deliver such papers as shall be ordered by the court" [section 7 (4)]. Act July 1, 1898, c. 541, 30 Stat. 545, 546 [U. S. Comp. St. 1901, p. 3421].

There is no merit in the contention that the order to execute said request was equivalent to a resignation of said personal membership in the stock exchange. The bankrupt lost his membership when the essential element thereof—the seat in the stock exchange—vested in the trustee. He was "fully and completely divested of his property in the seat or membership." *Platt v. Jones*, 96 N. Y. 24. The order of the court merely effectuates the provision empowering it to cause the estates of bankrupts to be collected, by requiring this bankrupt to obey the provision for the execution of the papers necessary for such purpose.

The order is affirmed, with costs.

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UNITED STATES, for Use of ROCKLAND LAKE TRAP ROCK CO., v.  
CONKLING et al.

(Circuit Court of Appeals, Second Circuit. January 19, 1905.)

No. 102.

**1. PUBLIC WORK—STATUTORY BONDS—CHARTERS.**

Rev. St. § 3747 [U. S. Comp. St. 1901, p. 2523], requires every person contracting with the United States for public work to execute a bond to make payments to all persons supplying him "labor and materials" in the prosecution of the work, and that the person supplying such labor and materials shall have a right to sue in the name of the United States on the bond. Defendant, having contracted with the United States to purchase and remove certain stone near the Harlem river, executed a bond under such section, conditioned that he would promptly make full payments to all persons supplying him with labor and materials in the prosecution of the work. *Held*, that the furnishing of certain scows to defendant, to be used in removing the stone and in other work being prosecuted by defendant, did not constitute the furnishing of "labor and materials" to defendant, so as to entitle plaintiff to recover the amount due under the charter party on the bond.

**2. SAME—EVIDENCE—LETTERS.**

In an action on a charter party, the exclusion of letters between the parties prior to the execution of the contract was not error; the contents thereof being merged in the subsequent contract.

In Error to the Circuit Court of the United States for the Southern District of New York.

John F. Foley, for plaintiff in error.

James R. Soley, for defendants in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. In May, 1899, defendant John P. Conkling entered into a contract with the United States to purchase and remove the stone owned by the United States, stored on the south side



of the cut through Dyckman's Meadows, near Spuyten Duyvil and the Harlem river. The contract provided as follows:

"The contractor for the removal of the stone must furnish all appliances and labor necessary to handle and transport it, and must dispose of it in accordance with law. All débris or material which may be mixed with the rock must also be removed. \* \* \*

"The stone will be measured by cubic contents on scows, or other vehicles of transportation on which it may have been placed, and for this purpose it must be compactly piled in such a manner as to facilitate the measurement.

"Measurements will be taken at the place where the stone is stored, by an authorized agent of this office."

Defendant Conkling, as principal, and defendant the Fidelity & Deposit Company of Maryland, as surety, executed the required bond that defendant Conkling would duly perform the covenants in said contract and "shall promptly make full payments to all persons supplying him with labor and materials in the prosecution of the work provided for in said contract."

The relator chartered to Conkling certain scows, to be paid for in monthly payments at a per diem rate, and sought to recover on said bond for their use, on the ground that they were labor and materials supplied in the prosecution of said work. The statute relating to such bonds provides, *inter alia*, as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract, and \* \* \* said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit, in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution." Rev. St. § 3747 [U. S. Comp. St. 1901, p. 2523].

The court below expressed the opinion that these scows and their use were not "labor." The evidence shows the correctness of this conclusion.

Jacob E. Conkling, the secretary of the relator, testified as follows:

"We employed the captains of these vessels that we chartered to Conkling, and we paid them. They were simply custodians of the scows—keepers of the scows. \* \* \* The master is custodian of the scow. He keeps the scow, looks after her, keeps her pumped out, and does such other work around the scow as to protect her and take care of her, and attends to her lines. He has nothing whatever to do with the loading or unloading."

United States v. Kimpland (C. C.) 93 Fed. 403.

The question presented is as to the legal construction of the words "labor or materials," as used in said statute. Counsel for the relator relies upon the decision in *American Company v. Lawrenceville Cement Co.* (C. C.) 110 Fed. 717, as "a controlling authority." Counsel for defendants rely on the decision in *United States ex rel. James McAllister v. Fidelity & Deposit Company of Maryland*, 86 App. Div. 475, 83 N. Y. Supp. 752, in which, they say, "the facts are identical with the facts in the present case."

The cases of *American Surety Co. v. Lawrenceville Cement Co.*, supra, and of *United States v. Morgan* (C. C.) 111 Fed. 474, involved claims arising out of the same transaction, and based on the same bond. There one Morgan, as principal, and the American Surety Company, as surety, executed a bond under said statute for the performance of a contract by Morgan to do work and supply materials for gun emplacements at Great Diamond Island, Portland Harbor, Me. In the course of said work the plaintiff, the Loughlin Company, paid the expenses for transporting beams, bolts, and washers, to be used in the work contracted for, from Portland to Diamond Island, and this charge was allowed; but the charges of plaintiff for expense in fitting out and equipping a steam launch, expressly constructed for transporting material to the place where the work was to be done to be used in said work, were disallowed, as were also expenses incurred in constructing cars, ships, tubs, and conveyors used in the prosecution of said contract, "in making the excavations, \* \* \* and conveying the materials excavated." Charges for furnishing tools and appliances used in the prosecution of the work, and for the construction of a track upon which cars were run to transport the earth and rock excavated preparatory to the building of the fortification, and afterwards used for conveying concrete to said building, were disallowed. This decision was rendered by Judge Webb. *United States v. Morgan*, supra.

In the *American Surety Company Case*, supra, Judge Putnam allowed other contractors' claims for repairs to the plant, and for trucking from the steamboat landing on the island to the precise locality of the work. Claims "for water-borne transportation of materials used in the work, such as coal and lumber, to the island where the work was done," were rejected by the master; and the rejection was approved and affirmed, on the ground that the court could not determine from the record on which side of the line they fell, in reference to the rule stated by the court in its opinion. There the court, referring to the report of the master as to the claims, said as follows:

"Also we think the master was too strict with reference to some minor claims for transportation. Clearly, he was right in his illustrative suggestion which led up to his conclusion with reference to claims for trucking and water carriage. As stated by him, the carrier ordinarily has a lien for his freight, which is a sufficient protection to him. Therefore, in cases of transportation by a carrier from distant points, or, indeed, from another port than the port at which the contractor's work is being done, the carrier would not ordinarily be protected by the statutory bond, for two reasons: First, transportation for considerable distances in the regular course, by the ordinary lines of either steam, sail, or rail, cannot easily be brought within the words of the statute, 'supplying labor or materials'; and, second, inasmuch as carriage of that character, especially under an ordinary bill of lading, or its equivalent, creates a well-recognized lien for freight, the equitable rule would apply, that a carrier, under such circumstances, cannot give up his cargo, and enforce his claim against a mere surety, after he has so placed himself that the surety cannot be subrogated to the security which the law gave. The first objection, however, does not necessarily apply to truckmen who are moving materials from a place of landing to the exact locality of the work under contract, although the distance may be somewhat considerable, nor to water-borne transportation carried on by the servants of the contractor, or for short distances without the aid of steam or a fully equipped vessel. The second objection, moreover, must not be carried to an extreme; otherwise it would defeat the practical operation of the statute. Every person selling materials for cash holds a lien

for the purchase money until he voluntarily waives it by delivery; and every person engaged in transportation, who is not the mere servant of the owner of the merchandise transported, holds a carrier's lien, even though the carriage is of miscellaneous parcels, over short distances in the immediate locality, and at frequent, irregular intervals. Nevertheless, with reference to each, such liens are not ordinarily insisted on, and it would be an unreasonable construction of the statute to hold that it intended to interfere with the convenience of minor dealings in such methods as the usual practices establish. Therefore, as already stated with reference to either class, to insist on the fact that the lien is waived, and short credit given, would defeat the beneficial purpose of the statute, and the practical ends which it is intended to accomplish."

The court had already discussed the state lien statutes and the federal statute, and the effect of giving a lien in the latter for labor and materials used "in the prosecution of the work." Judge Putnam says:

"The underlying equity of the lien statutes relates to a direct addition to the substance of the subject-matter of the building or other thing to which the lien attaches, while the statute in question concerns every approximate relation of the contractor to that which he has contracted to do."

That case presents conditions radically differing from those involved herein. The decision as to charges allowed for transportation to the place where the work was to be done seems to rest on the fact that the carrier had a lien on the cargo for freight, but that it would be impracticable to assert it for carriage for short distances by vessel or trucks. Here no lien could be claimed for carriage to the place where the work was to be done, because the contractor was to remove the material, and it was removed after the work was done and before the carriage began. The scows were not materials supplied "in the prosecution of the work provided for in the contract," for the prosecution was completed when the removal of the stone was effected, and before the scows had served any purpose except as a convenient means for measurement; the measurements being made at the place where the stone was stored. Whether the stone was removed to an adjoining piece of land, or to a scow, or to a railway track, or otherwise lawfully disposed of, was immaterial. The obligation of the contract, which the bond was intended to secure, was fulfilled by the act of removal. But irrespective of these considerations, Judge Putnam holds that general transportation for a considerable distance by ordinary lines of transportation is not within the words "supplying labor or materials," and approves the rejection of claims for transportation by the master in the absence of evidence to show that they fall within the rule as stated by him. He bases his disallowance of other claims on the following ground:

"They did not enter into the construction of the public work, but were in the nature of tools and appliances to be used by the contractor for his own convenience and advantage in his execution of his contract."

This case does not sustain the contention of the relator.

In *United States v. Hyatt*, 92 Fed. 442, 34 C. C. A. 445, the Circuit Court of Appeals for the Fifth Circuit expressed the opinion that freight charges by a railroad for the carriage of stone to the place of prosecution of work were neither labor nor materials, within the meaning of the statute under consideration.

In *United States ex rel. McAllister v. Fidelity & Deposit Company of Maryland*, *supra*, where the material facts are practically identical with those herein, the court said:

"The plaintiffs in furnishing a boat to transport materials to the works at Coaster's Harbor Island have not furnished any material used in the prosecution of the work provided for in the contract, any more than a common carrier might be said to furnish materials by transporting them to the point where they were to be used. Churchyard might have hired the plaintiffs to transport his materials as freight, and it would hardly have been suggested that under the statute the plaintiffs would have had a lien for materials furnished in performing the contract, and we are unable to discover any reason why they have a stronger claim because Churchyard chose to hire the means of transportation, and to assume the responsibility of operating the craft."

We conclude that the statute was not intended to cover a case like the present, where there was neither carriage nor a contract to carry to the place where the work was prosecuted, but only a contract to remove materials purchased from the place of purchase.

The court below held that the use of the scows was "not materials supplied solely in the prosecution of the particular work covered by the contract sued upon, because these scows were engaged in the prosecution of other work—in the prosecution of building a breakwater at Larchmont, building a pier for the Long Island Railroad at Newtown Creek, and some structure for the Central Railroad at Spuyten Duyvil; and there is nothing in the testimony upon which we can make any apportionment whatsoever for services in the different capacities." It appears that the scows were chartered for the execution of two distinct contracts—one for removal and one for construction—and that the relator claimed a lump sum under said two contracts, without attempt at apportionment. It further appears that defendant operated the scows under a general charter; that, the removal of the stone being effected by loading it on the scows, he employed them in the execution of other contracts for construction of a breakwater, a pier, and a bridge, respectively, at various places, at long distances from the place of loading; and that the stone was carried to and delivered at said places under said general charter. Therefore the scows were not supplied in the prosecution of the work, but they were supplied as carriers "for moving stone from Government Dock, Harlem Ship Canal, to and along shores for riprap and filling," and were to be used in "the Hudson River, New York Bay, East River, Harlem and in Long Island Sound, as far as Larchmont Harbor." This action is for the breach of condition of a bond for performance of a specific contract. The evidence showed that the scows were employed generally in the execution of several contracts. No evidence was introduced to show any segregation of charges to this specific contract. It is impossible for this court to say whether there was in fact any separation of services, or to apportion the general charges between the various contracts. The evidence leaves it very doubtful whether the plaintiff had in mind any claim of liability on this bond for any portion of the charter money. It is clear that the obligation of the surety could not be enlarged to cover the contractor's general liability under the charter, or a pro rata portion of such liability, and especially where no data are furnished for its determination. *Childs v. Anderson*, 128 Mass. 108; *Crawford v. Powell*, 101 Ind. 421; *Gorgas v. Douglas*, 6 Serg. & R. (Pa.) 512; *McClain v. Hutton*, 131 Cal. 132, 141, 61 Pac. 273, 63 Pac. 182, 622; *United States ex rel. McAllister v. Fidelity & Deposit Company of Maryland*, *supra*.

In *United States ex rel. James McAllister v. Fidelity & Deposit Company of Maryland*, supra, the contractor was engaged in the execution of three distinct contracts for the United States, and hired a lighter from the relator for transporting materials indiscriminately to the different points where the work was in progress. We have already seen that the court held this furnishing of a lighter did not constitute a supplying of materials. But in discussing the branch of the case relevant to the question we are now considering, the court said as follows:

"As a matter of fact, Churchyard used the lighter for transporting materials, machinery, etc., to each of the three government contracts, and no account was kept of the portion of time it was employed upon the Coaster's Harbor Island barracks. He used it generally in performing several contracts; the cargoes were apparently piled on indiscriminately, and delivered at the various points; and it is difficult to understand how the Fidelity & Deposit Company, which had no intimation, so far as the record shows, that this contract for the use of the lighter was to be made, could be held to have contracted to guaranty payment to these plaintiffs under the statute here in review. Assuming, as we must, that the defendants knew the law, could they be deemed to have contemplated this liability? Did the law contemplate it? We think not."

We conclude, therefore, that the statute was not intended to protect one letting a boat under a charter for the general use of a contractor, and that the court committed no error in dismissing the complaint on that ground.

The exceptions to the exclusion of certain letters between the parties prior to the execution of the contract are without merit. No reason was given why the letters were offered. The contents thereof were merged in the subsequent contract. Furthermore, while the exclusion of the letter of September 9th did not hurt the relator, it would have helped defendants, because it showed that the relator knew the scows were "to be used in transporting stone \* \* \* to be deposited in docks and breakwaters wherever I can get contracts for filling."

The judgment is affirmed, with costs.

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## AH TAI v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. February 16, 1905.)

No. 539.

### 1. PARTIES—STANDING IN COURT—DISPOSITION OF QUESTION.

Ordinarily questions involving the standing of a party in court are influenced largely by the knowledge of the court as to the history of the proceeding, and are disposed of summarily upon discretion.

### 2. ALIENS—CHINESE EXCLUSION—APPEAL FROM COMMISSIONER—WAIVER.

Where a Chinaman who had been ordered deported by the commissioner, and had perfected an appeal to the District Court within the statutory period, entered into an agreement which purported to waive his right of appeal, but nevertheless appeared and demanded to be heard upon his appeal, which was still pending, and which had not been dismissed under the agreement, his status under his appeal so far involved his statutory right to an appeal as to render the question whether his executory agreement amounted to a complete and absolute waiver thereof or not, reviewable by the Circuit Court of Appeals.

**3. SAME.**

Where a Chinaman who had been ordered deported by the commissioner perfected an appeal to the District Court within the statutory period, his right to appear and be heard upon his appeal was not forfeited by an agreement purporting to waive his appeal, which had remained merely executory, and under which the appeal had not been dismissed, nor the order of the commissioner affirmed, and in reliance on which nothing had been done.

In Error to the District Court of the United States for the District of Massachusetts.

See 125 Fed. 795.

George Libby, for plaintiff in error.

William H. Garland, Asst. U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. In this case a Chinese person, who is designated in the record as Ah Tai, alias Moy Yee Poy, plaintiff in error, was before Richard W. Hale, United States commissioner for the District of Massachusetts, charged with being a Chinese person unlawfully within the United States. The Chinaman defended upon the ground that he had been previously before a commissioner for the District of Vermont, and, after trial, had been discharged upon the ground that he was a citizen of the United States. At the hearing before the Massachusetts commissioner, the Chinaman introduced what purported to be his discharge in the District of Vermont, and on the discharge was what he claimed to be a photographic likeness of himself. After hearing, the Massachusetts commissioner found that the Chinaman before him was not the person discharged in the Vermont District, and that the photograph was not his likeness, and ordered that he be deported to China.

From the order of the Massachusetts commissioner the Chinese person seasonably claimed his appeal to the judge of the District Court for the District of Massachusetts, which was duly allowed. On the 20th of April, 1904, the Chinaman appeared in the District Court and demanded to be heard in the prosecution of his appeal. The bill of exceptions sets out that the court, acting on a previous oral agreement, made in open court, found that the Chinaman had waived his right to be heard on his appeal, and ruled that he was not entitled to be heard. The District Court subsequently, but without hearing, affirmed the finding and order of the commissioner, and the case comes here upon an exception to the ruling which deprived the Chinaman of a hearing in the District Court upon his appeal.

The record is meager. Sufficient appears, however, to show that the appeal from the commissioner to the District Court was perfected within the statutory period, and that whatever was agreed in the direction of a waiver of the right to prosecute the appeal was left unexecuted. It is not claimed that the court or any one at the time acted upon the supposed agreement, nor is it claimed that the

previous agreement was entered of record. It appears that the agreement upon which the government relies was made in open court between John L. Dyer, counsel for the Chinaman, and Mr. Garland, representing the United States.

We pass over all questions as to the authority of an attorney to bind a client under the circumstances disclosed, and treat the case as though what was done was done by the Chinaman himself. At the most, it was merely an executory agreement not to prosecute, and, before any action was taken by the court in the direction of dismissing the appeal, or of affirming the order of the commissioner, the aggrieved party appeared in court and claimed the right to prosecute his appeal.

Ordinarily questions involving the standing of a party in court are influenced largely by the knowledge of the court as to the history of the proceeding, and are disposed of summarily upon discretion. Quite likely we may not know from the record all the grounds upon which the District Court acted, but, looking at the record, we incline to the view that when the Chinaman appeared and demanded to be heard upon his appeal, which had been allowed and was still pending, his status under his perfected appeal thus pending so far involved his statutory right as to render the question reviewable in this court, whether the executory agreement amounted to a complete and absolute waiver.

The agreement in question is referred to by the District Court as one previously made, not as one entered into for the purpose of disposing of the case at the time the action was taken by the court. At the time the Chinaman was denied his right to prosecute, the appeal, as has been said, was still pending; and, however it might be if it had reference to a situation involving a strictly civil case, we do not think the previous executory agreement, in a case concerning the restraint of personal liberty, should be accepted as so far acted upon as to become absolute, and deprive the appellant of the right to prosecute his statutory appeal. If, at the time it was made, the agreement had been executed, and the appeal dismissed, or the order of the commissioner affirmed, it would have been different.

By analogy, cases like *Ward v. Hollins*, 14 Md. 158, and *Hay v. Jenkins*, 28 Md. 564, which hold that a person may abandon or withdraw his appeal without explanation, and take another within the statutory time, would seem to sustain the idea that a party who has made an agreement not to prosecute may rescind, while the appeal is pending, and return to his right to go forward.

The law is reluctant to hold parties to executory agreements resting in the past, which, if enforced, would deprive them of their life or liberty. It is for this reason that, in proceedings involving the higher offenses, the old formalities of pleading in person and in the presence of the court are held to, as necessary and proper safeguards of liberty. In such cases, judgment is based not upon agreement, but upon an admission of the fact of guilt. While this is not a criminal proceeding, its purpose is to exclude the Chinaman from the liberty of the territory of the United States, and in a sense,

therefore, to restrain him of personal liberty. If it were a criminal proceeding, where the respondent had entered a plea of guilty, or in any way admitted his guilt, the fact of the admission would be evidence against him upon the question of guilt or innocence, though respondents are often allowed to retract their plea of guilty and go to trial, but an executory agreement of a respondent to plead guilty or not to defend himself would not operate to debar him of the right of trial. Moreover, the right of the United States to deport a Chinaman, with incidental expenses, rests not upon agreement, but upon the duly established fact that the person is a Chinese person unlawfully within the United States, and not a citizen thereof.

No point has been made whether this case should have been brought before us by appeal rather than by writ of error, and we are not to be held as expressing any opinion in reference thereto, even by implication.

The finding and order of the District Court affirming the finding and order of the commissioner are reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

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#### THE MAURICE.

(Circuit Court of Appeals, Third Circuit. February 7, 1905.)

##### No. 89.

1. **TOWAGE—INJURY TO TOW—EXCESSIVE LENGTH OF LINE.**

The sinking of a barge in tow in the Schuylkill by striking against the cribbing of a bridge while passing through the draw held due solely to the fault of the tug for towing with too long hawsers.

2. **EVIDENCE—ADMISSIONS—RES GESTÆ.**

Statements made by the master of a barge which was sunk by collision with a bridge, made at a subsequent time and different place, as to the cause of the accident, are not admissible in a suit to recover for the loss, either as admissions binding the owner or as *res gestæ*.

3. **TOWAGE—NEGLIGENCE OF TUG—LIABILITY FOR LOSS OF TOW.**

Where the striking of a barge in tow against the cribbing of a city bridge was due to the fault of the tug, she cannot shift the liability upon the city on the ground that if the cribbing had been in perfect condition the collision would not have injured the barge.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towage, §§ 11, 19.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

John F. Lewis, for appellant.

Willard M. Harris and Harry T. Kingston, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree in admiralty dismissing the libel of the owner of the barge Peter A. Rogers against the tug Maurice for negligent towage. The city of



Philadelphia was made a party to the cause, under rule 59 of the Supreme Court, but the court below was clearly right in deciding that there was no ground upon which it could be held liable.

The Rogers, while being towed by the Maurice on the Schuylkill river, struck a part or appendage of the Gray's Ferry Bridge, and was so injured that she sank. The learned judge of the District Court held that the Rogers was alone to blame for the accident, and that the fault with which she was chargeable was her master's failure to give proper attention to the wheel during the quarter of a mile that intervenes between the draw of the Baltimore & Ohio Railroad Bridge and the draw of the Gray's Ferry Bridge. We are unable to concur in this conclusion. The hawsers which were used by the tug were much longer than they should have been, and to that fact solely, we think, the occurrence of the collision must be attributed. They should have been shortened at or about the time when, passing from the Delaware river, the Schuylkill was entered. The omission to do this was not only the initial fault, but was the direct and proximate cause of the catastrophe. There was no failure to steer the barge upon approaching the Gray's Ferry Bridge. Her captain testified that when about seven or eight hundred feet from that bridge he went to his wheel and stood by it, and that his boat followed the tug, and did not seem to be in any danger until it was within about 200 feet of the bridge, when he perceived that it was likely to strike the obstruction, and that he never left the wheel until it did so. Of this testimony of the master of the Rogers, that of his brother, who was with him, and of the master of the other barge, which was being towed alongside the Rogers, is corroborative, and we perceive no sufficient reason for discrediting it. The account given by the tug's master of a conversation between himself and the captain of the Rogers, "on the road back to Camden," was duly objected to, and the objection was well taken. The statements of the latter were not relevant as admissions, for the libellant had in no way authorized them; nor as *res gestæ*, for both in time and space they were widely separated from the main transaction, and were simply narrative of past events. *The Oil City Fuel Supply Co. v. Boundy*, 122 Pa. 449, 15 Atl. 865. But, even if it had been admissible, this evidence would not have sufficed to relieve the tug from the consequences of its own default. The sheer which carried the Rogers against the "cribbing" was due to the unusual and excessive length of the hawsers, and the fact (if it be a fact) that she would not have been hurt if the cribbing had been in perfect condition would not absolve the tug from blame for having, by her negligence, produced the injury which actually resulted. If those responsible for her management had exercised due care, the cribbing would not have been struck at all; and, therefore, no matter what may have been its condition, she is answerable for the damage which was in fact caused by striking it.

The decree of the District Court is reversed, with direction to that court to enter a decree in favor of the libellant, and to appoint a master to ascertain and report the damages, in accordance with the customary practice.

**JONES, City Treasurer, et al. v. UNITED STATES ex rel. TOMPKINS  
COUNTY NAT. BANK.**

**SAME v. UNITED STATES ex rel. BANGOR SAV. BANK.**

(Circuit Court of Appeals, Eighth Circuit. February 18, 1905.)

Nos. 2,021, 2,022.

**1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR.**

The overruling of motions to quash an alternative writ of mandamus, and compel relator to amend the petition, cannot be reviewed, not having been challenged in the assignments of error.

**2. FEDERAL COURTS—SPECIAL FINDINGS.**

The making of special findings by a federal Circuit Court on waiver of a jury, and the effect thereof, is governed by Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570], and not by state statutes.

In Error to the Circuit Court of the United States for the District of Nebraska.

The Tompkins County National Bank of Ithaca, N. Y., and the Bangor Savings Bank of Bangor, Me., having recovered judgments in the Circuit Court of the United States for the District of Nebraska against the city of Beatrice, Neb., upon certain municipal bonds and coupons, instituted proceedings in mandamus against the treasurer, mayor, and council of the city to enforce the application thereon of funds in the city treasury and the levy and collection of taxes for the payment of the then remaining deficiency. The proceedings resulted in the issue of peremptory writs of mandamus, and the respondents have prosecuted writs of error to this court. The two cases are so similar in their essential features that they may be considered together.

Melvin B. Davis, for plaintiffs in error.

Chester B. Masslich, for defendants in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The plaintiffs in error excepted to the orders of the trial court overruling their motions to quash the alternative writs of mandamus and to compel the relators to amend their petitions in certain particulars, but the exceptions are unavailing. Even were the action of the court erroneous, which does not appear, it has not been challenged in the assignments of error.

Aside from the foregoing the record discloses no exceptions whatever on the part of the plaintiffs in error. No bill of exceptions was preserved, and consequently the rulings of the court during the progress of the trial are not shown. No request was made for any specific declarations of law. No legal propositions applicable to the case or any particular phase of it were formulated by plaintiffs in error and presented to the trial court for its ruling thereon. They took no exceptions to the special findings of fact or to the judgments which were rendered upon them. It is obvious, therefore, that the proper scope of review by this court is within a very narrow compass. *Mercantile Trust Co. v. Wood*, 60 Fed.

346, 8 C. C. A. 658; *Hooven etc. Co. v. Featherstone's Sons*, 111 Fed. 81, 49 C. C. A. 229; *Kirk v. United States*, 163 U. S. 49, 56, 16 Sup. Ct. 911, 41 L. Ed. 66. It is limited to the single question whether the judgments of the trial court are supported by the special findings upon which they are respectively predicated.

Complaint is made that the trial court did not make a finding of fact as to the character of some of the bonds which became merged in the judgments, and that it did not specially state certain conclusions of law in accordance with the civil practice act of Nebraska. The making of special findings by a Circuit Court of the United States upon a waiver of a jury, and the effect thereof, are governed by the acts of Congress (Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570]), and not by the statutes of a state. Nor was the action of the court in that particular the proper subject of an exception. *Insurance Co. v. Folsom*, 18 Wall. 237, 253, 21 L. Ed. 827.

The only questions which challenge attention upon a consideration of the sufficiency of the facts found and stated by the trial court to justify the relief finally awarded are whether it appears that before the proceedings were instituted and the alternative writs were issued a demand was made by the relators upon the municipal authorities to apply the funds then in the city treasury upon the judgments and to levy a tax for the deficiency, and, if not made upon them, then whether such demand was necessary or should be held to have been dispensed with in view of the attitude of the latter against paying the judgments under any circumstances. It is sufficient to say that these matters are disposed of adversely to the plaintiffs in error by what was said by this court in *United States v. Saunders*, 124 Fed. 124, 59 C. C. A. 394.

The judgments of the Circuit Court are affirmed.

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THE ALFRED W. BOOTH.

BOOTH et al. v. MORAN.

(Circuit Court of Appeals, Second Circuit. January 6, 1905.)

No. 97, 98.

**COLLISION—TOW AND ANCHORED SCOW—DEFECTIVE STEERING GEAR.**

A collision between the first of two tows on a long hawser and an anchored scow held to have been due solely to the fault of the tow, whose steering gear had been out of order for some days, to the knowledge of the master and owners, by reason of which she failed to follow the tug, which had no knowledge of her defective condition, and was entitled to assume that she could be steered.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 73-81.]

Appeals from the District Court of the United States for the Southern District of New York.

Appeal from decree of District Court holding Barney dumper No. 3 solely in fault for a collision with an anchored scow. Reported below in 123 Fed. 172.

Le Roy S. Gove, for appellants.  
Chas. C. Burlingham, for appellee Moran.  
W. S. Montgomery, for appellees Hughes et al.  
Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. We concur fully with the District Judge. The proximate cause of the collision was the condition of dumper No. 3, which made it impossible to give her a port helm. The disrepair which produced this condition had existed several days, was known to master and owners, and had not been communicated to the tug which had her in tow, and which was entitled to assume she could be steered.

The decree is affirmed, with interest and costs.

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**BALTIMORE & O. R. CO. v. KITCHIN.**

(Circuit Court of Appeals, Second Circuit. January 4, 1905.)

**CARRIERS—WRONGFUL EJECTION OF PASSENGER—DAMAGES.**

A judgment in favor of a passenger for \$200 damages for wrongful ejection from a car on defendant's railroad affirmed on the authority of *Pullman's Palace Car Co. v. King*, 99 Fed. 880, 39 C. C. A. 573.

In Error to the Circuit Court of the United States for the Southern District of New York.

On writ of error to the Circuit Court for the Southern District of New York to review a judgment entered on a verdict in favor of the defendant in error (plaintiff below) for the sum of \$200, damages sustained by him by reason of being wrongfully ejected from a railroad car at or near Dartmoor, W. Va., after having paid his fare from Grafton to Elkins and return to the defendant below.

Richard Reid Rogers, for plaintiff in error.

Before TOWNSEND and COXE, Circuit Judges.

PER CURIAM. We think the judgment should be affirmed on the authority of *Pullman's Palace Car Co. v. King*, 99 Fed. 880, 39 C. C. A. 573.

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**GREENE et al. v. BUCKLEY et al.**

**SAME v. MANHATTAN REFRIGERATING CO.**

(Circuit Court of Appeals, Second Circuit. December 2, 1904.)

Nos. 10, 11.

**1. PATENTS—CONSTRUCTION OF CLAIMS—EFFECT OF PROCEEDINGS IN PATENT OFFICE.**

Where a patentee acquiesces in a rejection of claims by the Patent Office, and amends the same so as to be more specific, such claims must be read and interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover either what was rejected or disclosed by prior devices.

**2. SAME—INFRINGEMENT—AUTOMATIC LUBRICATORS.**

The Buckley patent, No. 590,297, for a force-feed lubricator, the object of the invention being to provide means whereby several machines may be automatically supplied from a single lubricator, and the quantity of oil fed to each regulated, covers merely a convenient combination of old devices, performing their old functions and accomplishing their old results in their old way, equipped with a specific construction of the connection between the crosshead or reciprocating member of the machine which operates the forcing pistons and the piston rods, whereby a slip movement is secured, and the length of piston stroke may be varied with reference to that of the crosshead, which remains constant; and, in view of the proceedings in the Patent Office and the prior art, the claims must be limited to such specific means of adjustment. As so construed, *held* not infringing.

Appeals from the Circuit Court of the United States for the Western and Southern Districts of New York.

This cause comes here on appeal from two decrees of the United States Circuit Court for the Southern and Western Districts of New York, respectively (120 Fed. 952, 955), adjudging the validity of complainants' patent No. 590,297, granted to John Buckley, September 21, 1897, and finding infringement, and directing an injunction and accounting.

Geo. W. Hey and Arthur L. Parsons, for appellants.

W. H. L. Lee and B. F. Lee, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. In the suit against Buckley et al. it was contended in the court below that certain defendants were individually liable. The court dismissed the bill as to them, and no appeal was taken from said decision. The issues on this appeal, therefore, are the same in both cases.

The Manhattan Refrigerating Company is a user of the alleged infringing machines. The Sterling Lubricator Company is the manufacturer thereof, and has assumed and conducted the defense in both cases.

The patentee says:

"My present invention relates to lubricators particularly of the kind known as 'force-feed,' and it has for its object to provide means whereby several engines or machines may be supplied with lubricant from a single lubricator, and the quantity of oil fed to each regulated to a nicety. \* \* \* In my device I provide a single construction, embodying one movable part operated from any convenient prime mover, as the engine itself, and connected with this part are independently-adjustable feeding devices, as pumps, so that by means of the adjustments the operator can regulate not only the exact quantity that is required for any moving parts without stopping the operation of the movable part or device, but the frequency with which this quantity is supplied."

The claims in suit are the following:

"(1) In a lubricator, the combination with the reservoir, the cylinder outside of the latter, having the inlet-passage leading from the cylinder, the check-valve therein, and the exit-passage having the check-valve therein, of the piston operating in the cylinder, the reciprocating crosshead having a constant stroke, and the relatively-adjustable stops between the opposite sides of the head and the piston, whereby the strokes of the piston may be adjusted to any portion of that of the head, substantially as described.

"(2) In a lubricator, the combination with the reservoir, of the two cylinders outside of the reservoir, inlet and exit passages for the cylinders, and check-valves therein, the two pistons, 4, operating in the cylinders, the reciprocating crosshead, 7, and the relatively-adjustable stops on each of the pistons with which the crosshead engages, substantially as described.

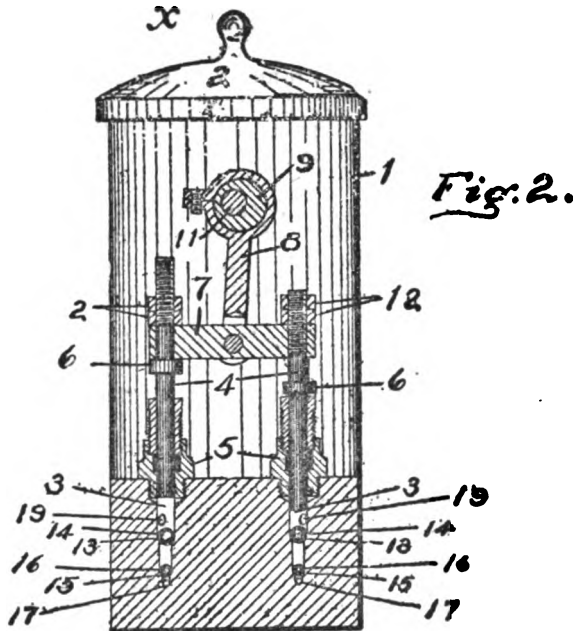
"(3) In a lubricator, the combination with a reservoir, two pump-cylinders having supply and discharge passages and valves therein, of a reciprocating member, as a crosshead, two pistons operating in the cylinders having the collars and adjustable nuts thereon, co-operating with the member, whereby the stroke of the pistons may be independently regulated, substantially as described."

"(6) In a lubricator, the combination with the reservoir, a pump-cylinder, inlet and discharge passages and valves therein, of the piston operating in the cylinder, the reciprocating member, as a crosshead, adjustable slip connections between the piston and reciprocating member for regulating the length of stroke of the former relative to the length of stroke of the latter, the cam-wheel actuating the member, an actuating device for the cam-wheel, as rod, 29, and adjustable connections between said actuating device and the cam-wheel, whereby the speed of the cam-wheel may be adjusted relative to the speed of the actuating device, substantially as described.

"(7) In a lubricator, the combination with the reservoir, two pump-cylinders, inlet and discharge passages and valves therein, and pistons operating in the cylinders, of a rotary cam-wheel, a reciprocating member, as a crosshead, actuated from the cam-wheel, independent adjustable slip connections between each of the pistons and said member for regulating their stroke relative to the length of stroke of the member, actuating devices, as a rod, 29, for rotating the cam-wheel, and adjustable connections between said actuating devices and the wheel, whereby the speed of the cam-wheel may be changed, substantially as described."

A force-feed lubricator is merely a pump device for supplying oil to an engine where pressure is required in order to positively force the oil from the source of supply to the parts to be lubricated. The operating piston of the lubricating pump is operatively connected with some moving part of said engine. It is often desirable to supply to the different working parts of an engine varying quantities of oil, adapted to the requirements of varying high and low pressures, or varying frequencies of operation. The object of the patentee was to provide such a lubricator, in compact form, in a single device, capable of convenient application and adjustment, and comprising such adjustable devices for regulating the supply of oil as to secure economy of operation of the device, and a saving in the amount of oil required. This result he secured by what is appropriately characterized by counsel for complainants as a "self-contained" device, which comprised an oil reservoir and pump mechanism in a single structure, said pump mechanism being located outside of said reservoir, so as to be easily accessible, having check valves to control the flow of oil from the reservoir to the pump cylinders, and from the pump cylinders to the place of use; thus permitting easy and accurate adjustment of the quantity of oil delivered. Each pump piston receives its motion from a reciprocating member, such as a crosshead, which is given under all circumstances a constant length of stroke. Each pump piston is adjustably connected with the crosshead, so that the length of stroke of the piston may be variable, although the length of stroke of the crosshead as aforesaid is uniform. By thus varying the length of stroke of the pump piston the quantitative supply of oil thereby can be regulated. This feature relating to

quantitative adjustment may be best understood by an inspection of Fig. 2 of the patent in suit, which shows a double lubricator:



The oil reservoir, 1, is provided at one side of its base with an enlargement, in which are bored cylinders, 3. Pistons, 4, provided with fixed collars or stops, 6, operate in said cylinders. The upper ends of the pistons pass through a movable crosshead, 7, locked to the piston by screw nuts, 12, so pivotally connected by means of a pitman, 8, and a cam, 9, to a driving wheel (not shown in the drawing), that when said wheel is rotated the crosshead will have a constant vertical movement. When the pump is operated the oil is forced from the reservoir through 17, past the check valves, 16 and 14, out of the cylinder through the passage, 19, to the portion of the machine to be lubricated.

It will be observed that in Fig. 2 the crosshead is in direct contact at the left with the collar, while on the right they are separated by an intervening space, 4. This adjustment is accomplished by screwing the adjustable head up on the right-hand piston. This arrangement illustrates the graduating feature of the patent.

When the pump is operated, the left-hand piston, being rigidly connected with the crosshead between the fixed collar and the nut, travels the full length of stroke imparted to the crosshead by the driving mechanism, while in the right-hand piston there is a lost motion while the crosshead is making the slip movement along the piston and until it contacts with the nut. Because of this adjustable slip connection the piston remains stationary, while the crosshead has a constant, unvarying movement; and, by this means of relatively regulating the length of one stroke to that of the other, any desired quantitative ad-

justment of the supply of lubricant may be secured. Not only is quantitative adjustment thus provided for, but speed adjustment also is effected by varying the time required for the reciprocating member or crosshead in making its reciprocations.

This latter construction, in its single and double form, is covered by the latter clauses of claims 6 and 7, respectively. But because the patentee admits that these means are not new, but are substantially the same as those described in a prior patent, and that any other suitable form of actuating device may be employed, and because counsel for complainants assert that the corresponding device employed by defendant is old in the art, this branch of the case will not be further discussed.

The principal issue is that of infringement. The determination of that question depends upon the status of the patent, and the interpretation of the claims and their scope, in view of the file wrapper and the prior art.

The following facts are admitted or proved: (1) That there is not a single novel element in the combination of the patent in suit was admitted by counsel for complainants on the argument, and is proved by the record. (2) That the patentee originally believed himself entitled to cover broadly adjustable connections, and acquiesced in the action of the Patent Office in limiting his claims to a certain definite construction, is shown by the file wrapper and contents of the patent. (3) That the defendants' adjusting device for varying the length of the stroke of the piston is old, and is found in the Fraser British patent, is specifically admitted by counsel for complainants. (4) That the Harlow prior patent discloses a double-way force-feed lubricator, and that single-feed lubricators made under said patent were in use prior to the invention of the patent in suit, is also admitted. (5) That the real advance over the prior art accomplished by the patentee consisted in providing a double or multiple way lubricator, better and more convenient than the single lubricator of the prior art, appears from the evidence, and is practically admitted by counsel for complainants. (6) That commercially successful single force-feed lubricators were manufactured and sold prior to the date of the alleged invention of the patent abundantly appears from the record, and is admitted by the former manager of complainants' predecessor in this business.

Referring to April, 1897, the date when he first commenced to sell lubricators for complainants' predecessor, he testified that he did not sell lubricators made under the patent in suit until June, 1897, because he "had a large stock of the other style of lubricator (the prior single force feed), and was anxious to get rid of them." He then testified as follows:

"X-Q. 197. Even though you knew they gave you more or less trouble, owing to the lack of adjustment, and when you were just starting, as you say, to introduce force-feed lubricators in New England? A. Yes; because by using different styles of cams they could be adjusted to suit the engine or pump upon which they were placed, and would do good work. X-Q. 198. What was the reason of the return by you to the Rochester Company of these lubricators which did not have the piston adjustment; that is, had cams removable and of different sizes for adjusting the throw or throws of the piston? A. Because the lubricator with the adjustable plunger was a great deal more convenient to install and regulate."



The defendants' lubricator secures all the material advantages possessed by that of the patent in suit. Disregarding minor immaterial differences of construction, and similarities of construction negligible and immaterial because found in the common prior art, the essential feature relied on to support the charge of infringement is the adjustable connection between the cam and the piston, which enables the stroke of the piston to be varied at will. This connection comprises a rocker arm pivoted to a stud above the cam, the ends of which move up and down in a curved path. The rocker arm is slotted to receive a link connecting it with the piston. This link may be moved to any desired point on the slotted arm, and fastened by means of a set screw. Thus the piston may be given a longer or shorter range of motion, dependent upon the distance of the fastened extremity of the link from the center of motion of the rocker arm. The defendant Buckley admits that the functions and objects of defendants' rocker arm and of complainants' crosshead are the same.

The details of construction for regulating the speed adjustment need not be considered, for reasons stated above.

In considering the patent and comparing the respective adjusting devices, it is to be noted in the first place, as complainants' expert asserts, that "the particular means for adjustment was not new, and it and the corresponding means employed in the defendants' lubricators were known equivalent means for adjustment." Admitting that the defendants' adjusting devices are unlike those of complainants, he refers to the prior Fraser British patent, No. 16,940, as follows:

"This patent is interesting, as showing the particular means for adjusting the extent of stroke of a pump piston which is employed in the defendant's lubricators, and it confirms my opinion expressed in my original deposition to the effect that this means of adjustment is the equivalent of the specific adjustment used for the same purpose set forth in the Buckley patent."

The application originally contained 10 claims. Of these, all except the tenth claim (now claim 3) were rejected and amended. Claim 3 covered the specific details of construction set forth in the specification and shown in the drawings, namely, the crosshead, pistons, provided with fixed collars and adjustable nuts, and so co-operating with the crosshead that the strokes of the pistons may be independently regulated. The second claim covers a duplication of the parts of the first claim, and they will be considered together.

The first and second claims originally covered broadly the combination of crosshead or connector, having a determined stroke, and "the piston and adjustable connections between said piston and the reciprocating member" (the crosshead). These two claims and claims 4 and 5 were rejected on Harlow patent, No. 295,919. This patent covers a double force-feed lubricator, as appears from the language of the first claim, which is as follows:

"(1) In a lubricator, the reservoir having two or more outlet-passages, combined with a series of independent forcing devices actuated in common, by means of which different quantities of the lubricant may be forced from each outlet as desired, substantially as described."

The specifications describe and the drawings show a rocker shaft connected with the actuating rods of the pump device, said rods being provided with milled heads or threaded portions, which engage with

their guides by means of jamb nuts, and thereby the quantity of oil delivered at each stroke of the pump piston may be regulated and adjusted. The applicant thereupon canceled said broad claims 1 and 2, and substituted the limited ones of the patent in suit. He also attempted to differentiate claim 5 from Harlow, on which it had been rejected, and to differentiate claims 6 and 7 from the references cited, on which they had been rejected. Claims 5, 6, and 7 were again rejected. The applicant then partially acquiesced in the rulings of the Patent Office, and amended claims 6 and 7 by limiting them to a construction for regulating the length of stroke of the piston relative to the length of stroke of the crosshead. This amendment was made after the assertion by the applicant that his invention was differentiated from Harlow and Carlson, based on the following argument:

"These amendments are believed to clearly distinguish my invention from the references, as in neither the Harlow or Carlson patents is the length of the stroke of the piston capable of regulation relative to the length of the stroke of the reciprocating member, but, on the contrary, whatever the adjustment of the pistons relative to their piston rods, the pistons move the same distance as the actuating rods. This difference is important, as in the combinations covered by these claims I am enabled to regulate not only the quantity of oil fed by each piston, but the speed, as well, even when the prime mover operates at a constant speed."

The Patent Office, however, again rejected said claims 6 and 7, and they were only allowed after acceptance of its suggestion and subsequent requirement that they be amended "by indicating that the crosshead has free movement between the adjusting nuts, 12, and the stop, 6," because—

"There can be no regulating of the stroke of the piston relative to the length of the stroke of the crosshead if the crosshead does not have free movement between the adjusting nuts, 12, and the stop, 6, and therefore the claims should bring out the fact that said crosshead has such movement."

The amendment introduced in conformity with this requirement provided in claim 6 for "adjustable slip connections between the piston and reciprocating member for regulating the length of stroke of the former relative to the length of stroke of the latter."

The amendment of claim 7 is practically the same as above.

It thus appears that the patentee, having originally covered his real invention by the last of the original 10 claims, and having unwarrantably attempted by said other claims to cover a broader invention, secured a patent for certain other claims, limited to the definite construction shown and described in his application. In so doing he has committed himself to a definite interpretation of "the relatively adjustable stops" for regulating the length of the stroke of the piston relative to the length of the stroke of the crosshead, and by means of "adjustable slip connections." In addition to the foregoing limitations imposed by the Patent Office, further limitations upon the scope of the patent in suit are required by other disclosures of the prior art. Thus Bischoff patent, No. 368,702, shows a single force-feed lubricator provided with pistons moved back and forth by a connection such as is shown in the device in controversy, one of said pistons being secured to the actuating frame, while the other is so connected therewith by a neck and collar that the frame moves for a certain distance on the piston without moving

the piston. But it does not appear to disclose any means for adjusting the quantity of the oil supply, and, despite the assertions of defendant's expert to the contrary, it is doubtful whether such adjustment could be provided so as to be practically operative without the exercise of invention, especially in view of the presence of an operating finger, not used by Buckley, but apparently essential in Bischoff.

Felthousen patent, No. 215,271, with Bischoff and Harlow, chiefly relied on by counsel for defendants, shows a single force-feed lubricator equipped with a device for regulating the frequency of stroke practically identical with that covered by claim 6 of the patent in suit. It also shows a serrated bar, which forces a piston rod beyond an opening from the oil reservoir, and thus pumps the oil to the place of use. This piston is adjustably connected to the socket in said bar, and by means of a set screw the length of the stroke of the piston may be adjusted. The patentee says:

"It is therefore self-evident that the two extremes of this pump being a delivery of oil or lubricant equaling the full stroke of the piston in one case, or none at all in the other case, an adjustment between the two extremes may be made to any quantity of lubricant, ranging from nothing up to the full stroke of the piston, and that this adjustment can be effected, irrespective of the length of stroke or the number of strokes of the piston, by simply pushing the piston, D, farther into or withdrawing it out of the socket, Q, to the desired point."

Confronted by this exhibit, the court called on counsel for complainants to differentiate it from the single force pump claims of the patent in suit. We were referred to the brief for a full discussion, upon examination of which we find only the following statement:

"Patent to Felthousen, No. 215,271, dated May 13, 1879, shows substantially the same quantitative adjustment of oil supply as is shown in the Siegrist British and United States patents. There is substantially the same relative adjustment between the pump piston and the oil-supply passage. The pump piston has a uniform stroke. The quantity of oil supplied is varied by adjusting the effective portion of such stroke."

The Siegrist patents were not discussed or explained by either counsel on the argument, no model was produced, and in complainants' brief it is stated as follows:

"Considering the Siegrist structure as a whole, it belongs in the category of complex and intricate mechanisms, where much ingenuity has been wasted in producing a machine of no value. It is a case of misdirected energy."

In these circumstances we are not disposed to critically discuss the Siegrist patent, but prefer to rest our conclusions as to the Felthousen patent upon what is disclosed by its specification and drawings, as above stated. It is evident, however, from a mere inspection of the Siegrist patent, that it shows a force-feed lubricator provided with pistons connected with a reciprocating crosshead by adjustable nuts on opposite sides of the crosshead.

Finally, this is not a case of attempted anticipation or limitation by mere paper patents.

Complainants' expert testifies as follows:

"X-Q. 112. As I understand your testimony relating to Mr. Wilhelm's consideration of the prior art in this cause, the prior art was quite replete with various types of both single and double force-feed lubricators, some of which were self-contained, in the sense in which you have employed this term, and

others were made of segregated parts requiring support upon different parts of the machine to be lubricated, for example, and that you have defined the invention of the Buckley patent to reside in the combinations which are recited in the claims in issue here. Am I correct in this idea? A. Yes. X-Q. 114. I call your attention to the lubricator exhibit introduced on behalf of the complainants and marked, 'Complainants' Exhibit J. & B. Cup No. 3, Jany. 30, 1902, J. A. S., Examiner,' and ask you if that lubricator is a compact, self-contained force-feed lubricator? A. Yes. X-Q. 115. And what does that lubricator lack to disclose the invention of claims 1 and 6 of the Buckley patent? A. I cannot tell whether this exhibit has check valves in the inlet and outlet passages, but, assuming it to have such valves, it has no means for adjusting the piston so as to secure a variable length of stroke, and consequently it does not have the subject-matter of claims 1 and 6."

We have already seen, from the admissions of complainants' manager, that the J. & B. cups were practical devices and did good work.

It is further admitted that:

"Certain Harlow and Moses single-way lubricators had a mushroom existence. A few of them were in actual use, but the manufacture thereof had been abandoned, and none were on the market, when the Rochester Automatic Lubricators of the Knipper & Knipper 1894 and the Butler 1896 patents appeared. The Harlow lubricators seen by Sherry were single-way lubricators. So far as the double lubricator is concerned, therefore, the Harlow patent is certainly a 'paper patent.' The Harlow single lubricators seen by Sherry were certainly not the exact thing shown in the Harlow 1884 patent, which is a two-way lubricator."

With the light afforded by the foregoing discussion, the contentions of complainants will be again examined.

(1) The Buckley lubricator is a self-contained device, and therefore convenient for general application to different machines without reorganization. But as it is asserted and admitted that none of the elements which constituted this convenient combination were new, or performed any new function, or accomplished any new result, except that they were more salable, because more convenient, this contention is insufficient.

(2) The same may be said of the fact that the operating mechanism is outside of the oil reservoir, so as to be readily accessible.

(3) There is nothing new in check valves to control the flow of a fluid. That "this organization is important, \* \* \* enabling very free adjustments to be effected," etc., is immaterial upon the question of patentable novelty. It is not the result, but the novel means, which are the subject of a patent.

(4) The arrangement by which each piston is so adjustably connected with the crosshead that the length of stroke of the piston may be variable, although the length of stroke of the crosshead is uniform, appears to be novel, in this connection, and will be discussed later.

(5) The provision for speed adjustment, as distinguished from quantitative adjustment, is confessedly old.

(6) The contention that the Buckley double lubricator involved invention, because the operating mechanism was not duplicated, was not pressed on the argument, and need not be discussed. A double force-feed lubricator was not novel, but was described in the Harlow patent, as already stated.

The claims of the patent, therefore, cannot cover broadly adjustable connections for regulating the stroke of the piston, because the patentee

acquiesced in the action of the Patent Office in rejecting claims therefor, and because such connections are shown in Harlow and Felthousen. They cannot cover the speed-adjusting devices of claims 6 and 7, because they are confessedly old. They must be limited, then, to the reciprocating crosshead, having a constant stroke, and the relatively adjustable stops between the opposite sides of the head and the piston, whereby the strokes of the piston may be adjusted to any portion of the head, of claims 1 and 2, to the specific crosshead, pistons, collars, and nuts of claim 3, and the adjustable slip connections between the piston and reciprocating member for regulating the length of the stroke of the former relative to the length of the stroke of the latter of claims 6 and 7.

It is believed that a mere comparison of complainants' and defendants' devices, in connection with the admissions of the patentee and of the witnesses and counsel for complainants, establishes noninfringement. Aside from the minor differences that the pumps of defendants' lubricator are not outside of the reservoir, and are not connected by inlet passages having check valves therein, the defendants' rocker arm and connections is not the reciprocating crosshead having a constant stroke and connections of the patent, because the stroke of the rocker arm is not constant, but variant, according to the distance of the point of connection from the center of its motion, and "the length of the stroke of the piston" is not "capable of regulation relative to the length of the stroke of the reciprocating member." See file wrapper and claims. As to this difference, complainants' expert testifies as follows:

"X-Q. 93. And the movement of the pistons in the Buckley structure in relation to the movement of the crosshead in respect to the corresponding two parts of the sterling lubricator exhibit is in marked contrast in the respect set forth in my last question; that is, that in the Buckley device the movement of the cross-head is variable with the movement of the piston, and in the Sterling it is constant with the piston. Is not that true? A. The facts stated in the question are true."

There are therefore no "relatively adjustable stops \* \* \* whereby the stroke of the piston may be adjusted to any portion of that of the head," and there are no "stops between opposite sides of the head and the piston." There are no pistons "having the collars and adjustable nuts thereon," such as are described in the patent.

But complainants' expert, being obliged to admit that the result is old, seeks to establish infringement by the assertion of equivalency of function in the two devices for accomplishing the adjustment of length of stroke. In order to do this he is forced to argue, in reference to the "independent adjustable slipping connections," that:

"The Sterling double lubricator has such independent adjustable slip connections, the connections being arranged as already described, so as to slip along the reciprocating member aforesaid, so as to effect the adjustment."

But he is forced to make the following admission:

"X-Q. 89. But as a matter of fact, the piston is connected to the crosshead in the Sterling single lubricator, so that the part you call the link has no slip on the crosshead when the crosshead itself is rocked, and to this extent the connection with the crosshead is fixed? A. Yes. \* \* \* X-Q. 260. That is to say, you do not find in the Sterling lubricators, or either of them, a crosshead reciprocating lengthwise of one or more pistons operated by said

crosshead with a lost motion; that is, by slipping along one or both of the pistons for a limited distance? A. No; but I do find an equivalent construction and arrangement in the Sterling lubricator. X-Q. 261. The question is, however, if the Buckley claims must be construed as limited to such crosshead and connections between the crosshead and pistons, as described in the last two questions, and said claims are not entitled to the doctrine of equivalents, would you then find that such claims of the subject-matter thereof were included in the Sterling lubricators, or either of them? A. Certainly not."

It will be remembered that the patentee, while making his application, definitely committed himself to an interpretation of this slip movement as one accomplished by means of lost motion secured by the slip and free movement of the crosshead along the pistons between the adjusting nuts and stops, the piston meanwhile not being moved, in order to regulate the relative length of stroke of piston and crosshead. The patentee therefore cannot now contend that his invention covers a device where there is no slip—in fact, no lost motion—and where the change in adjustment does not affect the relative length of stroke of the two members, but where all movement of the rocking lever is transmitted to pistons, which move continuously during the operation of the device.

Complainants' expert testifies as follows:

"X-Q. 116. Assuming that this exhibit J. & B. Cup, No. 3, was constructed in strict accordance with Defendant's Exhibit Butler Patent, No. 564,502, dated July 21, 1896, in all particulars, excepting that the enlargement of the base is bored for two pump barrels, and the necessary valves shown in Fig. 5 of the patent drawing are provided for each barrel, and a reciprocating crosshead, with two pistons connected thereto with nuts on each side of the crosshead, as is shown, for instance, in the Siegrist patent, excepting that the crosshead is reciprocated with a cam, should you say that the J. & B. cup, thus modified, would contain the invention of claims 1, 2, 3, 6, and 7 of the Buckley patent in suit? If not, why? A. It seems to me that the structure contemplated by the question would be substantially that of the Buckley patent in suit, excepting that two nuts would be provided for each piston above and below the crosshead; and, for reasons heretofore stated by me, I do not think that such an arrangement would be feasible or practical if the pistons should be adjusted to anything except their maximum strokes, since they would not retain their adjusted positions. Aside from this consideration, I think that the assumed structure would embody the subject-matter of each of the claims in question. X-Q. 117. The only thing the hypothetical structure of the preceding question would lack would be the fixed collars on the pistons and the two adjustable nuts on each piston for the opposite side of the crosshead. Am I right as to this? A. Yes; or some equivalent retaining means to maintain the adjustment."

The facts herein exclude the application of the doctrine of equivalents. The patentee has limited himself to a specific construction. Even if defendants' adjusting device is the functional equivalent thereof, it is found in the prior art. The patent in suit merely covers a convenient combination of old devices, performing their old functions and accomplishing their old results in the old way equipped with a specific construction of collars and nuts, so arranged as to secure relative adjustment through the lost motion involved in the slip movement.

The claims of a patent covering a mere improvement upon prior machines, which were capable of accomplishing the same general result, must receive a narrow interpretation. *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 273, 9 Sup. Ct. 299, 32 L. Ed. 715. In such cases the patentee cannot treat another as an infringer, who has im-

proved the original machine by use of a different form or combination performing the same function. *McCormick v. Talcott*, 20 How. 402, 15 L. Ed. 930. Where the result is old, and the novelty consists only of improvements in a known machine for producing a known result, the patentee must be tied down strictly to the mode which he has described for effecting such improvements. *Proctor v. Bennis*, 36 Chancery Division, 740, cited with approval in *Morley Sewing Machine Co. v. Lancaster*, *supra*.

Where it appears from the proceedings in the Patent Office and a consideration of the state of the art that a patent is not a pioneer patent, its claims must be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements, of different construction and arrangements. In such cases there should be identity of means and identity of operation combined with identity of result, in order to constitute infringement. *Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 8, 19, 23 Sup. Ct. 521, 47 L. Ed. 689. And where the patentee specifies a particular form as a means by which the effect of the invention is produced, or otherwise confines himself to a particular form of what he describes, he is limited thereby in his claim for infringement. *Walker on Patents* (4th Ed.) § 363, and cases cited. Where a patentee acquiesces in a rejection of claims, and amends the same so as to be more specific, such claims must be read and interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. *Knapp v. Morss*, 150 U. S. 221, 225, 14 Sup. Ct. 81, 37 L. Ed. 1059; *Roemer v. Peddie*, 132 U. S. 313, 10 Sup. Ct. 98, 33 L. Ed. 382. "Where a patentee has modified his claim in obedience to the requirements of the Patent Office, he cannot have for it an extended construction which has been rejected by the Patent Office; and in a suit on his patent his claim must be limited, where it is a combination of parts, to a combination of all the elements which he has included in his claim as necessarily constituting that combination." *Phoenix Caster Co. v. Spiegel*, 133 U. S. 360, 368, 10 Sup. Ct. 409, 33 L. Ed. 663. The words of limitation inserted in a claim must be construed in the light of the circumstances surrounding the issuance of the patent, in order to prevent an undue broadening of the scope of the invention. *Singer Manufacturing Co. v. Cramer*, 192 U. S. 265, 285, 24 Sup. Ct. 291, 48 L. Ed. 437. In interpreting such a patent, the admissions and declarations of the patentee in the Patent Office, and amendments made by him which relate to the essence of alleged improvements, and are directed to the question of invalidity, when understandingly and deliberately assented to, are binding upon him. *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 61 Fed. 958, 10 C. C. A. 194; *Walter A. Wood Mowing & Reaping Mach. Co. v. William Deering & Co. (C. C.)* 66 Fed. 547; *Ball & Socket Fastener Co. v. Ball Glove Fastening Co.*, 58 Fed. 818, 7 C. C. A. 498.

The decree is reversed, with costs.

## KAHN et al. v. STARRELLS.

(Circuit Court of Appeals, Third Circuit. February 13, 1905.)

No. 43.

## PATENTS—VALIDITY AND INFRINGEMENT—FLAT KNIT CAPS.

The Kahn patent, No. 669,011, claims 1 and 2, for a method of forming flat knit caps by expanding a tube of knitted fabric, having a band-forming selvage at one end, and setting it in the desired shape, instead of shaping the cap in the knitting as previously practiced, the result being to greatly increase the rapidity with which the caps can be made, and lessen the cost, disclosed patentable invention. Claim 3 for the product is void for lack of novelty. Claims 1 and 2 also held infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 131 Fed. 464.

Joseph C. Fraley, for appellants.

L. L. Smith, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The decree of the Circuit Court dismissed a bill of the appellants which charged the appellee with infringement of all three claims of patent No. 669,011, dated February 26, 1901, issued to Nathan E. Kahn, assignor to Adella Kahn and Arthur H. Stephenson, for "flat knit cap and art of making same." The first two claims are for a method of forming flat knit caps, and the third claim is for the flat knit cap produced by that method, as a new article of manufacture. We think the court below was clearly right in holding the third claim to be invalid, and we deem it unnecessary to add anything upon that subject, especially in view of the fact that the learned counsel of the appellants have stated that the enforcement of claims 1 and 2 will suffice to give them full protection. But we are of opinion that the two process claims should have been sustained, and held to have been infringed. Those claims are as follows:

"(1) The method of forming flat knit caps, which consists in forming an elongated tubular body with a band-forming selvage at its lower open end, then flattening the tube by expanding it in a single narrow plane at a point between its ends, said plane being at a right angle to the longitudinal axis of the tubular body, and finally setting the article in its flat distended shape; substantially as described.

"(2) The method of forming flat knit caps, which consists in forming an open-ended tube of knit fabric with a band-forming selvage at one end, then raising a nap on the exterior of the tube, then closing the top of the tube by gathering the edge thereof together about its axis, then flattening the tube by expanding it or distending it at a point between its ends, the plane of such expansion being at a right angle to the longitudinal axis of the tubular body, and finally setting the article in its flat distended shape; substantially as described."

The learned judge, rightly understanding the second claim to be indicative of the entire invention, confined his attention to it; and he held, as being "the controlling thing against the patentability of this process, that not only does it repeat what is old in the art, but in what is done, as well as in the way of doing it, it exactly dupli-



cates the method already in vogue, differing from it only in the degree of prominence given to certain of the steps employed." The essential postulate of this proposition is that the method of the patent differs from what was old in the art only in the degree of prominence given to certain of the steps employed, and to this we cannot assent. As Kahn correctly stated in his specification, by his invention "an organized method of manufacture is afforded, which is very simple, and enables the articles to be produced with greater economy, while yet possessing all the desirable qualities of the more costly products." Of the methods which theretofore had been employed to produce the flat shape which is characteristic of these "Tam O'Shanter" caps, the only one that seems to have materially influenced the court below, or which need be referred to here, is that in which the shaping was effected by knitting. It is true that this was followed by blocking, but that only made the caps smoother and more symmetrical. The knitting shaped them, and, in order that it might do so, was necessarily complicated, and much retarded. This the patented method practically avoided. Kahn still knits the elastic band which fits the head, and by reason of this, and of the fact that enough web to make a number of caps is continuously knitted, the fabric is not produced in unvarying cylindrical form, but is somewhat narrowed at the points where the head bands occur; and it may, in a sense, be said that "this involves a certain amount of fashioning, and produces, not a cylindrical tube, but one \* \* \* that is globular or balloon-shaped." It, however, does not fashion or shape a cap, or anything which, without further shaping, could be taken to be one; whereas in the prior art, when the caps came from the knitting machine, they were fully fashioned, and all that followed was a mere finishing operation, which, without changing their shape, gave them a more shapely appearance. In brief, the old process involved a substantially complete shaping by knitting, while that of the patent provides for shaping after the knitting has been done. This, we think, does not merely constitute a difference in degree, but plainly distinguishes the two methods; and with respect to a matter of especial consequence, for, as was said by the court below, the method of Kahn has enabled a cap to be made with greater rapidity, and cheapened the cost, "ten dozen being possible, where only one dozen was before."

The defendant was absolved from the charge of infringement upon the ground that, though in all else he unquestionably practiced the patented method, his band-forming selvage was not produced as an integral part of the tubular body, but was separately knitted, and afterwards united to the body by sewing. It may well be doubted whether, notwithstanding the description of continuous knitting in the specification, the terms of the claims themselves should not be given controlling effect, and be held to be distinctly inclusive of an "elongated tubular body," or "open-ended tube of knit fabric, with a band-forming selvage at one end," whether formed in one piece or from two pieces of material. But, be this as it may, it seems to us that to permit the defendant to obtain the benefit of the essential feature of Kahn's invention, by reason of

such an obviously unimportant variance in detail, would practically be to deprive the owners of this patent of the monopoly to which by law they are entitled. *Lepper v. Randall*, 113 Fed. 627, 51 C. C. A. 337.

Having reached the conclusion that claims 1 and 2 are valid, and that they were infringed by the defendant, the decree dismissing the bill must be reversed, and the cause be remanded for further proceedings in conformity with this opinion; and it is so ordered.

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NATIONAL CASKET CO. v. STOLTS.

(Circuit Court of Appeals, Second Circuit. January 12, 1905.)

No. 60.

1. PATENTS—SUIT FOR INFRINGEMENT—PROOF OF INFRINGEMENT.

In a suit for infringement of a patent against an individual defendant, who is described as being president and treasurer of a joint-stock association organized under the laws of New York, the bill is not sustained by proof of the sale of an infringing article by the association, where there is neither allegation nor proof that defendant is a stockholder therein, there being no statute requiring that the president or treasurer of such associations should be stockholders.

2. SAME—APPEAL—REMAND FOR REOPENING OF CASE.

Where the record on appeal in a suit for infringement fails to show any connection between the defendant and the act of infringement proved, the court will not remand the case to permit the amendment of the pleadings and the introduction of new evidence to prove such connection, nor to substitute as defendant the party shown to have infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 127 Fed. 158.

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, upon pleadings and proofs, dismissing the bill of complaint in a suit brought for infringement of United States patent 619,567, issued February 14, 1899, to William Hamilton for an improvement in face plates for burial caskets.

F. S. Warfield, for appellant.

Hans v. Briesen, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. We find it unnecessary to discuss the other questions arising upon this appeal, because we are satisfied that complainant has not proved any act of infringement committed by the defendant. The bill is entitled "National Casket Company v. Julius W. Stols," and recites that complainant "brings this, its bill of complaint, against Julius W. Stols, who is, as your orator is informed and believes, the president and treasurer of a joint-stock association organized under the joint-stock association law of the state of New York, having at least eight stockholders,

and carrying on business within the borough of Manhattan, city and county of New York, in the state of New York, and said Julius W. Stols being a citizen of the state of New York and a resident of the Southern District of New York." It further alleges that "the defendant, who is the president and treasurer of the joint-stock association J. & J. W. Stols, has conspired with others to infringe upon the rights of your orator." And that "said defendant \* \* \* at the place of business of the said joint-stock association J. & J. W. Stols, in the borough of Manhattan, city of New York, [committed certain specified acts of infringement] by which complainant has been and is still being deprived of great gains and profits which it might and otherwise would have obtained, but which have been received and enjoyed and are being received and enjoyed by the said defendant and by the said joint-stock association by and through such aforesaid unlawful acts and doings." It further prayed that defendant specifically answer certain questions, one of which is "whether or not J. & J. W. Stols is a joint-stock association having at least eight stockholders, organized under the laws of the state of New York, having its principal place of business in the \* \* \* city of New York, \* \* \* and whether he is president and treasurer thereof." The bill concluded with a prayer for the granting of a writ of subpoena "directed to the said defendant Julius W. Stols," commanding him to appear and answer.

Manifestly, this is not a bill of complaint against the joint-stock association. Stols is averred to be the president thereof, but he is not sued as president. The bill is against him individually. And the suit has been conducted as one against him individually. The answer is by "Julius W. Stols defendant." It denies that he has committed the acts of infringement charged, and as to the interrogatory above-quoted contains the following clause: "And this defendant states that the interrogatory relating to J. & J. W. Stols being immaterial so far as this defendant as a party to this suit is concerned, and impertinent and not relevant to be answered unto by him, the said J. & J. W. Stols not being parties hereto, this defendant declines to answer said interrogatory." At the taking of testimony counsel appeared "for defendant," and the final decree is entitled as the bill was, and recites that the dismissal is "on motion of solicitors for the defendant." The only act of infringement shown is the sale of a burial casket by J. & J. W. Stols, a joint-stock association, at their place of business in New York City, on October 15, 1901. It was proved that the joint-stock association was organized January 27, 1896, that the number of its stockholders was eight, its place of business in New York City, and that Julius W. Stols was in January, 1901, its president and treasurer. It was admitted by the defendant's counsel that at the time of the commencement of the suit in October, 1901, the defendant was such president and treasurer. It does not appear that the statutes of New York require that the president or treasurer of a joint-stock association should be a shareholder therein, and there is no proof in the record that defendant is, or ever was, a shareholder or associate in such joint-stock association. In *Tyler v. Galloway* (C.

C.) 13 Fed. 477, it was held by Justice Blatchford, sitting at circuit in the Southern District of New York, that members of a joint-stock association might be held as infringers when it was shown that acts of infringement had been committed by the association, on the theory that an infringing use by the association was "a use by each of them, quite as much as if there had been a copartnership without shares of stock." It was further held that one of the defendants in that suit, who was shown to have been the secretary of the association, but did not appear to be a shareholder, was entitled to a dismissal of the bill. The propositions laid down in the case cited seem entirely sound, and are determinative of the question whether complainant herein is entitled upon the present record to recover against Julius W. Stolts individually. No infringing act committed personally by Stolts or by any partnership or association of which he is or was a member having been proved, defendant was entitled to a dismissal.

Complainant seeks to cure the defects in the record in either of two ways: First, he asks that, in the event of this court's being satisfied that the patent is valid, and that the casket sold by the association infringes its claims, the cause be remanded, with instructions to the Circuit Court to allow complainant to amend so as to aver that Stolts was a stockholder, and to reopen the cause so as to allow him to prove such amendment. No authority disposing in such way of a similar situation has been called to our attention, and such disposition would be fruitful of abuses. If relief were granted in one cause, it might be fairly claimed in another, and so whenever upon analysis of a record on appeal this court might reach the conclusion that the complainant's proof was not sufficiently convincing to show an act of infringement by defendant, a motion would be at once made to reopen the cause so as to give complainant a chance to make his case stronger. Such practice should not be encouraged.

The complainant next asks to amend the bill and the subpoena by adding after the name Julius W. Stolts the words "as president and treasurer," etc. This amendment would bring in a new party, not a merely formal party, who has no interest in the controversy, or one through whom some party already in derives title. It would be an attempt to substitute one person for another as defendant in an action on tort after judgment. No authority cited by complainant warrants the granting of such extraordinary relief, and if it were granted it would avail nothing. Amendment of the subpoena would not bring in the new person until that person be served with it; and, when served, such person, who has not yet had any day in court, would be entitled as of right to answer, to cross-examine, and to put in proof. This would amount to an entire retrial of the action, and it is quite as easy and far more orderly to begin a new one.

The motions to reopen and to amend are denied, and the decree of the Circuit Court is affirmed, with costs.

CAYUTA WHEEL & FOUNDRY CO. v. KENNEDY VALVE MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 20, 1905.)

No. 87.

PATENTS—INFRINGEMENT—HYDRANTS.

The Loetzer patent, No. 631,545, for a hydrant, *held* infringed as to claims 8, 12, and 14, and not infringed as to claim 2.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 127 Fed. 355.

This cause comes here upon appeal from a final decree of the United States Circuit Court for the Southern District of New York granting an injunction and accounting in a suit in equity to restrain the infringement of letters patent No. 631,545, dated August 22, 1899, granted to Christian E. Loetzer, for an improved hydrant, and by him assigned to the complainant (appellee).

W. P. Preble, Jr., for appellant.

Julian C. Dowell, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. In the court below complainant claimed that all of the 20 claims in suit, except the thirteenth, were infringed. In this court he elected to stand on claims 2, 8, 12, and 14.

The complainant and defendant are rival manufacturers of hydrants. In the year 1901 the city of New York advertised for bids for hydrants, the specifications of which, at the suggestion of complainant, embodied certain constructions claimed to be covered by the patent in suit. Complainant and defendant were opposing bidders, and defendant got the contract.

The Acts of 1897 of the State of New York provide as follows:

"C. C. 477. No patent hydrant, valve or stop-cock, shall be used by the department of water supply unless the patentee or owner of said patent shall allow the use of the patent by said department without royalty." Laws 1897, p. 166, § 477.

There is a dispute as to whether complainant induced defendant to believe that by reason of this statutory provision it would not be required to pay any royalty for the use of any of the improvements covered by said patent. This question is immaterial to the disposition of the case, except as bearing upon defendant's contention, sufficiently supported by proof, that it never before or since made any other hydrants embodying the alleged infringements, and that it acted in good faith in bidding for said contract.

As found by the court below, the specification of the patent in suit is long and complicated, and the various elements of the combinations covered by the claims were old and had been used elsewhere. The patent covers the ordinary street hydrant for supplying water in case of fires, consisting of a stand-pipe, provided with

valves and a nozzle for a hose, and an annular support for the lower end of the stand-pipe within an outer casing. The portions of the construction material to the disposition of the case may be understood by the reference to the four claims specially relied on by complainant. Said claims are as follows:

"(2) In a hydrant, the combination with a stationary terminally exposed casing for connection with a distributing main, and having an interior stand-pipe rest or support, a stand-pipe removably fitted and housed at its lower end within the casing, a valve-seating ring interposed between the lower end of the stand-pipe and the said rest or support, and in rocking engagement with the latter, adjustable securing devices for forcing the stand-pipe downward toward its rest or support to clamp the seating ring in place, and a valve and operating devices carried by and removable with the stand-pipe, substantially as specified.

"(8) In a hydrant, the combination with a casing for connection with a distributing main, and having an interior stand-pipe rest or support and an adjacent centering bevel, a stand-pipe loosely fitted within the casing, and adapted for adjustment at its lower end by said centering bevel, a valve, and valve-operating devices mounted upon the stand-pipe, substantially as specified.

"(12) In a hydrant, the combination with a casing for connection with a distributing main, and having an interior stand-pipe rest provided with an inwardly and downwardly inclined upper surface, a stand-pipe removably fitted within the casing, a valve-seating ring having an interlocking connection with the lower end of the stand-pipe, and provided with an exterior inwardly and downwardly inclined shoulder for contact with said rest, means for securing the stand-pipe in place, and a valve, and valve-operating devices carried by the stand-pipe, substantially as specified.

"(14) In a hydrant, the combination of a stationary member for connection with a distributing main, and having an interior rest or support, a valve-carrying removable member loosely fitted in said stationary member, and having a rocking bearing upon said rest or support, to provide for angular deflection of said removable member without separation of the bearing faces thereof, and means for securing said removable member in a fixed position with relation to the stationary member, substantially as specified."

It is contended that the elements, "a valve-seating ring interposed between the lower end of the stand-pipe and the said rest or support, and in rocking engagement with the latter," of the second claim, and "a valve-carrying removable member loosely fitted in said stationary member, and having a rocking bearing upon said rest or support, to provide for angular deflection of said removable member without separation of the bearing faces thereof," of the fourteenth claim, are infringed. In support of this contention it is claimed that defendant's valve provides, and the drawing thereof shows, a narrow crevice or clearance space between the valve-seating ring and its rest or support, which permits a loose fit and a slight rocking motion. The defendant strenuously asserts that no such clearance was intended, and that in their hydrant it is most important that the upper part of the seating ring should make an absolutely tight fit against the elbow, in order to prevent leakage when the parts of the hydrant are operatively assembled. It is unnecessary to pass upon this contention, however, for the reason that the patent states that the rocking engagement provided for therein,

and covered by claim 2 and referred to in claim 14, is not secured by any such loose fit as it is claimed is found in defendant's device.

The patentee says:

"Obviously the shoulder 12 of the valve-seating ring is constructed to correspond in taper with the rest or shoulder 13 in order to provide a snug and water-tight contact therewith. In addition, however, to this downwardly tapered or substantially trunco-conical construction of rest 13 and shoulder 12, I have found it desirable in practice to slightly round the contacting surfaces of said rest and shoulder, the surface of the rest being slightly concaved spherically, and the shoulder 12 being correspondingly convexed. This relation between the surfaces of the shoulder and rest forms what may be termed a 'rocking joint,' whereby, in securing the stand-pipe in place within the casing, any slight angular deflection of the stand-pipe from a truly vertical or axial position within the casing (due to tightening the bolts, 5c, upon one side more than upon the other) does not affect the efficiency of the joint between the movable and stationary members of the hydrant. In other words, the movable member may be rocked or rolled slightly to one side or the other and still maintain a uniform and coextensive contact of the surfaces 12 and 13."

It is admitted and proved that defendant's hydrant does not have the spherically concaved and convexed contacting surfaces forming the "rocking joint" of the patent. The defendant, therefore, does not infringe the claims of the patent which cover the rocking-joint connection.

Whether the defendant infringes the other claims is a doubtful question. We are not satisfied that the combinations covered thereby may not be found in defendant's hydrant.

It is conceded that no substantial question of damages is involved herein. It is not shown that defendant ever made any infringing hydrants, except in the execution of this contract with the city of New York. We are disposed to concur with the court below in its conclusion as to infringement of said claims, and to give the complainant the benefit of an injunction.

The decision of the court below as to the claims covering the rocking joint, which appear to be claims 1, 2, 3, 4, 6, and 15, and of which claim 2 has been selected as a representative on this appeal, is reversed. The decision as to the other claims, represented on this appeal by claims 8, 12, and 14, is affirmed, the finding of infringement of claim 14 resting solely on the alleged "loose fit" of defendant's construction. Inasmuch, however, as complainant in the court below claimed infringement of all the claims except one, and on the taking of proofs expressly declined to state on which ones it relied, and now abandons all but four of said claims, no costs will be allowed in favor of complainant on this appeal.

The cause is remanded to the court below, with instructions to enter a decree in conformity with this opinion.

GLUCOSE SUGAR REFINING CO. v. ST. LOUIS SYRUP & PRESERVING  
CO. et al.

(Circuit Court, E. D. Missouri, E. D. February 25, 1905.)

No. 5,086.

**PATENTS—INFRINGEMENT BY CORPORATION—LIABILITY OF OFFICERS.**

The president of a corporation not alleged to be insolvent cannot properly be joined with the corporation as defendant in a bill for an injunction and accounting for an alleged infringement of a patent by the corporation merely because as such president he directs the business of the corporation.

In Equity. Suit for infringement of patent. On demurrer to bill for misjoinder of defendants.

R. H. Parkinson and W. B. Homer, for complainant.  
Rassieur, Schnurmacher & Rassieur, for defendant.

ADAMS, District Judge. This is a suit on letters patent of the United States No. 491,234, for an injunction and accounting, in which the defendant preserving company and Rudolph Wintermann, its president, are made defendants. Besides the formal and unnecessary confederacy clause, the only averment of fact making the defendant Wintermann liable is as follows:

"Your orator further shows that the said St. Louis Syrup & Preserving Company has carried on and is carrying on said infringement as aforesaid under the direction and with the knowledge and authority of said Rudolph Wintermann, president thereof."

A demurrer for misjoinder of Wintermann as a defendant is filed. In view of the allegations of the bill, it is necessary to consider whether a president of a corporation may be joined in a bill for an injunction and accounting in a patent case merely because, as such president, he directs the business of his corporation.

As already seen the charge is that the corporation is doing the wrongful act, but is doing it under the direction and with the knowledge and authority of its president. There is no charge of any other misconduct on the part of the president than such as is incidental to his position as chief executive officer of the corporation. There is no charge that he is personally infringing complainant's rights, or that he is deriving any personal benefit therefrom, or that he is making use of a sham corporate organization to shield himself from liability for his own wrongful conduct, or that the corporation is insolvent or otherwise irresponsible for its conduct. The question, therefore, is whether, in a bill in equity for an injunction and accounting against a corporation alleged to be engaged in infringing complainant's patent, the president of that corporation may properly be joined as a defendant merely because he is such president?

A corporation is an artificial body—an entity separate from its officers, directors, and stockholders. It is authorized by the law under which it is created to do certain business, and is by the same



law held accountable for its conduct. As such artificial body, it is not self-actuating or controlling. It is necessarily moved to action by an outside force, and it is only when this outside force, which is the board of directors or executive officers, directs an act to be done, that the corporation acts at all. In a theoretical sense, it is true, the executive officers are said to be agents of the corporation, but in reality they are the moving force itself of the corporation. In these respects executive officers of a corporation differ materially from the agent of a natural person.

The general rule that agents are not excused from liability for their wrongs or torts because while performing the wrongful acts they are acting for and in the service of another cannot be gainsaid. *Mitchell v. Harmony*, 13 How. 136, 14 L. Ed. 75. But the application of this rule to the president of an existing solvent corporation, when acting solely for the corporation in the conduct of its business, and when sued with the corporation in equity for an injunction and accounting in a patent case, is another matter. What beneficial purpose can be subserved by joining a president or other executive officer as a defendant in such a case? The injunctive order, whether preliminary or final, against a corporation, may, and properly does, go against the corporation itself, its officers, agents, servants, and employes, so that they, and each of them, are as effectually enjoined without being made parties to the suit as if they were made such parties. And if any accounting for profits is decreed, it is firmly settled that such a decree goes only against that party which by the use and sale of the infringing device has made the profits. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103; *Coupe v. Royer*, 155 U. S. 566, 583, 15 Sup. Ct. 199, 39 L. Ed. 263; *Belknap v. Schild*, 161 U. S. 10, 26, 16 Sup. Ct. 443, 40 L. Ed. 599.

In exceptional cases, where damages to the owner of a patent, other than for the profits made by the infringer, are allowed, it is equitable, at least, whatever may be the strict rule at law, that the real infringer, who has received the sole advantage and benefit accruing therefrom, should primarily be made to respond; and certainly, as between one so benefited and the agent acting only in the line of his duty, the doctrine of respondeat superior should prevail.

When the corporation itself is not shown to be insolvent or otherwise unable to respond to any possible decree for damages, and when no showing is made that the individual officer is making any colorable use of the corporation for his own benefit, and when no showing is made that he is individually interested, it is not equitable to subject him personally to the expense and trouble of making a separate defense. A possibility exists that it might be convenient to have him bound by the decree for damages, if one should be rendered, so that in the event the solvent corporation should become insolvent, and the damages not collectible from it, the complainant might have immediate recourse upon him. But in a case where, at the institution of the suit, facts do not exist to render the necessity of any such recourse probable enough to justify a showing to that effect, the court cannot anticipate such a contingency and make pro-

vision for it. The practical result of the contention of complainant's counsel would, as was admitted by him in argument, render all the executive officers and directors of a corporation, if not, indeed, its stockholders, subject to a suit in all cases when their corporation, however solvent, and with whatever good faith it acted, should be sued for the infringement of a patent. I am unable to reach a conclusion in this case that would justify such inequitable, useless, and expensive procedure.

Some language employed by the writer of this opinion in the case of *Peters v. Union Biscuit Company* (C. C.) 120 Fed. 679, 686, is referred to by counsel of complainant in support of his contention; but, when the peculiar facts of that case are considered, it will be observed that its stress rests in the following extract from the opinion:

"The executive officers of a corporation who necessarily inspire all its acts cannot shield themselves behind an artificial and sometimes irresponsible creation from the consequences of their own acts, even though performed in the name of the artificial body."

The principle thus announced is doubtless sound, and is now fully recognized. No person can act for himself in any adopted name, artificial or otherwise, and escape liability for his own acts. No person or persons can organize a sham corporation with the intention of working through it and in its name for their own individual purposes, and escape liability for their wrongful conduct. Other general expressions found in the opinion in the *Peters Case* must be taken as applicable to the peculiar facts of that case only; otherwise such expressions must be disapproved.

It is readily admitted that there is much contrariety of judicial opinion on this subject. I have examined all the cases, and, with great respect for the learned judges who have written the opinions, I believe that such opinions as favor the joining of officers of corporations merely because of the relation of agency existing between them and the corporation give too much consideration to the technical rule of law subjecting agents to liability for their torts, even when committed in the line of their duty, and too little consideration to the peculiar relation, involving the practical absorption of the agent in the principal, existing between the chief executive officers of a corporation and the corporation itself, and especially too little consideration to the real necessity of making such officers parties defendant for the purpose of any equitable relief to which the owner of a patent is entitled. The principal cases supporting complainant's contention are *Iowa Barb Steel Wire Co. v. Southern Wire Co.* (C. C.) 30 Fed. 123; *Cleveland Forge & Bolt Co. v. United States Rolling Stock Co.* (C. C.) 41 Fed. 476; *Armstrong v. Savannah Soapworks* (C. C.) 53 Fed. 124; *Graham v. Earl*, 92 Fed. 155, 34 C. C. A. 267; *National Cash Register Co. v. Leland*, 94 Fed. 502, 37 C. C. A. 372, and cases and text-books therein cited. On the contrary, the conclusion now reached in this case is supported by the following authorities: *United Nickel Co. v. Worthington* (C. C.) 18 Fed. 392; *Smith v. Standard Laundry Mach. Co.* (C. C.) 19

Fed. 826; *Howard v. St. Paul Plow Works* (C. C.) 85 Fed. 743; *Boston Woven Hose Co. v. Star Rubber Co.* (C. C.) 40 Fed. 167; *Mergenthaler Linotype Co. v. Ridder* (C. C.) 65 Fed. 853; *Consolidated Brake Shoe Co. v. Chicago, P. & St. L. Ry. Co.* (C. C.) 69 Fed. 412; *Rowbotham v. George P. Steel Iron Co.* (C. C.) 71 Fed. 758; *Consolidated Fastener Co. v. Columbian Fastener Co.* (C. C.) 79 Fed. 795; *Bowers v. Atlantic, G. & P. Co.* (C. C.) 104 Fed. 887; *Loomis-Manning Filter Co. v. Manhattan Filter Co.* (C. C.) 117 Fed. 325; *Farmers' Mfg. Co. v. Spruks Mfg. Co.* (C. C.) 119 Fed. 594; *Greene v. Buckley* (C. C.) 120 Fed. 955; *Hutter v. De Q. Bottle Stopper Co.*, 128 Fed. 283, 62 C. C. A. 652; *Ambler v. Choateau*, 107 U. S. 586, 590, 1 Sup. Ct. 556, 27 L. Ed. 322.

Concerning the foregoing cases, it may be remarked that the case of *Boston Woven Hose Co. v. Star Rubber Co.*, supra, is a case in which the officer was held liable because he was not using the corporate name in good faith, but was making a pretext of doing business in the name of the corporation, but in reality for his own benefit. This, the court says, "is too flimsy to shield him from accounting." In *Mergenthaler Linotype Co. v. Ridder*, supra, Judge Townsend collects the then existing authorities pro and con on the question now before the court, and says that many of the cases which announce the rule favorable to joining officers with the corporation are cases in which the individuals had personally infringed, and were joint tortfeasors. As to the case before him, he says:

"In this case the bill describes the individual defendants as persons who are the managers and controllers of, and do business under the name of, the Monoline Composing Company, but the charge of infringement is personal. The plea denies said personal charge, and alleges that all the acts of said defendants in relation to said alleged infringement were done solely in their official capacity. \* \* \* It does not appear that the corporation is insolvent, or that there is any obstacle in the way of obtaining full relief against it. In these circumstances, the individual defendants cannot be ordered to account."

In the case of *Hutter v. De Q. Bottle Stopper Co.*, supra, Judge Cox writes the opinion for the Court of Appeals for the Second Circuit. He collates the authorities, and concludes as follows:

"Francis H. Ruhe, who is alleged in the bill to be secretary, treasurer, and one of the directors of the defendant company, is made a party defendant. There is not the slightest proof to establish infringement by him as an individual, and no sufficient reason is shown for making him a defendant. An injunction against the corporation restrains all its officers, agents, and servants; and there is little justification for making these persons defendants, except in rare instances, where it is shown that they have infringed the patent as individuals, or have personally directed infringement. The courts of this circuit have frequently had occasion to criticise this practice, and have in some instances imposed costs upon the complainant as a penalty for thus subjecting innocent parties to the expense and annoyance of defending themselves against an unwarrantable accusation."

In the case of *National Cash Register Co. v. Leland*, supra, in the Circuit Court of Appeals for the First Circuit, a majority only of that court reached the conclusion favorable to joining the officers of a corporation. One of the judges dissented therefrom.

As a result of the consideration of all the cases, I am of opinion

that the weight of authority, and especially of the more recent cases, as well as reason, is against the complainant's contention in this case.

The demurrer will therefore be sustained.

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VALVONA v. D'ADAMO.

(Circuit Court, E. D. Pennsylvania. February 24, 1905.)

No. 40.

1. PATENTS—INVENTION.

Where a patent discloses invention in some degree, the courts are not called upon to measure it by an exacting standard.

[Ed. Note.—For cases in point, see vol. 88, Cent. Dig. Patents, §§ 14-18.]

2. SAME—ANTICIPATION—FOREIGN PATENTS.

A United States patent will not be defeated by a prior foreign patent, unless it describes or shows the patented invention in such full, clear, and exact terms as to enable any person skilled in the art to practice it without the necessity of experimenting.

3. SAME—MOLDS FOR BISCUIT CUPS.

The Valvona patent, No. 701,776, for a mold and oven for making biscuit cups to be used for holding ice cream, was not anticipated, and discloses invention; also held infringed.

In Equity. Suit for infringement of letters patent No. 701,776, for a combined mold and oven for making biscuit cups, granted to Antonio Valvona June 2, 1902. On final hearing.

Ernest Howard Hunter, for complainant.

C. Bradford Fraley, for respondent.

J. B. McPHERSON, District Judge. The patent in controversy is No. 701,776, issued June 2, 1902, and relates to improved apparatus for baking biscuit cups to be used for holding ice cream. The character and objects of the device appear in the following quotation from the specification:

"By the use of the apparatus of this invention I make cups or dishes of any preferred shape or design from dough or paste in a fluid state, that is preferably composed of the same materials as are employed in the manufacture of biscuits, and, when baked, the said cups or dishes may be filled with ice cream, which can then be sold by the venders of ice cream in public thoroughfares or other places. In order to produce said cups or dishes, I provide a combined metallic mold and oven, consisting of two plates, as a and b, each of said plates having a piece, c, projecting from its edge at one side, connected by a hinge, d, and each plate provided with a handle, e, projecting from its opposite edge. The faces of the aforesaid two plates are provided or formed, respectively, with one or more cores, f, and dies, g, one fitting into the other, with a small space between them, when the faces of said plates are placed close to each other. All the heat-absorbing and conducting sides of the mold are of substantially the same thickness, so that heat may be evenly conducted through the body of the mold, as will be seen by reference to the drawings.

"The biscuit dough or paste, which is of the consistency of a thick fluid, is poured from a can, that may be provided with one or more spouts for depositing the required quantity of paste either successively or simultaneously in each of the dies or molds, g. The plates are then closed, and the cup or dish is formed by the dough being pressed into the space between the core, f, and the

mold, g. It is then baked by the apparatus being placed over a gas or other fire, the formation of the said apparatus enabling it to be turned as frequently as required, and the biscuit cup thereby uniformly baked. To make these thin-shaped cups satisfactorily from paste, with the thin walls described, and to insure their proper turning out of the molds in good shape, properly baked, I find it necessary to first heat the molds, then pour in the batter and bake with the projections downward for awhile, then reverse the mold and bake in that position. This enables me to readily remove the cups from the mold in perfect condition, and to this end I have constructed my mold so as to enable it to be readily reversed, and to occupy a stable position on the top of the gas range or the like."

The claim of the patent is as follows:

"A combined mold and oven for producing biscuit cups or dishes, consisting of two metal plates connected together by a hinge, and provided with handles and means for securing said plates in closed position, the opposing inner faces of the said plates being provided, one with a projecting core, and the other with an indented mold in the metal of such face, into which the core fits, with a small space between the two, and the outer faces being so formed as to be adapted to rest on the top surface of a stove, either side up, so that heat may be evenly conducted through the body of the mold, all the heat-absorbing and conducting sides of the mold being of substantially the same thickness, whereby a cup may first be formed with the projections downward, and afterward baked in the reverse position to facilitate the baking and allow the cup to be turned out of the mold, as and for the purpose described."

While it must be conceded that no marked advance in the art is presented by the complainant's device, it has taken the final step to complete success, and I see no reason for denying it the protection of the law. The exercise of inventive talent may not have been severe, but invention in some degree has been shown, I think, and, if this be true, the court is not called upon to measure it by an exacting standard. *Clark, etc., Co. v. Copeland*, Fed. Cas. No. 2,866; *Washburn Co. v. Haish* (C. C.) 4 Fed. 900. With regard to the patents that have been offered to support the defense of anticipation, I need only say that none of them appears sufficiently relevant to need discussion, except the Swiss patent to Aegeter. This is an undoubted anticipation in several particulars, but, if the rule be remembered that should be applied to such publications when they are relied on to defeat a domestic patent, I think it will be seen that Aegeter's device does not anticipate Valvona's mold. The rule is thus stated in *Hanifen v. Godshalk Co.*, 84 Fed. 649, 28 C. C. A. 507, by the Circuit Court of Appeals for this Circuit:

"It is a well-settled and familiar doctrine that an invention patented here is not to be defeated by a prior foreign patent, unless its descriptions or drawings contain or exhibit a substantial representation of the patented invention in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, without the necessity of making experiments, to practice the invention. *Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. Ed. 33; *Cahill v. Brown*, 3 Ban. & A. 580, 587, Fed. Cas. No. 2,291."

*Seymour v. Osborne* was reaffirmed by the Supreme Court in *Eames v. Andrews*, 122 U. S. 66, 7 Sup. Ct. 1073, 30 L. Ed. 1064. See, also, *National Co. v. Belcher*, 71 Fed. 876, 18 C. C. A. 375; and *Hanifen v. Armitage* (C. C.) 117 Fed. 845. Now, if the Aegeter apparatus is examined with this rule in mind, I think it will be found to differ in several important respects from Valvona's. No one could practice Valvona's invention by the use of the Swiss device.

It is not an oven at all, but only a mold intended to be put into an oven and baked in the ordinary way. It could not produce an evenly baked cup if it were exposed to heat upon the top of a stove or over a gas flame, and it could not be turned so as to apply the heat to both sides of the mold. Moreover, as was said by the complainant in an argument addressed to the Patent Office while his patent was under consideration:

"These cups being thin, it is necessary that they get just so much baking, and no more, and to get this they must be baked where they are under the attendant's immediate supervision. The top of a gas stove or the like is the only place this can be gotten. My molds as set forth in my claims are so constructed that they may be so used, heat is equally conducted to all portions surrounding the cups, and that they are adapted to be turned either side up as necessitated in baking."

Valvona's apparatus is so constructed that the distribution of heat is approximately uniform, and the result is that the cup is evenly baked—a matter of prime importance. So far as appears, Aegeter's device was not successful, and it was allowed to expire in a very short time for failure to pay the tax that was levied upon it. In brief, it never could have produced Valvona's cups without material modification. It was intended to be used in a different way from the apparatus in question, and was neither adapted to, nor actually employed in, the manner which is essential to the proper production of Valvona's results. I think, therefore, that the two combinations are, on the whole, materially distinct, although there are undoubtedly some elements that are common to both.

Concerning infringement, nothing need be said. Even a casual inspection shows that the defendant's apparatus is identical with the complainant's, except in a trifling detail.

The usual decree may be entered, with costs to the complainant.

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#### BAKER LEAD MFG. CO. v. NATIONAL LEAD CO.

(Circuit Court, D. New Jersey. February 27, 1905.)

#### PATENTS—INFRINGEMENT—LEAD TRAPS.

The Robinson patent, No. 406,146, for a method of forming the bottoms of lead traps by spinning an end section on a tube or cylinder under pressure or friction sufficient to cause the metal to flow and unite and form a homogeneous, seamless, and complete bottom, was not anticipated, and is valid. Also held infringed.

In Equity. Suit for infringement of letters patent No. 406,146, for a method of making lead traps, granted to Alpheus A. Robinson July 2, 1889. On final hearing.

Louis W. Southgate, for complainant.

Henry M. Brigham, for defendant.

ARCHBALD, District Judge.<sup>1</sup> This case is of no serious difficulty. The patent in suit, to my mind, is clearly valid, and the defendants

<sup>1</sup> Specially assigned.

have just as clearly infringed it. It covers a process which is a valuable contribution to the art of lead-trap making, and it is not anticipated by anything which had gone before. The sanitary value of drum or cylinder traps, as contrasted with others, such as the familiar S trap, does not concern us. They must have merits, or they would not be in such demand as they are. A prime necessity, however, of such a trap, is that it shall have a solid, homogeneous, and integral bottom, which shall not only be free from imperfections, so as to be water-tight, but shall also be sufficiently thick to resist the scouring and consequent weakening from the dirt and sediment flushed through it. If lead is used, as it must be in the great majority of cases, it cannot be molded or cast, on account of the liability to blowholes. This was the difficulty with the McCloskey patent (1884), to which reference is made by the defendants, but which calls for no particular notice. Neither can the end or bottom of the trap be fashioned by hammering; a union of the parts in this way being no more feasible than by rolling or pressing, however great. And if the seams which are left be closed with solder, the lead is laid open to the action of the acids of urine and the alkali of soaps, by which it will sooner or later be eaten through. The method devised and patented by Phillips (1888) came nearer the mark, although falling just short of it. Taking a cylinder of the required size, and revolving it in a lathe, he spun in the bottom, out of the material of the sides, under the pressure of a proper tool in the hands of a workman. Not realizing, however, that the operation could be continued until the bottom was complete, a small opening was left at the apex, which he closed by fusing the metal about it by means of a flame. The rudiments of the process in suit may be here, but, as just intimated, the extent to which it could be successfully carried was not seen. The objection to the process, as it stands, is that the surrounding parts are drawn upon at the point of fusion, and thus weakened where they ought, instead, to be made strong. The operation, also, is a divided one, and not continuous, as is the one in suit, which detracts from it commercially. And the comparative merit of the two is well suggested by the fact that for several years past Mr. Phillips, the inventor, has bought traps of the complainants, manufactured by their process, rather than his own. Of even less significance is the British patent to Pittner (1888), by which the defendants seem to set much store. Assuming that the method for closing the ends of tubes or vessels of soft metal, which is there described, could be made effective in the construction of lead traps, which I very much doubt, there is nothing in it to suggest or anticipate anything which we have here. The process simply consists in the concentric forcing together of the end of the tube to be closed by means of revolving squeezing-discs, which, in conjunction with the other apparatus employed, narrow in upon it progressively, until, as it is claimed, a solid end or plug is formed. It is suggested by the appearance of some of the work turned out that the metal is made to yield or flow to a certain extent, under the pressure applied, the same as in the process in suit. But this is not claimed by the inventor, and, however involved, was evidently not appreciated; the effect being actually minimized

by the squeezing discs being made rotary, and so comparatively frictionless. But more than this, even if the tube is capable of being closed in the way stated, and as the result of a sort of spinning of the metal, there is no fusing at the apex or center, under the heat evolved, which, as we shall presently see, is an essential feature of the present process. A machine of the supposed Pittner pattern was set up in court and operated by the defendants at the time of the hearing, but nothing to change these views was produced. More successful experiments are said to have been conducted previously, exhibits of which have been put in evidence. But not only were these on small two-inch pipes, and of chemical instead of commercial lead at that, but they were carried on without any representative of the complainants being present; and at others subsequently undertaken, which were subject to scrutiny, by no means the same results were obtained. The Pittner process was also tested by Mr. Baker, the head of the complainant company, in 1897, after he had lost the suit brought against him for the infringement of the present patent in the Circuit Court of the United States for the District of Massachusetts, before Judge Aldrich, as a possible relief therefrom. But he was compelled to give it up as of no practical value. Doubt is sought to be cast upon what he did, because the wrong shop in Worcester, where his experiments were said to have been conducted, was at first given. But they are too well substantiated otherwise to be so impugned. It is also to be observed that the Pittner patent was evidently regarded by the inventor himself as a commercial failure, as is shown by the fact that he allowed it to lapse in 1893 for nonpayment of the renewal fee. With this record against it, and distinguished as it plainly is in the respect suggested from the process in suit, there is no occasion to let it trouble us.

The only real issue in the case, if, under the evidence, there is indeed that, is the one of infringement. The patent which was issued to Alpheus A. Robinson in 1889 has two claims:

"(1) The improved method of forming the bottoms of lead traps, consisting in taking a tube or cylinder of a sufficient length, and in spinning an end section of the cylinder or tube of sufficient length to or beyond the center of the tube or cylinder, and under a pressure or friction sufficient to cause the metal to flow and unite, and form a homogeneous, seamless, and complete bottom, as and for the purposes specified.

"(2) The improved method of forming lead-trap bodies, comprising the taking of a cylinder or tube of sufficient length to form the wall of proper height, and a continuous, homogeneous bottom, and forming the homogeneous bottom by spinning in, under heat produced by pressure or friction of the spinning-tool during the spinning operation, an end section of the tube or cylinder sufficiently large to form the homogeneous bottom, and continuing said spinning operation under said heat past or beyond the center of the bottom, whereby all the metal of the spun-in section forms a part of the bottom of the trap, and subsequent melting or soldering of the bottom of the trap to close a hole dispensed with, substantially as described."

It is undoubtedly essential to the process so specified, not only to distinguish it from the prior art, but in order that it should have the merit claimed for it, that in the final touch, by which the bottom of the trap is closed, the metal should be made not only to flow, but to fuse or unite, under the force of friction and pressure, at the apex or center, so as to form an integral, imperforate, and homogeneous mass. But the opera-



tion covered by the patent was conducted by skilled workmen with appropriate apparatus in open court at the hearing, and that this condition was fulfilled I observed unmistakably with my own eyes. The metal actually flowed or ran at the close, being held in place by the end of the spinning tool, which was extended under and slightly beyond the center for that purpose. The heat by which this is brought about is, of course, not great. The metal is not molten. It could not, indeed, be spun in that state. But it is decidedly hot, and the action observable, just as the end is closed, is such as to justify the claim that there is a complete fusion at that point. An examination also proves it. Sections of the trap, sawn through the center, being inspected, show the bottom integral in every part. It is true that the union is more perfect in some instances than in others, slight radial seams being sometimes found on the inner surface at the center. But this is negligible; the bottom not only being water-tight, but the attempt to break through where such seams appear being ineffectual, even by heavy pounding, as was demonstrated by the efforts of defendants' counsel to do so in open court.

The defendants contend that they do not infringe, because, while admittedly using the same spinning process to close in the end of the trap, there is no fusing of the metal, which simply flows cold; only sufficient pressure being exerted to bring the contiguous parts firmly and closely together. The lead, in other words, is not, according to this, made plastic, so as to form a simple, homogeneous, and integral whole, such as called for by the patent; and neither is the spinning tool carried to the center, as it is claimed, but is kept just short of that, the bottom ending in a point or nipple in consequence. But no such pretext as this can stand before the facts shown. The defendants not only have the same apparatus, but, to all appearances, make use of it in exactly the same way, and, what is more to the purpose, with precisely the same results attained. The section of lead cylinder from which a trap is to be spun is revolved at a high rate of speed on the mandrel of a lathe, and the operator, exerting a strong leverage by means of a heavy hardwood spinning stick, spins in the end of the trap in a single operation, until it is completely closed. The metal, under the influence of the pressure and friction so brought to bear upon it, necessarily becomes plastic; and the parts about the center are not simply brought together, but are united into a homogeneous whole, indistinguishable from the sides, except as it is thickened up by the extra material spun into it, the same as is proposed by the process in suit. All this is indisputably established (whatever may be testified to the contrary) by sections of the traps manufactured by the defendants, which have been put in evidence, by which it is clearly shown. In no sense is the apex of the trap closed by the surrounding metal being forced together to make a water-tight joint, no such cohesion being possible. The constituent parts are plainly made to fuse or flow into each other, the metal presenting at that point substantially the same character as at every other. That heat is generated in the operation, and contributes to the result, there can be no doubt; and it is no inconsiderable heat, either, being sufficient to sear the end of the wooden spinning stick, as well as to make water sizzle and steam. Nor am I persuaded that the spinning operation is only continued, as contended,

up to the center of the bottom, and not past or beyond it the fractional distance required by experience to completely close the end. Not only is this essential to the process, but the evidence establishes that it is the course actually pursued. The finished product turned out by the defendants shows no such point or nipple at the center as would result from the contrary, or at least only in occasional instances, and then most minute. And we have the direct testimony of Mr. Southgate, who succeeded in getting into the defendants' works at St. Louis along with Mr. Baker, and watched the workmen there, that they spun past the middle, just as was to be supposed. In the face of this, the attempted denial by the defendants is of little avail. The opportunity for evasion is too great to have it accepted, without much more convincing proof than has been produced.

Let a decree be drawn sustaining the patent and finding it infringed, and referring the case to a master to take an account.

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JENKINS et al. v. MAHONEY.

(Circuit Court, W. D. Pennsylvania. November 9, 1904.)

PATENTS—INFRINGEMENT—MULTIPLYING CAMERA.

The Jenkins patent, No. 620,036, for a multiplying camera, held valid, and infringed by a camera having the same construction, except that instead of the "cellular box" of the patented device, having separate cells, in front of each of which a lens is moved successively on a slide having both a horizontal and vertical movement, it employs a single cell, which is fastened to the slide, and moves with the lens; such construction being the equivalent of that of the patent.

In Equity.

C. M. Clarke, for complainants.

L. C. Barton and Jas. H. Smith, for respondent.

BUFFINGTON, District Judge. This is a bill in equity brought by John W. Jenkins and Evan L. Jenkins against Thomas Mahoney to enjoin infringement of patent No. 620,036, granted to them February 21, 1899, for a multiplying camera. The invention disclosed by the patent consists of a camera having a number of subdivisions or cells so constructed as to prevent light escaping. A slide carrying a single lens is mounted at the front of the camera, and is adapted to move horizontally and vertically. There is a plate of sufficient size to cover the rear of all the cells at the back of the camera. The construction of the device is such that, as the slide moves either horizontally or vertically, the lens comes into successive alignment with each cell, and an individual picture is taken on the part of the plate at the rear thereof. The proofs show the invention is valuable. Its use is largely confined to what is known as "kidnapping," or taking the pictures of children in the poorer sections of large cities, in which work it is extensively employed. By reason of its economies, small pictures of a good grade of stock are sold at very moderate prices. The first claim, which alone is here involved, is:

"In a photographic camera, the combination of a cellular box, a plate-holder seating against and closing the rear end of the cells, a sliding front closing the front end of the cells, and having stops by which it may be fixed in relation to a particular set of cells, a lens-carrying slide moving in guides on the sliding front, and means for adjusting the slide to register the lens with each cell of the set with which the front is in relation, whereby a separate exposure may be made in each cell of the box without moving the plate, and with but once drawing the plate-holder slide, substantially as described."

As we find nothing in the prior art showing such construction, and there is nothing to negative the presumption arising from the grant of the patent, we hold the claim valid. The respondent was in the employ of complainants for some time, operating one of the patented cameras. He left such employ, and continued in business, but began using the alleged infringing instrument. In it we find a lens carried on a slide adapted to move horizontally and vertically, and of the exact construction shown in complainants' patent. Instead, however, of partitioning his camera box into a number of fixed cells, he uses but one, which, being attached to the slide, is adapted, at the working instant, to be in the position of each one of the stationary cells, and perform the light-confining function of each. The two cameras work in the same way, and accomplish the same result. The question of infringement therefore turns on the question whether the respondent's camera is a "cellular box." In considering that question, we must look at substance, not names. If we look at names, it is clear the respondent's camera box is not a cellular box, for, standing by itself, it is an empty one. When, however, complainants' box is in use, it is only the single, working sell that is functional and essential. The other cells are at that instant negligible factors. To impart, therefore, to a single cell, placed in the camera chamber, the capacity to be moved and used at the working instant in the several positions of the other cells, is to make it in these many positions the mechanical and functional equivalent of a number of stationary cells. And why should it not be held the equivalent in patent law? The gist of the Jenkins invention was the single lens on a slide adapted to horizontal and vertical movement. This feature the respondent has taken without the semblance of a change. He thus avoids the expense and risk of non-uniformity incident to using more than a single lens, and by means thereof he can take a picture on one section of a plate without affecting the residue. In construction, however, he attaches his cell to the slide, and, by means of the mobility of the slide, he thus converts the interior of the camera into a cellular chamber at each successive working instant. Having thus given the working part of every portion a cellular capacity at such working moment, and having thereby obtained every advantage incident to such cellular capacity, we are of opinion his camera is, when its functional purpose is to be fulfilled, a cellular box.

Applying the standard of substance, and seeking to protect meritorious inventors in the enjoyment for a limited time of substantial rights they have disclosed to the public, we are of opinion the respondent's camera has a cellular box, and the further use should be enjoined.

ALPHONS CUSTODIS CHIMNEY CONST. CO. v. H. R. HEINICKE,  
Incorporated.

(Circuit Court, S. D. New York. December 20, 1904.)

PATENTS—SUIT FOR INFRINGEMENT—IMPROVEMENT IN CHIMNEYS.

An application for a preliminary injunction against infringement of the Custodis patent, No. 512,504, for a chimney, denied in view of the fact that the patent had not been adjudicated, and that the showing made raised a serious question as to its validity.

In Equity. On motion for preliminary injunction.

Dickerson, Brown, Raegener & Binney, for the motion.

A. Parker Smith, opposed.

TOWNSEND, Circuit Judge. Motion for preliminary injunction. The complainant is the owner of patent No. 512,504, granted January 9, 1894, to Alphons Custodis for an improvement in chimneys. The patent states that:

"Heretofore the inner wall of a chimney was made continuous, and upon expansion of any one of its parts the entire wall would frequently be thrown out of line, and had to be replaced. To remedy this defect is the object of my invention."

McCord patent, No. 117,555, granted in 1871, shows that the foregoing statement as to prior constructions was erroneous, or, rather, that sectional chimneys were known in the art. He provided for "a chimney flue \* \* \* in the interior of which are arranged the sections of piping, B, placed one upon another to the upper end of the flue," and stated as one object of his invention to prevent damage from the cracking of the brick walls "produced by the contraction and expansion of the brickwork as well as from the settling of the building." The patented improvement in the patent in suit consists in the provision of steps projecting inwardly from the outer wall of the chimney, and separate independent sections of inner wall so supported upon said steps that any one of said sections can be separately repaired or replaced. The claim is as follows:

"A chimney composed of an outer wall having a number of inwardly projecting steps and of a sectional inner wall, which is supported upon said steps, substantially as specified."

The prior art shows metal chimneys described in the Clawson patent as provided with an interior flue composed of sections of earthenware tube which are supported upon a suitable base, and in combination with such a sectional chimney a series of flanges so constructed as to unite the sections and at the same time provide independent supports for the chimney at intervals. The patentee says:

"In order to support the chimney at intervals, and to relieve the base and the lower sections of too much weight, I form projecting brackets, I, which are secured to rings, F, and may be fastened to a wall or other support near the chimney, so that each bracket may support that portion of the chimney between it and the next one above by means of the lugs, H, and the flanges,

L, on the inner sections, as before described. By this construction the strain upon the chimney is divided and relieved."

It is contended that these chimneys are not the same thing as the invention of the patent in suit, because the lining is practically continuous, and there is no air space between the lining and shell. On the argument counsel for complainant also assumed that the patent in suit was for a chimney composed of brick, as distinguished from metal. There is not a word in the patent suggesting the provision of an air space in the chimney, or limiting its construction to any specific material. It has already been shown that the prior art covered a sectional construction and inwardly projecting supports. It is unnecessary to consider other prior constructions. The patent in suit is not an adjudicated patent. No facts are stated as to acquiescence, and the alleged infringing chimney is being constructed for the United States government. In these circumstances, as the patents and other publications introduced in defendant's affidavits raise a serious question of validity, its determination should be reserved for final hearing.

The motion is denied.

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#### KANSAS CITY SOUTHERN RY. CO. v. STEVENSON.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. March 4, 1905.)

##### EQUITY—LACHES—SUIT TO ENFORCE TRUST.

Where defendant, on resigning the presidency of a railroad company, retained the title to certain property in another state, which had been donated to induce or aid in an extension of the road, claiming that the property was his own and did not pass to the company, which claim was shortly thereafter known to the officers of the company, a delay of over nine years before bringing suit to establish and enforce the trust, in the absence of any showing in excuse, was such laches as to bar the right to relief, where actions at law to recover the property would have been barred, under the laws of the state, in from three to seven years.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 191-196; vol. 47, Cent. Dig. Trusts, §§ 568-573.]

In Equity.

Read & McDonough, for complainant.  
H. C. Mechem, for defendant.

ROGERS, District Judge. I must regard the proof in this case as establishing the fact that the donations and subsidies in controversy, received by L. L. Bush in his own name while the president of the Kansas City, Ft. Smith & Southern Railway Company of Missouri, and the donations and subsidies in controversy received by John B. Stevenson, Jr., in his own name while president of the same corporation, were held in trust by each of them for the corporation, and that the said donations so received by the said Bush, and subsequently conveyed by him to said Stevenson, were held by said Stevenson in trust, also, as the property of said corporation, because it is clear that Stevenson, before he took the title, had ample

notice of the conditions under which Bush had received the donations and subsidies to put him upon inquiry, which, if followed up, would have disclosed all the facts. *Percy v. Cockrill*, 53 Fed. 875, 4 C. C. A. 73. Stevenson was a trustee for the company, its president, and he could not be allowed to buy for himself property held in trust by Bush for the company. Nor could he be allowed to buy properties for himself while president which were essential to the operation of the company's road—for instance, the right of way on which it had been built, or property necessary for its business. His duty was to procure such properties for the company, and he could not, for personal gain, be allowed to disregard his duty and violate his trust by antagonizing the very interests it was his duty to subserve and promote.

The properties in controversy all lie in Arkansas. The contention is that the corporation could not accept subsidies and donations in Arkansas to aid in building or extending its line of road into the state of Arkansas, (1) because its charter gave it no right to build elsewhere than in Missouri; (2) because to extend its line in Arkansas without compliance with the laws of Arkansas was against the public policy of that state. I have examined with great patience the statutes of Missouri under which the corporation was organized, and I have reviewed the history of all railroad legislation in Arkansas, and examined all statutes which relate to its public policy as regards the construction by foreign corporations of their roads into the state of Arkansas. I have also examined the authorities, and considered carefully the argument of the learned counsel who seeks to uphold the contentions stated. It has proven a very interesting and important inquiry, in a general way; but I do not deem the contentions essential to the correct determination of this case. As throwing light on this subject, I cite 1 Rev. St. Mo. 1889, §§ 2508, 2543, 2568, and the acts of Arkansas of March 22, 1887, March 16, 1881, and March 13, 1880, all of which, except the first act, are found in Kirby's Digest, under the head "Railroads"; and also the following decisions: *Bank of Augusta v. Earl*, 13 Pet. 587, 10 L. Ed. 274; *Thompson v. Waters*, 12 Am. Rep. 243; *Fidelity Mutual Life Ass'n v. Ficklin* (Md.) 21 Atl. 680; *Levi v. Thompson et al.*, 4 How. 17, 11 L. Ed. 856; *Executors of McDonogh et al. v. Murdoch et al.*, 15 How. 413, 14 L. Ed. 732; *Paul v. Virginia*, 8 Wall. 177, 19 L. Ed. 357; *St. Louis v. Ferry Co.*, 11 Wall. 429, 20 L. Ed. 192; *Railroad Co. v. Harris*, 12 Wall. 81, 20 L. Ed. 354. But as it is not necessary to decide the contentions suggested, I do not pass upon them, but, following the wholesome rule, will leave these matters to be determined when a case shall arise which makes it necessary to do so.

It was also contended that if the Missouri corporation, in point of fact, accepted the donations and subsidies in controversy in the name of its president, as trustee, nevertheless it could gain no footing in a court of equity to enforce the trust, because the trust itself was both ultra vires and in violation of the public policy of the state of Arkansas. That question is pretermitted, also, as not essential to the correct determination of this case.

It is contended that the bill cannot be maintained, because of laches in instituting the suit. The evidence of the case is voluminous, and a vast deal of it extraneous and irrelevant. I have gone over it all carefully and patiently, and regard it unprofitable to review it. I consider that it shows the following facts upon which the case must go off: The Kansas City, Ft. Smith & Southern Railway Company, a Missouri corporation, prior to 1890 was building a road in southwestern Missouri to the Arkansas state line, near Sulphur Springs, Benton county, Ark. L. L. Bush was its president. He was building the road under an arrangement by which he was to have so much stock and so many bonds of the company per mile as the road was completed and turned over to the company. Under this arrangement, the exact nature of which is not, in its details, made clear by the proof, Bush had become the owner of \$825,000 of stock and \$825,000 of bonds of the company for road constructed in Missouri. Bush and the company were both embarrassed for funds to continue the work. G. G. Latta, of Philadelphia, had become involved by indorsements for and advancements made to Bush, and held Bush's stocks and bonds as collateral to secure him therefor. To relieve the road of its embarrassments, some time prior to January 15, 1891, Latta became the owner of all Bush's stocks and bonds; and on the 15th day of January, 1892, Bush resigned as president of the company, and defendant, Stevenson, was elected president in his stead. Latta and his friends afterwards, on the 3d of January, 1893, sold all the stocks and bonds of the Kansas City, Ft. Smith & Southern Railway Company to the Missouri Coal & Construction Company, also a Missouri corporation, which afterwards changed its name to the Philadelphia Construction Company, also a Missouri corporation. Stevenson, however, under the arrangement made at the sale, remained nominally president of the Kansas City, Ft. Smith & Southern Railway Company, in order to secure certain deferred payments for the stocks and bonds. These deferred payments having been made, Stevenson's resignation as president was accepted on June 12, 1893, although the management of the corporation had passed completely into the control of the Missouri Coal & Construction Company on June 1, 1893, when its own board of directors were elected. When the properties in controversy are sifted, it is admitted that only four tracts of land and the Sulphur Springs town site stock are really in controversy. The other properties described in the bill have either been conveyed by Stevenson to the railroad company, or were acquired by him after he ceased to be president, or were disclaimed in his answer. The properties in controversy, therefore, are the town site stock, which was owned by Bush prior to April 15, 1892, on which day he assigned it to defendant, Stevenson; the quarry tract, which was conveyed to Bush December 28, 1888 (this land was conveyed by Bush to defendant, Stevenson, along with other properties, on April 15, 1892); the Y property, purchased by Stevenson from one Dunn and wife, conveyed to him March 11, 1893, and the deed recorded May 24, 1893; the Heckman tract, conveyed to Stevenson September 27, 1892, another deed correcting the first being made to him March 23, 1893, and recorded May 24, 1893; and the McGraw tract, conveyed to defendant, Stevenson, April 6, 1892, and the deed recorded May 24, 1893. It will therefore

be seen that all this property was acquired by Stevenson before his resignation was formally accepted as president of the Kansas City, Ft. Smith & Southern Railway Company, but the three last tracts were acquired after Latta and his friends had sold all the stocks and bonds of the Kansas City, Ft. Smith & Southern Railway Company to the Missouri Coal & Construction Company, to wit, January 23, 1893. Passing over defendant's evidence, the testimony of the plaintiff's own witnesses, Trimble, Martin, Gentry, and Hibler, proves, that within a few weeks, or, at most, months, after this sale, it was brought to the attention of the officers of the Missouri Coal & Construction Company that Stevenson claimed that the sale of the stocks and bonds of the Kansas City, Ft. Smith & Southern Railway Company to the Missouri Coal & Construction Company (both Missouri corporations) did not carry with it any of the properties in Arkansas, and that Stevenson not only claimed all donations and subsidies in Arkansas, but also the right of way of the railroad company from the Arkansas state line to Sulphur Springs, Ark., and certain railroad iron deposited on the right of way of the road in Arkansas, as his own property. The right of way and some other matters were subsequently adjusted after some litigation between the Philadelphia Construction Company and Stevenson and others, but no steps were taken to recover the properties now in controversy until October 2, 1901, eight years and nine months after the sale of the stock by Latta and others to the Missouri Coal & Construction Company, and more than eight years after Stevenson set up his claim to all the Arkansas properties in controversy. During all this time the proof fails to show that the company was in possession of any of the property in controversy, and by a deed made by Stevenson in 1895 that part of the Y property now in controversy was specifically reserved from the conveyance. There is no semblance of any allegation in the bill showing any reason why the plaintiff company and those under whom it holds have not taken steps at an earlier date to assert its claim to the property in controversy. The statute of limitations in Arkansas applicable to the recovery of town site stock is three years, and the statute applicable to the recovery of real estate is seven years. The rule in equity in such cases, assuming that Stevenson was a constructive trustee for the Kansas City, Ft. Smith & Southern Railway Company of Missouri, and that the properties in controversy passed to the Missouri Coal & Construction Company by assignment of the stocks and bonds by Latta and others to the latter company, is clearly stated in *McCaughy et al. v. Brown et al.*, 46 Ark. 34:

"It was competent for equity to grant the full measure of this relief. It frowns upon a multiplicity of suits, and, when the appellees had successfully invoked its aid to invest them with the legal title, it would not then remit them to an action at law to recover possession; but, having taken jurisdiction of the case for its own exclusive purposes, it would retain the cause to administer the legal after the equitable relief. It is long established that 'courts of equity in cases of concurrent jurisdiction consider themselves bound by the statute of limitations which governs courts of law in like cases, and this rather in obedience to the statute than by analogy.' *Farnam v. Brooks*, 9 Pick. 212. The evil resulting from delay in the enforcement of legal and equitable rights is the same, and the courts of equity take the same limitations for their guide that govern law courts in analogous cases. This is illustrated in this court by the application of the statute governing actions



to recover real estate to a suit to foreclose a mortgage (*Ringo v. Woodruff*, 48 Ark. 469), as well as to remove a cloud from the title, as in *Conway v. Kinsworthy*, 21 Ark. 9. It is argued further that Mrs. McGaughey, and her heirs after her death, held the land in trust for the heirs of Fountain Brown, and that the statute will not bar a trust. Express and positive trusts are certainly within the rule contended for. But this doctrine is subject to two qualifications, namely, that no circumstances exist to raise a presumption of the extinguishment of the trust, and that no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act as upon an asserted adverse title. *Angell on Lim.*; *Wood on Lim.* 212, 218; *Harriet v. Swan*, 18 Ark. 495. The rule, with the exceptions, was clearly stated by Judge Fairchild in *Brinkley v. Willis*, 22 Ark. 6, and the benefit of the statute was denied an executor, ten years after his breach of duty, because the trust was still subsisting; the executor not having been discharged therefrom by the probate court. But this does not help the appellees' case, for, if we should regard James A. McGaughey as in possession of the estate in his own right, still the facts remain that he was regularly discharged from the trust by the probate court in 1870, and the lands were held adversely for more than seven years thereafter. The following language used in *Clarke v. Boorman's Executor*, 18 Wall. 493, 21 L. Ed. 904, is applicable to this case: 'It may be conceded that, so long as a trustee continues to exercise his powers as trustee in regard to property, he can be called to account in regard to that trust. \* \* \* But when he has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert themselves in his favor, and time begins to cover his past transactions with the mantle of repose.' But trusts which arise from the operation of law (that is, constructive trusts) are subject to the operation of the statute. The possession of Mrs. McGaughey and her heirs falls under this class, and it was incumbent upon the appellees to assert their rights within the period limited by the statute after knowing the facts in relation thereto. *Ashhurst's Appeal*, 60 Pa. 290, 316. They seek to evade the force of the statute by contending that the appellants' title originated in a fraud which no time will bar. To warrant this conclusion, not only must the trust be established, but the fraud must have been successfully concealed from the knowledge of the beneficiaries. *Wood on Lim.* § 275 et seq.; *James v. James*, 41 Ark. 301; *Gelsreiter v. Sevier*, 33 Ark. 534; *Meyer v. Quartermous*, 28 Ark. 45. In *Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482, the court quote approvingly this language from *Badger v. Badger*, 2 Wall. 95, 17 L. Ed. 836: 'The party who appeals to the chancellor in support of a claim, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, should set forth in his bill specifically what were the impediments to the earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill.'

The principles here announced have been approved and followed, as binding upon the federal courts, by the Circuit Court of Appeals, in the Eighth Circuit, in *Percy v. Cockrill*, 53 Fed. 872, 4 C. C. A. 73; *Kelley et al. v. Boettcher et al.*, 85 Fed. 55, 29 C. C. A. 14; *Wyman v. Bowman*, 127 Fed. 268, 62 C. C. A. 189. See, also, 2 Wall. 95, 17 L. Ed. 836. In *Percy v. Cockrill*, ante, the court say:

"The rule that length of time is no bar in equity to a suit for relief from an actual fraud or a constructive trust, clearly proved, which has been fraudulently and successfully concealed from the party aggrieved, has no application to this case subsequent to 1858. One of the qualifications of this rule is that the facts constituting the fraud or trust must have been fraudulently and successfully concealed from the injured party. *Badger v. Badger*, 2 Wall. 87, 92, 17 L. Ed. 836. And notice of facts and circumstances which would put a man of ordinary intelligence and prudence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent

inquiry would disclose. 'Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. Where a person has sufficient information to lead him to a fact, he shall be deemed conversant with it.' *Kennedy v. Green*, 3 Mylne & K. 699, 722; *Wood v. Carpenter*, 101 U. S. 135, 141, 25 L. Ed. 807; *Rugan v. Sabin* (decided by this court December 6, 1892) 63 Fed. 415, 3 C. C. A. 578; *Parker v. Kuhn*, 21 Neb. 413, 421-426, 32 N. W. 74, 59 Am. Rep. 838; *Wright v. Davis*, 28 Neb. 479, 483, 44 N. W. 490, 26 Am. St. Rep. 347."

In *Wyman v. Bowman*, ante, the court say:

"Has the complainant been guilty of such laches that he may not invoke the aid of a court of equity? Courts of chancery are not bound by, but in the application of the doctrine of laches they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. Under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law. But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill, or by his answer, that extraordinary circumstances exist, which require the application of the doctrine of laches. And when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

In *Kelley v. Boettcher*, ante, the whole subject is more elaborately discussed by Judge Sanborn, and the authorities there cited.

It will be seen from reading the bill that the complainant has wholly failed to bring itself within the principles announced in these opinions. The suit, therefore, cannot be maintained, because it is stale, within the rule announced above, and the bill must be dismissed at the cost of the complainant.

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### THE CYPROMENE.

(District Court, D. Oregon. February 24, 1905.)

No. 4,646.

#### **COLLISION—STEAMER AND ANCHORED SHIP—EXCESSIVE SPEED IN NIGHT WITHOUT LOOKOUT.**

The steamer *Hassalo*, owned by libellant, navigating the Columbia river in the night, came into collision with the ship *Cypromene*, which was anchored in a customary place of anchorage on the Oregon side of the river, where she had been placed on the evening before by a tug of libellant. The ship carried the regulation lights, and, while there was testimony to the existence of a fog bank around her, the weight of testimony showed clearly that her lights could be seen for a considerable distance, and were seen by people who looked after hearing the collision. The *Hassalo* was going at a speed of 15 miles, and had no lookout. The captain and pilot, who were in the pilot house, testified that they could see no lights until just before the collision, on account of the fog. The pilot knew that the ship was anchored in the vicinity, but supposed she was in a different place. *Held*, under the evidence, that there was not such fog as to require the ship to ring her fog bell, but that the collision was due solely

to the fault of the Hassalo in not having a lookout, and in going at an excessive speed in a place where anchored vessels were to be expected. [Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 211-215.]

In Admiralty. Suit and cross-libel for collision.

H. F. Conner, for libellant.

J. C. Flanders, for claimants.

BELLINGER, District Judge. This is a suit upon the libel of the Oregon Railroad & Navigation Company against the ship Cypromene, and the cross-libel of the owners of the ship, for damages caused by a collision between the ship and the company's steamer Hassalo, while the former was at anchor in the Columbia river, on the Oregon side, a short distance below Kalama. The accident occurred on the 5th day of October, 1902. On the preceding day the company's towboat the Oklahoma proceeded, with the Cypromene in tow, from Portland to Astoria, the company having engaged to tow the ship to the latter place. At about 7 p. m. of that day, October 4th, the Cypromene anchored in the Columbia river between Coffin Rock and Kalama, under the direction of the master of the tugboat, in the place and in the manner designated by him. This place of anchorage was a usual and customary place of anchorage for vessels bound from Portland to Astoria. As night came on, the proper and usual riding lights, consisting of white lights in the mizzen rigging and fore rigging, were displayed upon the ship. Shortly after 1 o'clock in the morning of the 5th, the company's steamer Hassalo, while on her way from Portland to Astoria, and while in or near her usual course, collided with the ship, to the injury and damage of both vessels.

It is alleged by the navigation company that, at the time of the collision and prior thereto, there was a light wind upstream; that the Cypromene was enveloped in a thick bank of fog, extending downstream from a point a short distance above the ship; that the weather was a little hazy, and the fog bank was so obscured that those in command of the Hassalo were not aware of its existence; that when the steamer entered this bank of fog her pilot and captain saw a light about one point on her port bow, and immediately thereafter the jib boom of the Cypromene appeared in the fog directly in front of the pilot house of the Hassalo, and the collision occurred before any measures could be taken by the latter's officers to avert it. The company alleges that the collision was caused by the gross negligence of the ship's officers and crew in failing to have any lookout or anchor watch on the deck of the ship, or to ring a bell during the period and at the intervals required by law in such cases, or to give warning of the position of the ship by the use of a lighted torch, or by shouting, or by taking any other means to acquaint those in charge of the Hassalo with the position of the ship, and that it was impossible to perceive the latter's position until too late to avoid a collision.

On behalf of the Cypromene, it is denied that the ship was at the time of the collision obscured by fog, or that there was any fog in her vicinity. It is admitted that no bell was rung on the ship, and that

no warning was given of her position by shouting or by a lighted torch, but it is alleged that under the circumstances these precautions were not required, and that the Hassalo could not have been better apprised of the ship's position than by the regulation anchor lights that were burning brightly at and prior to the collision, and it is denied that such lights were in any manner obscured. It is denied that the Hassalo was proceeding at the time of the collision at a moderate rate of speed, but, on the contrary, it is alleged that she was being navigated at full speed, and it is alleged that she is a fast boat, and that the collision occurred solely by reason of the negligence and want of care of the Hassalo in failing to observe the lights of the Cypromene, and by reason of her improper navigation, and of the failure to keep a lookout and watch as required by law.

The master of the steamer Fannie, Capt. Copeland, testifying for the libellant, says that he passed Kalama with his boat going down the river about 11 o'clock, possibly a little later, on the night of October 4th. When he reached a point about halfway between Kalama and Kalama River Point he struck a very thick bank of fog, which he had not seen before. He took his bearings, ran to Kalama River Point, got the echo from some trees there, turned around, and made his way to Farr's Dock on the Oregon side, probably some 1,500 or 2,000 feet above where the ship was anchored. The Fannie had much difficulty in landing because of the fog, but was finally, at about 20 minutes or half past eleven, tied up at a dock at Neer City some 250 feet above Farr's Dock. The fog continued dense down the river; above it was lighter. Saw the lights of the Hassalo dimly as she passed down the river, at a distance of between three and five hundred feet, and heard the crash of the collision and looked downstream, but could see no lights.

Sullivan, master of the Hassalo, testifies that the Hassalo's speed is about 15 miles an hour, and she was running at full speed when the collision occurred; that there was no lookout on the steamer at the time of the collision; at the time the testimony was taken the company had a man detailed to act as lookout. Knew that the Cypromene was at anchor somewhere down the river. Her captain was on board the Hassalo, and had requested the master of the latter to put him on board the Cypromene. Was expecting to find the latter at Doublebarrs Shoal or at Rainier. He testifies that Coffin Rock is an unusual place to anchor a loaded ship; that they do anchor light ships there. He and his pilot, Barton, were in the wheelhouse of the Hassalo at the time of the collision. They had been talking about the landings to be made. Capt. Sullivan's account of the collision is as follows:

"And we had passed there [the dock at the ferry landing] perhaps— It seemed to me a minute and a half or two minutes, and suddenly saw a light on the port bow. I was not paying particular attention ahead, although looking that way. And I remarked to the pilot— I saw that it must be something unusual; there should be no light there. I remarked to the pilot, what did he suppose that was. I looked at him, and I saw he had reached for the bell and pushed the lever over; he recognized there was something in his way. I next saw the jib boom of the ship coming over the hurricane deck. This jib boom caught the light screen and the guy lines of the pilot house, then the side posts, and tore them out, and, of course, checked the boat's speed in a measure; and, of course, the boat had been stopped. I will say, as soon as he saw the light, he rang the bell to stop. The boat drifted on by.

I told him to back the boat until the way was stopped, and I ran down below to see what happened. I went through the cabin, and saw that no one had been injured, or that no one had been knocked in the water; went down on the main deck; saw that the engines were not injured, the power was not disabled; went back to the speaking tube in the forward part of the boat, and told the pilot to turn around; told the pilot to go to Kalama, which he did. We were there only a few minutes. Very soon after leaving the ship, I noticed we ran into hazy weather again, or comparatively clear. I didn't notice this in particular, as, of course, I was occupied more in looking after the people—found they were frightened—and in trying to calm them. Q. How far were you away when you first saw the lights in the Cypromene, captain? A. Well, it appeared to me about the length of the boat. Q. How long is the Hassalo? A. 180 feet. Q. Was it foggy at that time, or otherwise? A. It was very thick. Q. How long had it been thick that way, and how long had you been proceeding through thick fog? A. I have no means of telling; I would have no means of knowing; there was no object ahead to see, no object on the side. The beach on the Washington shore is a flat sandy beach, with no background; for a long ways ahead there is no object except Coffin Rock light, which would probably be three-quarters of a mile, and we weren't looking for anything to give any idea of distance, and I have no way of telling; but it seemed to me that we just ran into it; there was nothing to indicate when we went into this fog."

This witness further says that it was quite a dark night, and the fog added to the darkness.

The testimony of Barton, the pilot, does not differ materially from that of Capt. Sullivan.

Larson, the pilot on the transfer boat at Kalama, a witness for the navigation company, testifies that the transfer boat left Goble for Kalama at 11 minutes past 1 (the collision occurred at 1:25). He doesn't remember whether he could see the lights at Kalama or that at Coffin Rock in leaving Goble; there wasn't much fog; on the Oregon side "there was a little fog, and down to Coffin Rock"; about 10:30 or 11 o'clock it was very foggy all the way from the ferry pontoon and down towards Coffin Rock; didn't see the Cypromene until he crossed at 5:15 in the morning; did not see her lights at all that night; looked for them on each trip after 10:40.

The testimony of Linnell, mate on the transfer boat, is substantially the same as that of the pilot.

Larkins, the master of the steamer Undine, a witness for the company, testifies that he was on the Undine the night of the collision, and was probably five miles up the river when it occurred. He landed at Kalama about 1:25, and remained about 10 minutes. Upon leaving Kalama, he shaped his course for Coffin Rock light; met the Hassalo about a quarter of a mile, or a little over, below the ferry, on the Washington side, apparently going to Kalama. The weather was a little hazy when the Undine left Kalama. There was a heavy fog overhead, but none on the water; low down on the water was a haze across the river; could see the Goble light, but nothing below that, as he "didn't observe at the time they were in port—didn't notice—any lights below the ferry light"; about halfway between Kalama and Coffin Rock ran into a dense fog; blew a fog whistle, and the Cypromene rang a bell almost abreast of the Undine, and then he saw the ship's lights, distant between two and three hundred feet; got within 150 to 200 feet of Coffin Rock before he saw the light; did not slacken his speed when he blew the fog whistle; had been run-

ning at full speed all the way down the river. "It is impossible to run a steamboat on this river without running full speed. None of them comply with that law; not one of them."

Lawrence, the incline tender at Goble, testifies that it began to get foggy towards midnight; it was a kind of rolling fog; doesn't believe he saw the lights on the ship—didn't pay attention to it; heard the sound of the collision; it was pretty foggy, pretty thick, a little ways down below there.

Mrs. Welter, wife of the Coffin Rock light keeper, was out of her house between 10 and 11; there was a pretty thick fog; she did not see the lights of the ferryboat—took no notice of them; didn't look for any lights; the Coffin Rock light is about 200 feet from the house; could not exactly see the light, but could see the shadow of it.

G. C. Fowler, who lives about a thousand feet north of Farr's Dock, on the bluff, which is 250 or 300 feet high, and about a quarter of a mile from where the Cypromene was anchored, testified, as a witness for the libelant, that he heard the collision; was in bed and half asleep at the time. He got up and went out, and saw there were "a lot of lights laying along the ship." It was clear where the witness was; down on the river from where the witness was to the ship it was a little hazy, but from the ship on it seemed to be a solid bank of fog; back of the ship—that is, east of the ship—there was fog; the ship was right on the edge of the fog.

The testimony of Peter Green, a watchman or lookout on the transfer boat, is substantially like that of Larson, the pilot on that boat, except that upon hearing the crash of the collision he looked to see what the matter was, and saw the Hassalo's lights, not very plainly; did not see the lights on the other vessel; it was all of a mile away; the transfer boat was just coming into the ferry slip at Kalama.

For the cross-libelants, James W. Berry, a passenger on the Hassalo, testifies that he was sitting in the forward cabin of the Hassalo at the time of the collision; that he immediately went out on deck; that he saw the ship "plain as day," and could tell exactly what had happened; that the weather was rather hazy, but he could see plainly; that he saw the lights on both sides of the Columbia; that in fact he could see what he thought was the ferryboat at Kalama; that the lights he saw were plain enough.

John Ostervold, a seiner by occupation, was out in his own boat about a quarter of a mile to the northwest of the collision, towards Coffin Rock, at the time the collision occurred. He was on his way down the river, and had passed the Hassalo while the latter was at Kalama. Later, the Hassalo passed the boat of witness as the former turned to go into Goble. He testifies that he saw the lights of the Cypromene soon after he passed Kalama, and that these lights remained in sight until after he had passed the ship; that such lights were visible from a mile to a mile and a half; that the weather was hazy; that he passed the ship about 200 feet on her port side, and thereafter kept the lights of the ship in sight to steer by, to make the Oregon shore, until the collision occurred; that one of

the ship's lights got shaded from him after he had passed "about 45° abaft the beam"; that he kept the light that was not shaded in sight to steer by, and saw the Hassalo coming out of Goble, making down the channel, and saw her constantly until she ran into the ship; that after the collision he ran into a bank of fog so thick that he couldn't see his hand before his face. On cross-examination, in answer to questions as to his noticing the Hassalo when she went into Goble and came out, the witness says:

"We always watch the Hassalo when she is around. I hate to meet her—makes the boat rock so much. I always keep away from her. I was wishing I could get over to the Oregon shore before she overtook me."

Walter Hamm, a passenger, with his wife and children, on board the Hassalo, testifies that he saw the lights at Kalama and Goble immediately after the collision, and there was no fog that he could see.

George Davey, second mate on the Cypromene, says the night was fairly clear; that his watch began at 11 o'clock, and he was on deck continuously until the collision; that he saw the lights on the steamer as she was approaching, three-quarters of a mile away, and he saw the lights at Kalama, Goble, and Coffin Rock; that the lights on the shore were plainly visible, and the ship's lights were burning brightly at the time of the collision; that when he saw the Hassalo approaching he supposed that the captain of the Cypromene was on board, and that the steamer was coming alongside for that reason.

Harry Feringa, an able seaman on the Cypromene, was one of the watch at the time of the accident. About half past 10 there was a little bank of fog that lasted about five minutes, when it cleared away, and it was clear when the collision occurred; while the fog lasted, witness rang the bell; that he first saw the steamer lights about 10 minutes before the accident; that he could see her saloon lights; that he could see the lights on shore at the time.

Arthur E. Olsen, the first mate on the Cypromene, testified that he was called on deck from his berth just before the collision by the second mate, who said there was a boat coming alongside with the captain of the Cypromene, whom they were expecting; that he could see the lights at Kalama, Neer City, and the Oklahoma's lights, and the light at Coffin Rock; that there was no fog.

Messenger, the ship's boatswain, came on deck immediately after the collision. There was no fog, and he saw the shore lights on both sides of the river.

Capt. Roberts, of the Cypromene, testifies that he was on the Hassalo, in his berth asleep, when the collision occurred. He had requested the master of the Hassalo to put him on board his own ship if possible; that the steamer's captain couldn't come to a decision, but said, if he was going to put him on board the ship, Capt. Roberts would be called in time to dress. He testifies that the night was clear, and he saw the Kalama and other lights.

My conclusion is that there was a hazy condition of the atmosphere above and at the place where the Cypromene was anchored at the time of the collision, that did not obscure the lights on the

ship; that these lights could easily have been seen from the Hassalo in time to have avoided collision, and that the collision would have been avoided if there had been a lookout on the Hassalo. The positive testimony of witnesses who saw the lights at Kalama and on both sides of the Columbia from the scene of the accident, and that of Ostervold, who was going down the river in his own boat and kept the ship's light to steer by, is more to be depended upon than the negative testimony of witnesses who didn't see the ship's lights. Moreover, these witnesses are corroborated by two of the witnesses who testified in behalf of the libelant. Peter Green, a lookout on the transfer ferryboat, heard the crash of the collision about the time the transfer boat was landing at Kalama, and looked to see what the matter was. He saw the Hassalo's lights, but not very plainly. He did not see the ship's lights. "It was all of a mile" from where the witness was to the Hassalo. G. C. Fowler, another of libelant's witnesses, hearing the collision from his residence, went out and saw a lot of lights lying alongside of the ship. He could see the "bulk of the ship—a dark object," and could see her riding lights, two of them. This witness lives on the bluff, which is 250 or 300 feet high, a distance of about 1,000 feet north of Farr's Dock. He thinks it is about a quarter of a mile from where he was to the place where the ship was anchored. The direction is a little north of east, while that from the Kalama Landing, from which Green saw the Hassalo's lights at the time of the collision, to the same point, is a little west of north. If lights on the ship or on the Hassalo, either or both, were seen from these two points of view, it is impossible that the riding lights of the ship could have been obscured from the course the Hassalo was on. The testimony of Ostervold does not admit of mistake. His own boat was ahead of the Hassalo, and he watched the latter boat because he always kept out of her way, and he was hoping to get over to the Oregon shore before she overtook him. The swells caused by this powerful boat going at full speed made it desirable that small craft should keep out of her way. It is a matter of common knowledge among those accustomed to travel on the river that the Hassalo is a source of anxiety to all small craft in her vicinity. The master of the Fannie, who testified for the libelant, says in his testimony that upon hearing the crash of the collision he thought something was breaking on his own boat, until the watchman said everything was all right. He says, "The swells from the Hassalo threw my boat against the dock pretty violently, and I thought possibly some of the piling might have run through her side." Moreover, Ostervold was steering by the ship's lights. There was a dense fog on the river, but it was below and to the east of the ship, and Ostervold could not see the Coffin Rock light because of it. The ship's light was his only guide. Of all the witnesses in the case, no one has such good reason for positive knowledge as to whether the ship's lights could be seen or not.

This collision is essentially a duplicate of the collision by which the steamer Oregon, the property of the libelant, sank the ship Clan Mackenzie in December, 1889, at the same place where this colli-



sion occurred, except that in that case the night was clear, although dark. In that case it was found that the inefficiency of the steamer's lookout caused the ship's light to be mistaken for the light at Coffin Rock, and I think it probable, notwithstanding the statements of those navigating the Hassalo, that this is what happened in the present case. If they did not make this mistake, then they were guilty of very great negligence in running the Hassalo at full speed, where vessels are accustomed to anchor, into a fog so thick that it obscured the Coffin Rock light only a short distance ahead. The fact that such light was obscured was notice to them of the existence of the fog which they were approaching. Common prudence required the Hassalo to check her speed and proceed with caution under such circumstances. Taking the statements of her officers as true, the Hassalo, before she reached the bank of fog in question, was running through "a haze" so thick that, according to the master of the Fannie, who was a witness for libelant, her lights could only be seen dimly from Neer City, from 300 to 500 feet distant, as she passed down the river, and she plunged into a bank of fog that obscured the light on Coffin Rock, a little more than a third of a mile ahead, at full speed, without a lookout, past the anchoring ground for ships navigating the river. And, in this connection, the testimony of the master of the Undine, one of libelant's witnesses, is of special significance. This witness, in justification of his own act in running at full speed through the fog, says, "It is impossible to run a steamboat on this river without running full speed; none of them comply with that law." Furthermore, the pilot of the Hassalo knew that this particular ship, the Cypromene, had anchored somewhere down the river, but was expecting to find her at Doublebarr's Landing or at Rainier. He had no right to depend upon a mere expectation of the kind. As a prudent navigator he should have been prepared, notwithstanding his expectation, to find her where he did in fact find her. The libelant cannot say that it did not expect to find the ship where its own tugboat had left her, and where it was the custom of vessels to anchor. Since the accident a lookout has been provided for the steamer; but without this implied admission of negligence in failing to have a lookout at the time of the collision, the duty to have a lookout was imperative. The Supreme Court of the United States, in the case of *The Steamship Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, which sank the *Clan Mackenzie* at this precise place in 1889, says:

"Considering the darkness of the night, her rate of speed, which was 15 miles an hour past the land, the narrowness of the channel, and the probability of meeting other vessels, the greatest watchfulness was required, and we think that prudence demanded at least an additional lookout. The watch was the smallest that would be tolerated under any circumstances, and, even were it sufficient for navigation by daylight, it by no means follows that it was sufficient for running a river in a dark night. It is hardly possible that in a four-hour watch the attention of the lookout should not be occasionally diverted from his immediate duty. Yet the withdrawal of his eye from the course of the vessel even for the fraction of a minute may occur at a moment when a light comes in sight, and, before this light can be accurately located and provided for, a collision may take place. As was said by Mr. Justice Swayne in *The Ariadne*, 13 Wall. 475, 478 [20 L. Ed. 542]: 'The duty

of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of the vessel, with all the property, and the lives of all on board. The same consequences may result to the vessel with which his shall collide. In the performance of his duty the law requires indefatigable care and sleepless vigilance.'"

If there had been a lookout on the Hassalo, or if that boat had been run at a moderate rate of speed, the collision would in all probability have been avoided.

The libel of the Oregon Railroad & Navigation Company will be dismissed. The question of the damages to which the ship is entitled is reserved, in pursuance of the stipulation between the parties in the case.

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### CONDON v. CITY OF EUREKA SPRINGS, ARK.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. February 10, 1905.)

#### 1. STATUTES—CONSTITUTIONALITY OF REPEAL—VESTED RIGHTS.

Act Ark. Feb. 27, 1875 (Acts 1874-75, p. 189), authorized cities to call in outstanding warrants, and to reject such as were spurious, and to reissue those found to be genuine; but, as construed by the Supreme Court of the state, it gave a city no power to compel a holder to present his warrant thereunder, or to bar him of relief if he failed to do so. *Held*, that it was within the province of the Legislature to repeal such act, and the repeal was effective with respect to warrants then outstanding, since it did not deprive a city of any vested right.

#### 2. MUNICIPAL CORPORATIONS—POWER TO CALL IN WARRANTS FOR CANCELLATION—ARKANSAS STATUTE.

Act Ark. March 27, 1893 (Acts 1893, p. 169), which empowers cities to call in outstanding warrants by order for cancellation and reissue not oftener than once a year, and provides that, if any warrant is not presented pursuant to such an order, it shall be barred, is not retroactive, and does not apply to warrants issued before its passage. If otherwise construed, it is unconstitutional, as impairing the obligation of contracts.

#### 3. SAME—CITY WARRANTS—AUTHORITY TO AFFIX SEAL.

Sand. & H. Dig. Ark. § 5273, which provides that "each city council shall cause to be provided for its clerk's office a seal \* \* \* which seal shall be affixed to all transcripts, orders or certificates which it may be necessary or proper to authenticate under the provisions of this act or of any by-law or ordinance of the city," does not authorize the affixing of the clerk's seal to city warrants, nor does any other provision of Act March 9, 1875 (Acts 1874-75, p. 27), of which said section was a part; and, in the absence of a by-law or ordinance providing therefor, such affixing of the seal is unauthorized, and adds nothing to the dignity or effect of the instrument.

#### 4. SAME—LIMITATION—ARKANSAS STATUTE.

Under the law of Arkansas, the five-years statute of limitations covering unsealed instruments applies to actions on city warrants which are unsealed, or to which a seal has been affixed without authority of law; and, such warrants being payable on demand, the statute begins to run from the time of their delivery.

At Law.

W. M. Cravens, for plaintiff.

C. D. James, for defendant.

ROGERS, District Judge. Plaintiff's action is based on certain warrants, commonly called "city scrip," of the city of Eureka Springs, Ark., all issued prior to the 27th of March, 1903. The city defends on two grounds: (1) The statute of limitations of five years; (2) that on the 3d of November, 1893, by its council, it made an order calling in for cancellation and classification under the act of March 27, 1893 (Laws 1893, p. 169), all the warrants of said city, and fixed a day on which said warrants should be filed—at 12 o'clock m. of March 15, 1894; that said order was published in accordance with the statute, and plaintiff failed to present his warrants as required by the order; and that therefore they are barred by the statute. These defenses will be considered in their inverse order.

As to the second defense, when these warrants sued on were issued there was in force in this state a statute authorizing the calling in of city warrants for canceling and reissuing the same. Laws 1874-75, p. 189. See, also, *Watkins v. Eureka Springs*, 49 Ark. 132, 4 S. W. 384, where the act is set out at length, and in which case sections 2 and 4 of the act are held unconstitutional, and leaving the whole act, as stated in that opinion, "of little practical utility." It, however, left enough of the act in force to authorize the calling in of warrants for cancellation and reissuing, but left the city no power to bar the holder if he failed to present them as required by the order of the court. This whole act, however, had been repealed by the act of March 27, 1903 (Acts 1893, p. 169), under which last act all the proceedings were had which are now pleaded to bar the warrants in suit. It may be conceded that so much of the act of February 27, 1875, as was valid, applied to all warrants issued while it was still in force; but, this being so, still there was no power left in the city to bar them if they were not presented, and no obligation imposed on the holder to present them. The legal status of the warrants was therefore the same as if the act of February 27, 1875, had never had any existence. And why should not this be so? The act of February 27, 1875, vested no right in the plaintiff. It imposed no obligation on him. It gave the city the right by order to call in warrants, but gave it no power to enforce the order. *Watkins v. Eureka Springs*, supra. The only right the city had was to make the order calling in the warrants, and, if any one presented the warrants, to examine, and reject the spurious and reissue the genuine. If no one presented warrants, no bar attached, and the city could do nothing. Is there any reason why the Legislature, who conferred these powers on the city, might not take them away? They related solely to the remedy the city had for getting rid of the spurious warrants and ascertaining the amount outstanding and this remedy it could not enforce. The city by the repeal of the act was not left without remedy in such cases. It could refuse to pay spurious warrants, and, if sued on them, defend on the ground they were spurious. All the right it lost by the repeal of the act was to cancel fraudulent warrants if any one saw fit to present them under the order calling them in for canceling and reissuance; and such an order could be made by the proper authorities and without a

statute, and, if any one presented the warrants, the same action might be had as under the act; but, in either event, obedience to such an order could not be enforced. Nobody has a vested right in a remedy. All remedies cannot be withdrawn as to past contracts, for that would infringe upon the obligations of such contracts. But as long as remedies are left in force, what the remedy shall be is within the discretion of the lawmaking power. In *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, the court held:

"The repeal of a statute of limitations of actions on personal debt does not, as applied to a debtor, the right of action against whom is already barred, deprive him of his property in violation of the fourteenth amendment to the Constitution of the United States."

In that case the whole question of vested rights in remedies is ably discussed upon authority. In *Percy v. Cockrill et al.*, 53 Fed. 872, 4 C. C. A. 73, the United States Circuit Court of Appeals for the Eighth Circuit held:

"By the common law of Arkansas and of most other states, a husband has no vested interest in his wife's choses in action which he has taken no steps to reduce to his possession; and the married woman's act of 1873 (Mansf. Dig. § 4624), making such rights the sole property of the wife, and taking away all the husband's interest therein, violates no constitutional right of the husband, although the marriage took place before the passage of the act. *Criscoe v. Hambrick* (Ark.) 1 S. W. 150, and *Shryock v. Cannon*, 39 Ark. 435, distinguished."

The same court held in *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209, 4 C. C. A. 290, that "an inchoate right of dower is not such a vested interest as cannot be taken away by legislative action."

These are cases between real or artificial persons, and they are stronger than the case at bar. Surely the state may exercise as much power over its municipal corporations as it may over individuals. May it not by statute waive or withdraw the right altogether for the city to call in its warrants and cancel or reissue them? To do so in no wise infringes on any right of plaintiff. The repeal of the act left him his right to have his warrants paid, and, if not, to sue and enforce them by law. Nor can it, in view of the cases cited, be fairly said that any vested right of the city was infringed by the repeal. It is only "where a law is, in its nature, a contract, and where absolute rights have been vested under that contract, a repeal of that law cannot divest those rights." *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162. What "absolute right," not purely remedial, became vested in the city under the act of February 27, 1875? I think there was none. I conclude, therefore, that the legal status of the warrants after the repeal of the act of February 27, 1875, was exactly the same as if that act had never had any existence. That act, therefore, which was in force when the warrants were issued, can have no bearing or effect so far as the questions involved in this case are concerned. Its repeal clearly eliminated it from all consideration. But as stated, the proceedings had, to bar the warrants in controversy, were not had under that act. They were all had under the act of March 27, 1893 (Laws 1893, p. 169). That

act was enacted long after the warrants sued on were issued. Was it intended to operate retroactively? If so construed, would it be violative of article 1, § 10, of the federal Constitution, which prohibits all the states from passing any law impairing the obligations of contracts? The first question must be answered in the negative. In the first place, this statute is not a mere statute of limitation, nor is it analogous to it. Statutes of limitation relate to the remedy, and, as stated before, nobody can have a vested right in a remedy. They do not enter into and become part of the contracts made while they are in force. They may be changed by the Legislature at any time, subject to limitation that they will not be upheld as to contracts in force when they are enacted unless a reasonable time is given in which to institute suits before such contracts are barred. I need not cite authorities on this point, or stop to state the principle with more accuracy. But the statute under consideration does enter into and become a part of all warrants issued while it is in force. *Allen v. Bankston*, Collector, 33 Ark. 740; *Desha County v. Newman*, 33 Ark. 793. It says, in substance, to every holder of such warrant, when he takes it, "Bear in mind, the city reserves the right to call this warrant in at any time, not oftener than once a year, for the purpose of canceling and reissuing it, and if, when it is called in, you fail to present it, it will be barred;" and the holder assents to that agreement, which, in legal effect, becomes part of the warrant. But can such agreement as that be imported into a warrant in the absence of a statute authorizing it? It seems to me the question answers itself. It is a *reductio ad absurdum* to say that a statute which had no existence at the time a warrant was issued at that very time became a part of the warrant. But the Supreme Court of this state, in considering an exactly similar statute as relates to counties, intimated that the statute is not retroactive. *Parsel v. Barnes & Bro.*, 25 Ark. 261; *Allen v. Bankston*, 33 Ark. 740; *Cope v. Collins*, 37 Ark. 649; *Desha County v. Newman*, 33 Ark. 792. It is the duty of this court to adopt that construction, even if his own conclusion did not agree with it. The act of March 27, 1893, was not intended to apply to warrants issued before its passage. If it was so intended, it was unconstitutional, in so far as warrants issued anterior to its enactment are concerned, because it imports into such warrants a condition and an obligation not originally contained in them, viz., the obligation to present the warrants when called in under an order of the city authorities, upon penalty of their being forever barred. No such obligation or penalty rested on the holder when the warrants sued on were drawn, and the Legislature possessed no power to import it into the warrants. The act is therefore unconstitutional as applied to warrants drawn before its enactment. This conclusion obviates the necessity of determining whether the city of Eureka Springs followed strictly the statute of March 27, 1893, in the proceedings under which it sought to bar these warrants. But see *Goldman v. Conway County* (C. C.) 10 Fed. 888, and *Newton v. Askew*, 53 Ark. 476, 14 S. W. 670.

As to the five-year statute of limitations, the question presented is far more difficult, and has had the very careful, patient, and thor-

ough investigation of the court. No decision, state or federal, has been found decisive of it. The question turns on the construction of the statutes of the state. It has been settled in this state that the statute of limitation runs against cities and towns, as regards real estate. *Ft. Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19; *Helena v. Horner*, 58 Ark. 151, 23 S. W. 966. It has also been held that the statute of five years applies to county warrants, although they bear upon them the seal of the clerk of the county. In *Crudup v. Ramsay*, 54 Ark. 168, 15 S. W. 458, Mr. Justice Hemingway said:

"That the statute of limitation runs in favor of counties, against their ordinary indebtedness, is the rule in this state. *Gaines v. Hot Springs Co.*, 39 Ark. 262; *Desha Co. v. Jones*, 51 Ark. 524, 11 S. W. 875. That it runs against county warrants follows, unless there is something in the law authorizing their issuance that takes them out of its operation. The law provides that whenever an allowance is made by the county court, and an order therefor entered upon the records, the clerk shall, when requested by the person in whose favor the allowance is made, issue a warrant for the amount of the allowance (*Gantt's Dig.* § 605; *Mansf. Dig.* § 1415), and that warrants shall be signed by the clerk and numbered progressively throughout the year (*Id.* § 606). It further provides that all warrants shall be paid out of any money in the treasury not otherwise appropriated, or out of the particular fund expressed therein, and shall be received, irrespective of their number and date, in payment of all taxes and debts accruing to the county (*Id.* § 610; *Mansf. Dig.* § 1420). Under this provision this court held that it was the duty of the sheriff and of the treasurer to receive warrants offered in payment of taxes or dues to the county, without regard to the time that had elapsed since their issuance. *Daniel v. Askew*, 36 Ark. 487; *Whitthorne v. Jett*, 39 Ark. 189; *Howell v. Hogins*, 37 Ark. 110. The decision in those cases was placed upon the language of the act, to wit, that 'such warrants, irrespective of their number and date, should be received in payment of taxes and dues to the county.' And in the case of *Daniel v. Askew* it was remarked by the court that the law provided two modes for the payment of warrants—the first, out of any money in the treasury not otherwise appropriated; and the second, in payment of taxes and dues to the county. It will be observed that the provision that they shall be received irrespective of date and number applies to the latter mode only, and does not by its terms extend to the mode provided by payment of money out of the treasury. This case is therefore not within the reason that controlled in the cases cited, and, if the statute of limitations does not apply, a reason for the exception must be found elsewhere. There is nothing in the act that suggests to us a reason for such exception. None has been pointed out by counsel, and we think that none exists."

Later on in the same case he says:

"The five-years statute applies in this case. The law does not require or authorize the issuance of warrants under seal, and the clerk could not, after drawing them as the law directs, add to their dignity or effect by the unauthorized affixing of the seal. As warrants are payable on demand, the statute begins to run from the date of their delivery. Our views are sustained by the rule of the Circuit Court of the United States of this district, as announced by Judge Caldwell, upon a consideration of all the authorities, in a very clear and satisfactory opinion. *Goldman v. Conway Co.* (C. C.) 10 Fed. 888."

This case was followed by the Circuit Court of Appeals for the Eighth Circuit in *Thompson v. Searcy County*, 12 U. S. App. 618, 57 Fed. 1030, 6 C. C. A. 674.

On the other hand, it was conceded in argument the courts hold that, where the statute requires the clerk of the county to attach his seal

to warrants, they become writings obligatory or specialties, and a different statute of limitation applies. *Heffleman v. Pennington County* (S. D.) 52 N. W. 851. It therefore follows that the question as to what statute of limitation applies to a county depends upon whether the warrant bears a seal or not, or whether, if it bears a seal, there was any authority of law for the seal being affixed to the warrants. It is settled in this state that there was no such authority; that an unauthorized affixing of the seal to a warrant in no wise effects any change in its character or adds to its dignity. In that event it would be treated as an unsealed contract. *Crudup v. Ramsey*, 54 Ark. 171, 15 S. W. 458; *Thompson v. Searcy County*, 12 U. S. App. 618, 57 Fed. 1030, 6 C. C. A. 674. I cannot imagine any reason why the general rule as to counties should not with equal propriety apply to cities and towns. If there be a difference, it must arise upon a difference in the statutes. The warrants in this case all bear the seal of the city clerk. The question therefore arises, where is the authority of law for affixing the seal on these warrants? The contention of the defendant is that there is no authority to be found in the statute directing the seal to be placed on city warrants, and it has shown by competent evidence that there never was any ordinance of the city of Eureka Springs directing it to be done, but that it has been the custom to do so ever since it became a city of the first class. The contention of the plaintiff is that it is authorized by section 5273 of Sandel & Hill's Digest of the Laws of Arkansas, corresponding to section 61 of the act of March 9, 1875 (Acts 1874-75, p. 27), which is the original general incorporation law of the state. That section is as follows:

"Sec. 61. Each city council shall cause to be provided for its clerk's office a seal, in the center of which shall be the name of the city, and around the margin the words 'City Clerk,' which seal shall be affixed to all transcripts, orders or certificates which it may be necessary or proper to authenticate under the provisions of this act, or of any by-law or ordinance of the city. For all attested certificates and transcripts, other than those ordered by the council, the same fees shall be paid as are allowed county clerks for similar services."

Now, mark the language of that section—"transcripts, orders or certificates which it may be necessary or proper to authenticate under the provisions of this act, or of any by-law or ordinance of the city." It is perfectly clear that by the very terms of this act the seal of the clerk is to be affixed only to such transcripts, orders, or certificates, as it may be necessary or proper to authenticate under the provisions of this act. The act therefore must be looked to, to ascertain what is necessary or proper to authenticate under its provisions. But before we look to the act, let us examine this language a little farther. A warrant is not "a by-law," nor is it an "ordinance," nor is a warrant a "transcript." Plaintiff does not contend otherwise, but he does contend that a warrant is an order or a certificate. Let us examine this contention. What is a warrant? In *Crudup v. Ramsey*, 54 Ark. 169, 15 S. W. 458, the court said:

"The law provides that whenever an allowance is made by the county court, and an order therefor entered upon the records, the clerk shall, when requested by the person in whose favor the allowance is made, issue a warrant for the amount of the allowance."

It is clear, therefore, that as to counties a warrant is not an order. The warrant is issued upon the order, and entered of record, and without the order the warrant is void. *Parsel v. Barnes*, 25 Ark. 261. Why does not the same rule apply to cities? Much less is a warrant a certificate (and yet sometimes in the statutes they are found to be used as synonyms), for certificates may or may not be issued on orders of the county. As to cities, I have been unable to find, after the most careful research, any express authority, or authority in terms, for issuing any warrants at all. We know it is done, and they are made receivable for city taxes. *Sand. & H. Dig. § 6576*. But this section is no part of the act of March 9, 1875. It was enacted July 23, 1868. The power to issue warrants is apparently traceable to sections 5130 and 5131 of *Sandel & Hill's Digest*. These sections correspond to sections 10 and 11 of the act of March 9, 1875. That act, as stated, is the original general incorporation act for the organization of cities and towns; and the power is conferred by these sections on cities to sue and be sued; to contract and be contracted with; to acquire, hold, and possess property, real and personal; and to exercise such other powers and to have such other privileges as an incident to other corporations of like character and degree, not inconsistent with the act or the general statutes of the states; and corporations organized under the act are made subject to the restrictions of the act itself. The most careful research fails to disclose in the act any reference to city warrants, except in section 89 (*Acts 1874-75, p. 37*), which reads as follows:

"Sec. 89. That any person owning property and having taxes to pay in any city or town, may, upon application to any judge or court, having authority to grant injunctions, enjoin the collection of any tax levied in such city or town, without authority of law, and may also enjoin the issue or the payment by such city or town of any warrants, certificates or other form or evidence of indebtedness against such city or town, issued or contracted without authority of law."

It will be noted that in this section the terms "warrants" and "certificates" are not used as being the same, but the word "certificates" is coupled with the words "other forms or evidences of indebtedness." Whatever significance that may have, there is no authority found there for attaching the clerk's seal to warrants or anything else. It will be borne in mind that the language of section 61, which we are considering, is, "which seal shall be affixed to all transcripts, orders or certificates which it may be necessary or proper to authenticate under the provisions of this act, or of any by-law or ordinance of the city. For all attested certificates and transcripts, other than those ordered by the council, the same fees shall be paid as are allowed to county clerks for similar fees." It will be noted that in the last paragraph the word "warrants" is omitted. It embraces only transcripts and certificates. It is to be inferred from this that the city clerk was not entitled, to say the least of it, to a fee for affixing the seal to city warrants. Otherwise the word "warrants" would have been retained in that paragraph. Moreover the act requires the seal to be attached to all "transcripts, orders or certificates which it may be necessary or proper to authenticate under this act." It therefore appears that for all certificates and transcripts ordered by the council the clerk gets no fees. He only gets



fees for attested certificates and transcripts necessary or proper to authenticate under the provisions of the act, and not those ordered by the council. We are, therefore, as stated, confined to the act itself, not the general laws of the state, to find what transcripts, orders, or certificates it is necessary or proper for the seal to be attached. An examination of the act of March 9, 1875, will disclose various certificates which the clerk must issue, such as the rate of taxation to be certified by him to the county clerk; the delinquent tax list (section 64); the delinquent tax assessed against property for opening streets (section 70); the certificate of by-laws, ordinances, or any act or proceeding of any municipal corporation recorded in any book or entered on any minutes or journal kept by the corporation to be used in evidence (section 27). The act also defines the duty of the city clerk (section 51), but nothing is said of either warrants or seals in that section. The act is barren of any provision from which any inference, however remote, can be fairly drawn that seals are to be attached to warrants. On the other hand, the act specifies to what papers seals shall be attached. The maxim, "*Expressio unius est exclusio alterius*," seems to apply. It is clear, I think, that no provision is to be found in the act of March 9, 1875, by which it is made necessary or proper to authenticate city warrants by the clerk's seal. Nor is there any authority for authenticating certificates of any kind by attaching the clerk's seal, except such as the act provides for; and if the act, in section 89, should be construed as using the word "warrant" as a synonym for "certificate," or other form or evidence of indebtedness, still no provision is found in the act authorizing the clerk's seal to be affixed to either of them. The act is definite and specific as to what the seal of the clerk shall be affixed, and nothing can be added to it by the court or by construction when it is clear in its terms. The warrants sued on must be treated as unsealed instruments. In that event the five-year statute of limitation applies. It may be added that, in the opinion of the court, neither the Constitution of 1868, nor that of 1874, has any application to these warrants. The statute of limitation for unsealed instruments has been five years ever since 1844 (Sand. & H. Dig. § 4827), and remains unaffected by any of the state Constitutions.

Judgment for the defendant under the five-year statute of limitation.

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## THE CERVANTES.

(District Court, S. D. New York. February 20, 1905.)

### 1. PILOTAGE—ALLOWANCE FOR EXTRA SERVICE—POWER OF MASTER TO BIND VESSEL.

A master has authority to bind his vessel to pay for extra pilotage services rendered at his request.

### 2. SAME—EXTRA COMPENSATION—NEW YORK RULES.

Under New York City Consolidation Act, §§ 2101, 2105, 2107 (Laws 1882, p. 511, c. 410), and by-laws 17, 21, and 36 of the board of commissioners of pilots for the port of New York, where a pilot brought a vessel in from the sea in the afternoon, and she was anchored in the harbor overnight because of having received no instructions for docking, and

at the master's request the pilot remained on board, and took the vessel to her dock the next afternoon, he is entitled to the extra allowance fixed by said sections 2105 and 2107 for detention and moving the vessel; such services not having been rendered on the same day, within the meaning of the act.

In Admiralty. Suit to recover extra pilotage.

Robinson, Biddle & Ward, C. M. Hoyt, and W. S. Montgomery, for libellant.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This action was brought by Daniel Gillespie, a duly licensed pilot under the laws of New York, to recover from the steamship *Cervantes*, bound here from a foreign port, \$3 for one day's detention and \$5 for "transporting the vessel." The steamship was consigned to the Lamport and Holt Line. The pilotage of \$78.47 was duly paid and the other items are the subject of controversy.

The claim is based upon certain provisions of the New York Act of June 28, 1853 (Laws 1853, p. 921, c. 467), with amendments and By-Laws of the Board of Commissioners of Pilots (Laws 1882, p. 511, c. 410), as follows, viz.:

"§ 2101. \* \* \* If the master or owners of any vessel shall request the pilot to moor said vessel at any place within Sandy Hook, and not to be taken to the wharf or harbor of New York, or the vessel to be detained at quarantine, the same pilotage shall be allowed and the pilot entitled to his discharge."

\* \* \*  
 "§ 2105. For every day of detention in the harbor, of an outward bound vessel, after the services of a pilot have been required and given, except detention shall be caused by such adverse winds and weather that the vessel cannot get to sea; and for every day of detention of an inward bound vessel, by ice, longer than two days for passage from sea to wharf, three dollars shall be added to the pilotage. If any pilot shall be detained at quarantine or elsewhere, by the health officer, for being or having been on board a sickly vessel as pilot, the master, owner or agent, or consignee of such vessel, shall pay to such pilot all necessary expenses of living and three dollars per day for each and every day of such detention. \* \* \*"

\* \* \*  
 "Pilotage fees for transporting vessels in harbor.

"§ 2107. For services rendered by pilots in moving or transporting vessels in the harbor of New York, the following shall be the fees: For moving from North to East River, or vice versa, if a seventy-four gun ship twenty dollars, if a sloop of war ten dollars, if a merchant vessel five dollars, except such vessel shall have arrived from sea, or is ready for and bound to sea, on the day such services for transportation are rendered; but if the services are rendered thereafter, such payment shall be made. For moving any vessel from the quarantine to the city of New York, one-quarter of the sum that would be due for the inward pilotage of such vessel. For hauling any vessel from the river to a wharf or from a wharf into the river, three dollars, except on the day of arrival or departure of such vessel. \* \* \*"

The said By-Laws provide:

"17th. Pilots are required to transport a vessel to any part of the port of New York, when applied to, under a penalty of twenty-five dollars, such service to be paid for as per Section 21 of the law."

\* \* \*  
 "21st. Pilotage for taking vessels from the old to the new Quarantine.

For vessels having had death or sickness on board, double outward pilotage;

For vessels from sickly ports, but having had no sickness on board, single outward pilotage.

Pilotage of vessels from Quarantine to New York, quarter pilotage.

Pilotage of vessels from New York to Perth Amboy, or from Perth Amboy to New York, except on the voyage to or from sea, shall be one dollar and a half per foot of the vessel's draught. (Amended October 25, 1887.)

Pilotage of vessels from the North River or the East River to Bayonne, or vice versa, ten dollars each way. (Amended May 5, 1896.)

In case of vessels bound over Sandy Hook Bar to or from points in Newark Bay, Staten Island Sound, the Passaic, Hackensack or Raritan Rivers, only one full pilotage shall be paid; of which two-thirds shall be paid to the pilot piloting the vessel over Sandy Hook Bar, and one-third to the local pilot:—

Provided, however, that if the Bar pilot is competent to pilot the vessel the whole way, he shall be entitled to do so, and to receive the full pilotage the same as if the vessel was piloted to or from New York, Jersey City or Brooklyn."

\* \* \* \* \*

"36th. A pilot in charge of a vessel is required to stay on board until notified by the master that his services are no longer wanted, under penalty of forfeiting the pilotage. The omission of the master to inform the pilot that his services are not wanted will entitle the pilot to detention money, unless the detention is temporary to take out passengers."

There is very little dispute about the facts, the controversy turning upon the construction of the law.

It appears that the pilot was regularly engaged and paid for his pilotage services. He boarded the steamship off Sandy Hook about 5 o'clock p. m. May 30th, 1903, and brought her to the vicinity of Liberty Island, where she was anchored about 7 o'clock, as no orders had been received as to her berth.

The pilot says:

"Q. What did the *Cervantes* do then? A. As there were no boats to give us any orders, or anything to that effect, the captain gave the orders to anchor.

Q. What orders did you expect to receive from the Lampport & Holt Line?

\* \* \* \* \*

A. It is customary for a boat always to meet us and give us instructions.

Q. Has your Pilots' Association received instructions on that subject from the Lampport & Holt Line?

\* \* \* \* \*

A. It has, to the effect that we are to take the ship to anchor unless ordered to the Dock.

\* \* \* \* \*

Q. How were such orders communicated by the Lampport & Holt Line? A. It came in an order from Captain Guy, which was put on our blackboard and remained there two or three years.

Q. Who is Captain Guy? A. I consider him the general superintendent of the Lampport & Holt Line.

Q. You have known him for some time? A. Yes, I have known him off and on ever since he came here.

Q. How long is that? A. I don't recollect, it is years.

Q. When you got up to Liberty Island anchorage grounds, near Liberty Island, there were no orders there from Captain Guy or the Lampport & Holt Line? A. No, sir.

Q. What did you say, if anything, to the captain of the *Cervantes* after you came to an anchor? A. I notified him that my duty was done.

Q. Tell us what you meant by that, and give us the language as near as

you can remember it? A. Well, certainly the captain gave the order; he says, There is no order for us to go in, and certainly it is customary and we will have to let go on the anchor. 'All right, sir.' We let go of the anchor. The sun was just going down, and after the ship had got all her anchors and chains out I said, 'You understand that my duty is done'; he said, 'I understand that, pilot, very well; and' he says 'I have orders from my owners not to allow the pilot to go ashore out of this ship until she is fast to the dock.'

Q. What did you say to that? A. Well I saw that he very well understood me; I said, 'Captain, that means for me to stop here until this ship goes to the dock?' That is the language as well as I remember, that was passed.

Q. Did you agree to stay? A. Certainly sir; we have to stay, according to our law.

Q. How long did you stay? A. I remained there until it was I think 20 minutes past one next day; it was round about that time the steamboat—and one of Mr. Guy's men came off.

Q. A tug came alongside? A. A tug come alongside."

The steamer master's version of what happened is:

"On arrival off Liberty Id. and not finding any orders awaiting us, I said to the Pilot that we must anchor as I did not know what berth we would be going to.

After anchoring he notified me that his duty was done and he would go on shore as soon as he could get a passing tug to take him off. I replied that we would be docking next morning and you must remain on board to take me off the dock, when the Tug Boat captain will help me to dock the ship for I have orders not to allow the Pilot to leave the ship until she is at the dock.

He agreed to this and said he would be entitled to detention money. I answered, You will be paid that. Nothing was said about transporting money then.

On arrival off the dock next day some time after noon, I told him that the Tug Boat Captain & I would dock the ship, and the Pilot then left the Bridge and when we were fast I signed his card for Sandy Hook Pilotage and draft of water and I think one day's detention.

The Pilot boarded us off Sandy Hook, he says 10' South, about 5 P. M. on May 30th, 1903, and we passed Sandy Hook about 5.20 P. M. (our time) and were at Quarantine at 6.15 P. M. and anchored off Liberty at about 7 P. M. About Noon on the 31st the Tug came off with our orders but I do not now remember if they were handed to me by Mr. Russell or the Captain of the tug, it is generally the latter that gives them to us in an envelope. I most certainly did not tell the Pilot to dock the ship, but to take her off the dock when as previously said the Tug Boat Captain and myself docked her he giving his orders to the Tug and I directing the Officers the Pilot not being on the Bridge."

The libellant, when he was about leaving the vessel, asked the master to sign a card showing that he was entitled to the fees in question. This the master refused to do saying that he had orders to sign for pilotage only and that the other charges would be attended to by the superintendent or port captain.

The claim for detention money is based upon the request of the master that the pilot remain on board until the ship should be docked. It is urged by the claimant that the master had no authority to bind the ship for this, but that contention has little to recommend it. He was undoubtedly acting within the scope of his authority for the benefit of the ship and owner and his acts must be regarded as authoritative. In pilotage cases resort may be had to the vessel, or the owner or master. Benedict's Admy. §§ 289, 391.

The question on this branch of the case is, was the pilot's duty finished when he anchored the vessel. If, at that time, he had fully

earned his pilotage fees, he is clearly entitled to extra compensation for detention. As appears above, if the master requested the pilot to moor at any place within Sandy Hook, without regard to New York or Quarantine, he became entitled to his discharge and regular fees. Not having done so, the question remains, how long could the vessel detain the pilot, under the law, in order to enable him to earn his pilotage fees. This is not explicitly determined by the statute in connection with detention but in the provision for transporting vessels in the harbor, it is said:

"Except such vessel shall have arrived, or is ready and bound to sea, on the day such services for transportation are rendered; but if the services are rendered thereafter, such payment shall be made."

Using the day in the sense of beginning at 12 o'clock A. M. and ending at 12 o'clock midnight, as it should in a case of this kind (8 Amer. & Eng. Enc. of Law [2d Ed.] 737 et seq.), it would seem that a pilot, in the absence of the extraordinary circumstances provided for by statute, contracts to devote the whole day to the service of the ship, if required, and no more. When, therefore, the master requested the pilot to remain and detained him in the service until the next day, the statute providing for extra compensation becomes operative and the pilot entitled to recover for detention. It was not reasonable that the master should have the privilege of detaining him on board beyond a fixed time without extra compensation. The master recognized this obligation and said it would be settled but that he was prohibited from signing a bill for the services.

With respect to the charge of \$5 for transporting the ship, it seems that the same principle should be applied. If the services had been rendered on the day of the vessel's arrival in port, doubtless the pilotage fee would be regarded as sufficient to cover such service under the statute, but when the vessel was not ready to have the service performed in legal connection with the pilotage, the charge for moving was apparently for a new service, entitling the pilot to the extra compensation demanded.

Decree for the libellant for \$8.

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#### LA GASCOGNE.

(District Court, S. D. New York. March 7, 1905.)

#### SHIPPING—EJECTION OF PASSENGER—BREACH OF CONTRACT MADE BY PASSAGE TICKET.

Libellant, while in New Orleans, was furnished, under a contract, with a steamship ticket from New York to Havre on the respondent vessel, which, at his request by telegram, was extended by the claimant. It appeared that afterwards, at the request of the person who had engaged the passage, the ticket was canceled; but libellant was not notified, and, on his presenting it at the New York office of claimant, it was accepted, and he was assigned a berth, and went on board with his effects. A few minutes before the vessel sailed, libellant was notified that the ticket was not good; and, being unable to then pay the fare demanded, he was ejected from the vessel, with a part of his baggage. *Held*, that under

such facts he was entitled to remain, and his ejection was wrongful, and that he was entitled to recover \$500 for the indignity put upon him, together with his expenses during the time he was delayed, and the cost of a new ticket.

In Admiralty. Suit by passenger to recover damages for ejection from steamship.

Charles Le Barbier, for libellant.

Edward K. Jones, for claimant.

ADAMS, District Judge. This action was brought by Eugene Roumegoux to recover from the steamship *La Gascogne*, the damages alleged to have been suffered by him, to the extent of \$25,000, in consequence of his expulsion from the steamship as she was about sailing, at 10 o'clock in the morning of the 31st day of January, 1901. The claimant, *La Compagnie Generale Transatlantique*, alleges that the ticket which the libellant presented to the company, and in accordance with which he received accommodation on the steamship, was not good because issued by a clerk in the claimant's office, who was without authority, and that the expulsion was without undue force and justified.

The testimony shows that the libellant, a lyric artist and stage manager, was engaged by one Henry Berriel of New Orleans as stage manager for a season of French Opera, beginning December 4, 1900. On December 21st 1900, the contract, having been found unsatisfactory, was cancelled by mutual consent, and provision made that the services were to end on the 23rd of December, 1900. It was also provided that a certain sum of money should be paid to the libellant and transportation furnished him from New Orleans to Paris, by rail to New York and thence by the steamship *L'Aquitaine* to Havre and by rail from there to Paris. On December 31st 1900, tickets were delivered to the libellant for the railroad transportation and a ticket for the steamship *La Gascogne*, instead of *L'Aquitaine*. These tickets were accepted by the libellant and the same day he sent a telegram to the agent of the claimant in New York asking that the time of the steamship ticket be extended to cover all of January. Later in the day, he called at the claimant's office in New Orleans and received a reply telegram granting his request. He also succeeded in having the time of his railroad transportation to New York extended. He remained in New Orleans until January 28th when he started for New York and arrived there about noon of January 30th. The next morning he went to the office of the steamship company and exhibited his original ticket and the telegram extending the same to cover all January. He was referred to an employee, one Dewar, who after examining ticket and telegram, wrote across the face of the ticket "Seen, good for *La Gascogne*, sailing January 31, 1901. Berth 173." The libellant then went to the steamship, and had a trunk checked and his other baggage, consisting of a small trunk, valise and hat box, brought to the state-room in which the assigned berth was situated. After placing in the room from his state-room baggage a few articles for personal use, he went on deck. This was about 9 o'clock and as

the steamship was scheduled to sail at 10 o'clock, he walked the deck with a friend, who had come to see him off. Shortly before sailing time, Dewar came up to him, saying the purser wished to see his ticket and the libellant delivered it to him. Dewar went off but returned very shortly saying the ticket was not good and the libellant must either pay his passage or go ashore. The libellant protested and demanded the return of his ticket which was refused. He then offered a draft he had in his pocket, drawn by a New Orleans bank on Le Comptoir a'Ecompte of Paris, payable to his order for a sum in excess of the price of the passage, saying, however, that he reserved the right to adjust the matter subsequently with the main office of the steamship company in Paris. The offer was refused, his ticket was returned to him, and he was removed from the steamship, with his cabin baggage.

He claims that the removal was accomplished just as the steamship was sailing, with considerable violence, by two sailors, one seizing him by each shoulder. The claimant contends that no force was used but that he went off quietly and his baggage was taken with him, excepting the trunk which had been taken into the hold. This was carried to France and subsequently delivered to him there. He claims that he was left in New York with insufficient clothing, even his overcoat having been carried away, so that he was obliged to expend about \$50 to obtain requisite clothing for use in New York, while he was necessarily detained there awaiting the receipt of funds from France.

After his expulsion from La Gascogne, he consulted an attorney in New York and through him an offer was obtained from the claimant to forward him on the steamship La Bretagne, sailing from New York February 7th 1901, but this offer the libellant declined lest he should compromise in some way his right of action for the expulsion. He did not sail until February 28th 1901, when he took passage in La Gascogne, paying for his ticket.

Upon his return to Paris, the libellant instituted proceedings against the claimant but these were discontinued by him, a right to prosecute elsewhere being reserved. Costs were adjudged against him in such action to the extent of \$50.

The action was subsequently brought in this court.

The claimant's defence in substance is, that Berriel, who had some arrangement with the claimant for furnishing transportation to his employees, gave an order on it for a 2nd class passage on L'Aquitaine, with a provision that if the libellant missed that steamship, the claimant should furnish him with a ticket for the following one. It is contended that Berriel intended that the time for departure should be limited to January 3rd, and notified the claimant that if it were extended beyond such time, he would not pay for the passage and that notwithstanding the limitation, the libellant planned to outwit Berriel and remain in this country to suit his convenience. It is further contended that the extension obtained for all of January was without Berriel's knowledge, and that when he heard of it, he repudiated the arrangement as far as he was concerned. On the 4th of January, the claimant telegraphed to its

New Orleans agent, that the libellant's passage was cancelled and directed the agent to return the ticket.

The libellant contends that he was never notified that his ticket was cancelled. Two witnesses for the claimant testified that he was advised of such action. The testimony of the libellant was not credible in all respects but I think in this particular that he was right. His actions tend strongly to support his contention that he did not know there would be any difficulty about his taking the later passage, as far as Berriel was concerned, and the claimant was at least negligent in not taking proper steps to carry out Berriel's wishes.

The claimant also contends that the clerk in its office who handed the ticket to the libellant was acting without authority, but he was apparently proceeding within the scope of his duties when he issued the ticket and it seems to me that the libellant was entitled to the passage. In any event, the ticket was accepted, the libellant duly installed as a passenger on the vessel and acquired the rights incident thereto. The contract was in force when the libellant was expelled from the vessel.

It only remains to consider the question of damages.

The libellant having been deprived of his ticket and compelled to purchase another, is entitled to be reimbursed in such respect. It appears that he was compelled to pay \$50 for his passage. This amount with interest he should recover.

The libellant was undoubtedly humiliated and his feelings injured by the tortious acts of the agents of the vessel. For such wrongs, I consider that he should be paid \$500. I see no necessity for going beyond these sums in arriving at the libellant's damages. I assess the sum of \$500, not for any violence done to him but because of the indignity he suffered in being obliged to leave the vessel, when he was entitled to be carried on her.

The libellant was offered passage by the claimant and could have gone to France on the steamer sailing February 7th. He refused to go then, because, he says, the offer to send him did not include reparation for the injury done him, but his going would not have deprived him of the right to seek such redress as the circumstances warranted. I do not think he should be allowed for what happened thereafter, even if his claim in such respect can be substantiated, which the evidence, in connection with his bearing, does not indicate. His testimony as to what he could have earned is very indefinite and unsatisfactory and, in my judgment, he will be amply compensated for the injury he has suffered by the above allowance, excepting for the necessary disbursements made in New York between the day of his expulsion and the time he might have sailed on the 7th of February. The testimony shows that he spent from \$60 to \$75. The former sum is the proper one to allow, with interest.

Decree for the libellant for \$610, with interest on \$50 from February 28th 1901, the date of the purchase of his new ticket, and on \$60 from February 7th 1901. From the \$610 herein provided for, the claimant is entitled to a reduction of \$50, with interest, the amount of the judgment recovered against the libellant in Paris in his action there. During the proceedings here, it was stipulated in



court that if any recovery should be allowed to the libellant, the claimant would be entitled to offset this amount.

Decree for libellant in conformity herewith, to be settled upon one day's notice.

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DUFF v. GILLILAND et al.

(Circuit Court, W. D. Pennsylvania. February 20, 1905.)

1. CANCELLATION OF CONTRACT—GROUNDS—CONSTRUCTION.

A contract assigned the legal title to a patent for a gas producer to a trustee for the benefit of a corporation, in consideration of the payment by the assignee of a stipulated share of all royalties received from licensees. The company subsequently found it desirable, for the purpose of introducing the invention, to build the producers itself, and engaged in such business at a profit, granting licenses to those for whom it built. The contract contained no provision respecting such building operations which were not at that time contemplated, but the patentee was fully advised of the company's action, and from time to time expressed his approval thereof. He also acquiesced in the substitution of a new trustee who paid a large sum for an interest in the company and in the patent. *Held*, that in the absence of any provision in the contract, and under the facts shown, the building operations of the company did not constitute a violation of the contract which entitled the patentee to a cancellation thereof, nor was he entitled thereunder to a share of the profits from such business.

2. SAME.

A provision of the contract requiring the company to keep accounts showing the licenses granted which should be subject to the inspection of the patentee did not give him the right to inspection of the books covering the construction work, and a refusal to permit such inspection therefore constituted no ground for cancellation of the contract.

In Equity.

Kay, Totten & Winter, for complainant.

Bakewell & Byrnes, for respondents.

BUFFINGTON, District Judge. This is a bill in equity brought by Edward James Duff against Alexander Gilliland, as trustee, and against him and his partners, doing business as the Duff Patents Company. The bill concerns a certain patent (No. 517,271) granted to complainant for an improvement in gas producers, the legal title to which is now vested in said Gilliland, trustee, by virtue of a written instrument which stipulates for the payment of royalties to complainant. The bill prays for relief as follows:

"(1) That the defendants may be decreed to account for and pay unto your orator one-third of all the profits and benefits, or the entire revenue, made by these defendants in the granting of licenses, and the manufacture and sale of gas producers made in accordance with said letters patent. (2) That the said Alexander Gilliland, trustee, one of said defendants, be ordered to reassign unto your orator the entire right, title, and interest in and to said letters patent; that the said agreement may be canceled and declared null and void, and it be decreed that all rights granted thereunder unto these defendants have reverted unto your orator in accordance with the terms thereof, and that your orator be put in full possession of the powers and rights under said letters patent, the same as if said agreement had not been entered into."

The facts in the case are that the complainant, a resident of Great Britain, invented a gas producer, and on March 27, 1894, received a United States patent, as above, for the same. Pending the grant of his patent, he entered into negotiations with his brother Alfred B. Duff and certain relatives named Bradley, with a view to introducing his invention in the United States, which resulted in the agreement following, which all parties signed:

"Whereas Letters Patent of the United States No. 517,271, were granted on the 27th day of March, 1894, to Edward James Duff, now of 478 Stockport Road, Longsight, Manchester, in the County of Lancaster, England, party of the first part, for an improvement in gas producers. And whereas, Alfred Barker Duff, of Allegheny, in the County of Allegheny, and State of Pennsylvania, party of the second part, is desirous of acquiring the entire right, title and interest in and to said Letters Patent, to have and to hold the same in trust as hereinafter mentioned. Now therefore, these presents witness, that the said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has sold, assigned, transferred, and set over, and does hereby sell, assign, transfer, and set over to the said party of the second part the entire right, title and interest, in and to said letters patent No. 517,271, the same to be held by the said Alfred Barker Duff, his legal representatives and assigns, party of the second part, as aforesaid, in trust and for the use of James Anderson Bradley, William Henry Bradley, Alfred Barker Duff and William Chapman Bradley, their legal representatives and assigns, all of Allegheny aforesaid, partners doing business under the firm name of the Duff Patents Company, to the full end of the term for which said letters patent are granted; upon condition, nevertheless, and it is hereby covenanted and agreed by the said party of the second part, for and in consideration of the foregoing assignment, to and with the said party of the first part, his legal representatives and assigns. First. That the said party of the second part, his legal representatives and assigns, shall not sell or transfer the right, title and interest in and to said letters patent, or any part thereof, without the written consent of the said first party, his legal representatives and assigns, first obtained, excepting that the said party of the second part shall have full power to grant licenses under said letters patent for single states or territories of the United States of America, upon terms and conditions to be determined in and by his sole discretion. Second. That the said party of the second part, his legal representatives and assigns, shall pay or cause to be paid to the said party of the first part, his legal representatives and assigns, one-third of the gross payments and each of them received by the said party of the second part, his legal representatives and assigns, for and under each of said licenses which may be granted by the said party of the second part under said letters patent. Third. That the said party of the second part, his legal representatives and assigns, shall keep proper books of accounts in which shall be clearly recorded all their transactions under this agreement and in regard to the grant of licenses under said letters patent, which accounts shall be audited every six months, and a copy of certified balance sheets, together with full statement of all licenses and sales effected, shall immediately afterwards be sent to the said party of the first part, his legal representatives or assigns; at the same time there shall also be paid to the said party of the first part, his legal representatives and assigns, the amount due him under article two of this agreement. Fourth. That the said party of the first part shall have the right, either personally or by his attorney, to make an examination of all books, accounts and documents relating to the business transactions of the said party of the second part, his legal representatives and assigns, relating to the sale of rights and licenses under said letters patent, and the said party of the second part hereby agrees to give all the assistance in his power to make such examination exhaustive. Fifth. That in case the amount paid by the said party of the second part, his legal representatives and assigns to the said party of the first part, under this arrangement, shall not, at the end of two years from the date hereof,

amount to the sum of at least three hundred and fifty pounds sterling, or should the party of the second part, his legal representatives and assigns, fail to comply with the conditions and agreements herein contained, or any of them, then the said party of the first part, his legal representatives and assigns, shall have the right to recover all the rights, title and interest in said letters patent, and the same shall revert to him, his legal representatives and assigns, upon notice in writing to that effect being served upon the said party of the second part, his legal representatives and assigns, excepting that nothing herein contained shall be so construed as to impair any grants or licenses which at that time shall have been granted by the said party of the second part under said letters patent and under this agreement, nor shall the right of the said party of the second part, his legal representatives and assigns, to collect and receive royalty under such vested licenses and grants, as hereinbefore provided, be impaired or called in question by the said reversion. In testimony whereof the said parties have hereunto set their hands and seals this 6th day of August, A. D. 1894."

In our view of the facts, we find nothing to take the case out of the rule that all prior negotiations merged in this written contract. *Krueger v. Nicola*, 205 Pa. 38, 54 Atl. 494; *Russell v. Glassworks*, 6 Pa. Super. Ct. 118. That instrument is therefore the definition of the rights of the parties. The proofs show that when it was made the Duff Patents Company was not engaged in building gas producers, and that its early efforts were all directed to granting licenses. But it was soon found the company itself would have to build. Thus Alfred B. Duff, the trustee, whose conduct throughout the whole affair the complainant commends, in a letter dated May 17, 1895, describes how, in the efforts to introduce the producer at Syracuse, N. Y., the company was forced against its will to do so. He says:

"They [the proposed licensees] wanted us to do our own building, though I would much prefer not to; yet it seems our only salvation, unless we let Smythe get onto the deal which would never do and they have an idea we should do the work the best, seeing it is our producer."

It also appears that an arrangement to grant licenses made with Swindells, an extensive building firm, was not satisfactory, and resulted in their substituting a producer of their own instead of the Duff. Thus in the same letter Mr. Duff says:

"They have written Swindell about our producer and he ran it down and recommended his own, stating they would call and see them at an early date. This is a nice way to represent us and the sooner he is stopped the better. He just advertises our producer to find out who wants producers and then pushes his own."

The outcome was, the Duff Patents Company began taking contracts in many cases for the erection of producers. They sublet the bricklaying, obtained castings and other details from foundrymen, and furnished the plans, engineering oversight, and men to put the plant in operation when finished, themselves. It also appears that, in addition, they granted licenses where they could. It is proper to say that a difference of opinion existed as to the wisdom of the policy of themselves building. E. J. Duff claimed the proper plan for the company was to grant licenses and abstain from building, which latter, he claimed, alienated builders. He also claimed building was not within the purview of the agreement. The testimony of seemingly disinterested witnesses is that the producer could not have

been introduced unless the company itself built it. That complainant was fully cognizant that the Duff Company was doing construction work, and making large profits therefrom, is also shown. In November, 1897, a correspondence was had between him and the company, looking to a sale by the latter to an English company of its construction business and the patent. Under date of November 18th, the Duff Patents Company sent him a statement of its building operations, showing a profit during 1896 and 10 months of 1897 of almost \$7,000. Not only so, but the complainant admits the idea had occurred to him as early as 1897 that he should claim a share in such construction profits; and, according to his brother's testimony, this contention was brought to the attention of his partners, and by them rejected. It will therefore appear, taking the complainant's own statement, that he knew of the Duff Company engaging in construction; that he knew they made profits thereby, and that the company denied his right to participate therein; and that he took no steps to enforce such alleged rights. And moreover, whatever complainant may have supposed his rights to be, it is clear he acquiesced in the course followed by the Duff Patents Company, and from time to time commended its efforts. This state of affairs continued until July, 1899, when, owing to ill health, A. B. Duff was compelled to retire from business. He thereupon sold out his interest in the patent and in the Duff Patents Company, for some \$11,000, to Alexander Gilliland. By a paper dated July 5, 1899, and signed by the complainant and the Messrs. Wallace, the remaining parties, A. B. Duff conveyed his interest in the patent to Alexander Gilliland, who was substituted for A. B. Duff as trustee. Not only did Gilliland pay a large sum of money for the interest in the patent and in the construction business of the Duff Patents Company, but, as we have seen, E. J. Duff had knowledge of such construction business, and impliedly approved of the same. His letter of July 22, 1899, just following the assignment, states his position, and shows he made no objections to the construction operations theretofore carried on. Thus, speaking of his brother's retirement, he says:

"My regret is the greater that it has been forced upon him by ill health, and I know it is a great grief to him to give it up after all the hard pioneer work and at the time of its assured success. I can only hope that by the knowledge you have all obtained by experience and by the assistance of your new partner you will be able to go on with an increasing business. You are aware that owing to my brother being trustee and his partners relatives I made a very easy agreement in which I gave you great freedom and trusted to your honesty and friendship in dealing fairly with me. This spirit has I am glad to say been maintained up to now and I trust will be continued in the future. There are one or two points of importance on which I must as a matter of business speak firmly about. The first is that my royalties be maintained. The agreement was for sale of royalties and I have allowed you to deal and build. I believe in the past this has not affected me adversely and so long as it does not do so in the future I shall not raise any objection. The second point is, and I have noted it with regret, that you have a tendency to experiment with my patent. That is to construct producers different to my patented design. If you build a producer similar to a design lately presented to me by my brother, it would be an utter failure and damage the reputation of the 'Duff Producer.' I now as a matter of pure business precaution warn you officially and instruct you that you must not erect any new

design or variation from my design without my consent in writing. I am much surprised that you should wish to do such a thing."

Under date of February 5th of the following year, in acknowledging receipt of \$6,700 for the half-year royalty, he wrote the company, "Allow me to congratulate you on a very satisfactory half-year's work, which it is pleasing to note you expect to maintain during the present half-year;" and on August 2d, acknowledging a check for the next half-year's royalty, of almost \$10,000, he wrote, "I beg to congratulate you all on the good way you have improved the business and upon the good results you have obtained and in which I share."

From these statements, it will be seen that complainant knew the company was contracting; that he was impliedly encouraging it in its efforts; that, if he thought he was entitled under the agreement to participate in the profits of the Duff Patents Company's construction work, he was not insisting on it. Later on, serious differences arose between the parties, and friction followed. The complainant had declined to join to the full extent of one-third in the expense of litigating the patent. The respondents refused to accede to his request to permit the use of his patent in connection with an ammonia extracting process he had, and the relations between them grew strained. These differences finally culminated in demands by the complainant for an accounting for one-third of the profits of the respondent's construction business, and for an inspection of the books covering those operations. On the part of the respondents there was a denial of any right of the complainant to share in such profits, and a refusal to allow him access to any books save the stubbook from which licenses were issued. On the hearing it developed that certain contested royalties had been collected, which were not accounted for in full to complainant, nor was he informed of the whole amount collected. While we are not, in our view of the case, required to pass upon the question whether respondents had a right to deduct the portions of such royalties retained by them, and we express no opinion on that point, we are free to say there was such an absence of frankness on their part—if not, indeed, concealment—as to afford ground for much of the feeling displayed in this controversy.

Under the proofs, is the complainant entitled to a decree of cancellation? After mature consideration, we are of opinion he is not. The question has been raised in limine that a court of equity will not lend its aid to enforce a forfeiture; citing *Horsburg v. Baker*, 1 Pet. 232, 7 L. Ed. 125; *Marshall v. Vicksburg*, 15 Wall. 146, 21 L. Ed. 121; *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030. But waiving for present purposes that question, we are of opinion such a decree should not be awarded, because to do so would be inequitable, under the proofs. The agreement vested in A. B. Duff, as trustee, and later in Gilliland, his successor, the legal title to this patent. The general scope of the agreement contemplated payment of a proportionate royalty to the complainant. The license granted contemplated the erection of a structure of a special kind. There was no express restriction in the paper preventing the

Duff Patents Company from building producers. So long as they did not take advantage of the agreement and their relation to the patent to restrict licensing or to reduce the royalty, we see nothing in the contract or in the relation of the parties to preclude them from erecting such producers. And such being the case, there is no covenant, express or implied, in the agreement, which gave the complainant an interest in the profits or a liability for the losses made by the Duff Patents Company in such construction work. Indeed, the agreement is silent on that point, and it would seem that when it was made the parties only contemplated a grant of licenses, and had not considered engaging in erection work. But the fact remains that as the business progressed the Duff Patents Company did go into construction work, and the complainant took no steps to prevent them from doing so. On the contrary, as we have seen, he encouraged them to proceed; and, while he did nothing to induce Gilliland to purchase an interest in the company, he not only gave no intimation or notice at that time of his purpose to allege such work as in violation of the contract, but signified his purpose to allow it to be continued. Under these circumstances, we think it would be highly inequitable for him later to allege such a course of conduct as a ground of forfeiture and cancellation. It is contended, however, that Gilliland, the new trustee, did not follow A. B. Duff's course, and that he refused to grant licenses, unless in cases when the Duff Patents Company got the contracts for building. Granting for present purposes such to be the case, this did not show the building operations of the Duff Patents Company, when they did build and paid a proper license fee, were in violation of the contract, but, rather, that it was exercising that right in other respects in an improper and inequitable way, and one for which complainant could hold it responsible in damages. The building operations of the company not being illegal under the contract, we are of opinion the complainant had no right to participate in the profits therefrom, and consequently he had no right to an inspection of the books covering such erection work. The denial of his right to such profits, and respondent's refusal to allow an inspection of books covering their erection operations, therefore afford no ground for forfeiture and cancellation.

The proofs therefore failing to sustain these fundamental grounds of relief, we are of opinion the bill should be dismissed. In doing so, however, we feel the action of the respondents in failing to disclose the amounts of royalties they had received in certain cases justifies this court in dividing the costs.

## PITCAIRN v. TOWN OF CHESTER et al.

(Circuit Court, N. D. West Virginia. March 9, 1905.)

**STREETS—DEDICATION—ACCEPTANCE—EVIDENCE.**

Where a space in an outlying town addition for a street was marked "closed" on the plat as recorded, and the owner of the land promptly asserted his ownership over it whenever occasion required, and it was never improved by the town, and used by the public only as outlying property connected with the town, there was no dedication thereof sufficient to subject it to a highway easement.

In Equity.

V. B. Archer, for complainant.

B. M. Ambler, for defendants.

JACKSON, District Judge. On the 22d day of June, 1903, John Shrader and wife conveyed a parcel of land situate where the town of Chester is located, in the county of Hancock, being a strip of land 35 feet in width, and commencing at the north line of Carolina avenue, 15 feet distant from the west line of First street, running thence in a northerly direction, preserving the same width, to the south line of Virginia avenue, upon which there was located one wooden bridge. On the 22d day of June, 1901, John Shrader and wife conveyed the same to Thomas C. Pitcairn, and lots No. 71 and 72, as there shown on the plan of lots of the town of Chester, as laid out by James E. McDonald and John Shrader. The deed is of record in the office of the clerk of the county court. On the 21st day of February, 1901, John Shrader and wife conveyed to Thomas C. Pitcairn lots 45 and 46, as shown on the plat of the town of Chester. It also appears that John Shrader purchased in the year 1896 an undivided one-fourth interest in the land where Chester is now located. In 1897 Shrader purchased from James E. McDonald the undivided three-fourths interest in the land in the town of Chester, whereby he became the owner of all the lots mentioned in said town of Chester that had not been previously conveyed to third parties. The bill filed in this case is to prevent the town of Chester from interfering with the rights of the plaintiff, who claims, under John Shrader, that portion of the streets claimed to be First street, 30 feet of which was claimed to be reserved as a passageway to the bridge. It is claimed that that street was never opened, and that when the plat was filed the words marked "Closed" were on the plat. It is also claimed that the strip of 15 feet wide each side of 30 feet was left to prevent a coterminous owner from using the street. The plaintiff in this case swears that his deeds cover lots Nos. 71 and 72, and also what is known as First street in the town of Chester, and also cover the lots Nos. 45 and 46 in Shrader's third plan of lots, and are a part of the land included in the deeds. John Shrader testifies that lots Nos. 71 and 72, 45, and 46 were sold to Thomas C. Pitcairn. Shrader also testifies that the lots were conveyed by James E. McDonald and Annie C. McDonald, his wife, to him, and also testifies that the wooden bridge is located on the 30-foot street.

It appears from the evidence that the alleged plat claimed to be

the plan of the streets and alleys of the town of Chester was recorded August 1, 1896, and was subsequently recorded on the 25th day of September following; the only difference being that there was an acknowledgment upon the plat that was last recorded that James E. McDonald conveyed to John Shrader one undivided fourth interest in all of the lots designated on the plat on the 25th day of June, 1896, before said plat was recorded. The recordation of these plats may be considered as a first effort of dedication of the streets and alleys in the town of Chester. It appears from the plat last recorded that the street called First street was marked "Closed." Before the plat was recorded or filed in the office of the county clerk John Shrader had acquired one-fourth of the property upon which the town of Chester was located.

There is no evidence tending to show that John Shrader ever dedicated that portion of First street claimed by the plaintiffs, for it was marked "Closed" on the plat. There has evidently been a great deal of looseness about this matter, as is often the case in reference to the organization of country towns and villages. This is substantially the evidence in chief in support of the plaintiff's contentions. At this point we notice the evidence of the Honorable O. S. Marshall, taken in rebuttal. He testifies that he was clerk of the county court of Hancock county, and his father was deputy clerk, and that the plat was recorded while he was clerk of the county, and the recording was done by his father, as deputy clerk; the writing was in the handwriting of his father, and the words marked "Closed" were in the handwriting of his father. This evidence was taken in rebuttal, but it might as well have been taken in chief. Mr. Marshall testifies that his father was a draftsman, and recorded the plat which is filed (Exhibit 6) with the deposition of John Shrader on November 25, 1904. Mr. Marshall's evidence clearly proves that when this plat was filed the word "Closed" was upon it, for the word "Closed" was in the handwriting of his father. Of course, if the word "Closed" was upon the plat as filed, there could be no possible dedication of the street, for that must be held as a reservation of that part of the property described in the plat. Another reason is shown why this is so by the testimony of E. D. Marshall, in which he states that Mr. McDonald stated to him that the streets and alleys where they approach Mr. Wm. P. Gardner's ground, and before they joined his land, would be closed in order to compel him to come to his terms in relation to the streets and alleys. This possibly is an explanation of why First street is marked "Closed." This is the case as made by the plaintiff. The contention of the defendants is, and the evidence tends very strongly to show, that what is called or known as First street has been used by the public generally as a highway in that town up until the granting of the injunction in this case. It is contended by the plaintiff that there is no dedication on the part of the owners of this street to the town of Chester for the benefit of the public. This possibly may be true that there was no actual dedication by the owners of the land, but this evidence tends to show that it has been used for years by the public. It is contended that there was such



an abandonment upon the part of the owners of the property, and an acquiescence in the use of the property by the public, that it acquired an easement in the street, in the absence of express dedication. In this connection, all the evidence tends to show that the ground was open and used in common—promiscuously by the people—and there was never any attempt, so far as the evidence discloses, to do anything in the way of improvement on what is called First street until shortly before the application for this injunction, which was the cause of the plaintiff making his application.

The question then to be considered by the court is whether there was a dedication of this land which is claimed to be First street by the owners of it. There is no evidence in this case that establishes the fact that the town of Chester ever accepted First street as an integral part of the town. There must be not only a dedication of the grounds described in the plat of the town of Chester, but an acceptance by the town, before it could acquire an easement and right to use First street as a part of the municipality. There is no evidence of any action, official or otherwise, of the town of Chester having accepted this plat of land as a part or parcel of the municipal corporation, nor does the evidence in this case tend to show that the corporate powers of Chester ever exercised any municipal authority over that portion of First street that is in controversy in this case. It is true that an acceptance may be shown by proof that the town of Chester assumed and exercised control over the street; that such exercise and control over the street was continuous until by the lapse of time there became an acquiescence on the part of the owners of the land, and thereby the town of Chester acquired an easement. Such acceptance must clearly appear from the evidence, and will not be implied. The Supreme Court of Georgia, in the case of *Kelsoe v. Mayor and Town Council of Oglethorpe*, has settled more clearly the question of law applicable to this case than any of the cases of our own courts. Cited 48 S. E. 366.

Much stress has been laid upon the fact that the evidence upon the part of the plaintiff tends to show that the word "Closed" was written across First street in the plat which was recorded in the clerk's office. This fact is very strongly controverted by the defendants. The most pregnant circumstance connected with this fact is that it is well established as an incontrovertible fact that, the plat as recorded in the clerk's office, the word "Closed" was written upon it, which tends to show that at the time the plat was recorded First street was closed. The evidence tends to show that, whenever there was an interference with his rights by any one, Shrader asserted his claim and title to the property in dispute—so much so that upon one occasion the city council, through its chairman of the streets and alleys, made an application to Shrader for permission to put up steps at the end of the bridge on First street. There had been very little occasion for Shrader ever to assert his rights to the street, inasmuch as it was used in common, but, when it appeared that it was necessary for him to do so, he promptly did it. He offered to give the bridge to the county court, and they declined it. Ephraim Johnson, one of the witnesses for the defendants, and a

member of the council, states that Shrader claimed First street years before his deposition was taken in this case. The chief reliance of the defendants in this case is that the piece of ground called First street had been promiscuously used by the public. But it is to be remembered that the mere using of a man's private property by the public does not establish a right in the public to use it, nor does such use make it a public road. Two things are necessary and requisite to establish the right in the public to any piece or control of ground for public use as a highway for the benefit of the public: First, there must be a dedication to the public by the owner of the land; second, there must be an acceptance by the authorized public authorities—either of the county or the municipality authorities. As we have seen in this case, if there has been no actual dedication under the evidence—and I am inclined to think there has not been—still there never has been such an acceptance upon the part of the constituted authorities of the town of Chester as would deprive the owners of the land of their right to it.

Upon the question of dedication of First street, the map filed in this case as Exhibit No. 6 with John Shrader's deposition, in the absence of the original plat of the town of Chester as recorded, is the best evidence that the nature of the case admits of, which is proved to be a copy of the original plat, and a literal copy of it; and it supports the statement of Mr. O. S. Marshall, who says that the original plat, as recorded upon the records of the county, shows that First street was closed. I think the great weight of the evidence tends to show that First street was closed. If so, there was never any dedication of it; but, if there was a dedication, there never has been any legal acceptance.

The history of this piece of property, as shown by the evidence in this case, fairly establishes the fact that it was an outlying piece of property—what we would call "commons"—connected with the town, over which there was very little or no occasion for the exercise of any authority. It will be observed that at the time that the plaintiff and his vendor, Shrader, acquired the deed to this land, the street was closed, and that his possession commenced before the filing of the plat when the street was closed, which covers the period Shrader owned the property. Shrader could not be divested of any right he had in the property, even if the street was not closed, because he was the owner in fee of the land when the plat was filed; and, in order to deprive him of his right to the title to the property, it would have to be acquired in some legal way. He conveyed whatever rights he had to Pitcairn, and, the town having acquired no rights against him, it can have no rights against the plaintiff in this action.

The plaintiff, Pitcairn, is entitled to the injunction prayed for, and it is so ordered.

In re MILLER.

(District Court, E. D. Virginia. February 23, 1905.)

**1. BANKRUPTCY—DISCHARGE—FRAUD.**

Where it was finally determined in a bankruptcy proceeding that a certain transfer of a portion of the bankrupt's property was fraudulent, and that such transfer occurred within four months prior to the filing of the petition, he was precluded from obtaining a discharge under the express provisions of Bankr. Act July 1, 1898, c. 541, § 14, subd. "b," 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411].

**2. SAME.**

Where a bankrupt's transactions showed that his financial difficulties were the result of suspicious and fraudulent dealings, and he had been guilty of gross misrepresentations as to his solvency, and his assets in bankruptcy were purchased by a pawnbroker, who immediately installed the bankrupt as manager of the business, with the same apparent control thereof as before, the bankrupt was not entitled to a discharge.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 732-736.]

**In Bankruptcy. On application for discharge.**

Under the standing rules of this court the referees in bankruptcy are required to report upon applications for discharge, and in this case the referee's recommendation is adverse to the granting of the same, and from which report the following appears: First. That the schedules filed in the bankruptcy petition show the amount of debts to be in excess of \$70,000, the amount of assets \$16,000, from which was realized only the sum of \$7,525. Second. That the bankrupt was in the retail clothing business, but more actively engaged in a continuous system of check and note "kiting," by which, with the assistance of his nephew, Adolph Mickaelson, also a bankrupt, and through the credulity, on the one hand, and the avaricious desire to gain usurious interest, on the other, of a series of victims, he was enabled within a period of 12 months, through his own efforts and the instrumentality of his nephew, to raise and dispose of the large sum of \$100,000, with nothing in sight from that source, practically, when the crash came. Third. That a few weeks prior to the filing of his petition he informed one of his creditors verbally that he was not only solvent, but did not owe a dollar, although at the time he must have known that he was either the maker or indorser of outstanding obligations of from \$75,000 to \$100,000. Fourth. That the conduct of the said bankrupt in the matter of an alleged sale to one M. Isentot, whereby he sought to transfer about \$500 of his property to said Isentot, was charged to be, and had been ascertained by the referee and court to be, a fraud on the rights of his creditors, and the property recovered. Fifth. At the sale by the receiver of the stock of the bankrupt, consisting of the stock of a wholesale and retail gentlemen's furnishing business, it was purchased by one Frank Jacobs, a pawnbroker of this city, and the bankrupt was immediately installed as manager of the business, apparently having the same in control as prior to his failure, and in this position has continued ever since.

E. R. Baird, Jr., and Thomas H. Willcox, for bankrupt.

WADDILL, District Judge (after stating the facts). The bankrupt is not entitled to his discharge. Section 14, subd. "b," Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by the Act of 5th February, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], provides that if any person, having been a bankrupt, "shall have at any time subsequent to the first day of the four months immediately preceding the filing of the petition, trans-

ferred, removed, destroyed, concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay or defraud any of his creditors," he shall be denied a discharge. Under this provision, it having been finally determined in this proceeding, to which the bankrupt was a party, that the Isentot transaction referred to by the referee was fraudulent, this alone should suffice to require a denial of his application.

The same should be refused for another reason. Viewing the case in the light of all the facts and circumstances surrounding it, it is apparent that the bankrupt does not belong to that class of honest, unfortunate debtors for whose benefit the bankruptcy act was intended, and designed to furnish relief. In the light of the facts of this case, with its many suspicious and unsavory environments, the bankrupt has no right to expect a court of justice to aid him in his effort to relieve himself from the payment of his debts, or disentangle him from the financial meshes in which he apparently involved himself. His creditors have the right to release him from his obligations, and put him on his feet financially again, if they so desire; but there is not a redeeming feature that suggests itself as a reason why this should be done, or that this court should become a party thereto.

A discharge will be refused.

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In re MANUEL J. PORTUONDO CO.

(District Court, E. D. Pennsylvania. February 24, 1905.)

No. 1,815.

**1. BANKRUPTCY—SALES—VENDOR'S LIEN—RETENTION OF PROPERTY.**

Where claimant sold tobacco to a bankrupt, receiving the bankrupt's notes as conditional payment, and claimant retained possession of the tobacco in question until after the bankrupt's adjudication and until the notes matured and were unpaid, the title to the property so retained did not pass to the bankrupt's trustee, except subject to the claimant's existing lien for the unpaid portion of the price.

**2. SAME—EXTENSION OF CREDIT—WAIVER OF LIEN.**

Though claimant waived his right to a vendor's lien by extending credit to the bankrupt, such lien was immediately revived, on the bankrupt becoming insolvent, as to so much of the tobacco as remained in claimant's possession.

**In Bankruptcy.**

J. Martin Rommel, for claimant.  
John Dickey, Jr., for trustee.

HOLLAND, District Judge. On September 5, 1903, Lewis Bremer's Sons sold the bankrupt 34 bales of tobacco, receiving from the bankrupt three notes, for \$651.60 each, at four, five, and six months, and gave the following receipt:

"Philadelphia, September 5, 1908.

"M. J. Portuondo Company,

"Bought of Lewis Bremer's Sons, Importers & Packers of Leaf Tobacco.

"Terms 4, 5 & 6 Mos. revenue entry when delivered.

"84 bales Vega 22

"4788-442-4844 at 45c.

"Received payment by notes, Nov. 9, 1908.

"Stored and insured under our policies.

Lewis Bremer's Sons,  
Per Hannis."

William H. G. Hannis transacted the business with the bankrupt for Bremer's Sons, and made the contract over the phone. The notes came by mail, and Hannis, upon receiving them, signed and returned the receipt, as above set forth, by mail to the bankrupt company. No other agreement was made in connection with the transaction, with the exception of the agreement that the duty was to be paid by the purchaser upon the withdrawal of these goods from the warehouse where they were stored. The tobacco had never been delivered to the bankrupt company, with the exception of 8 bales, and before the delivery of the remaining 26 the bankrupt presented its voluntary petition, on December 15, 1903, and was adjudicated a bankrupt on January 3, 1904. At this time the notes given, above referred to, were not yet due. The trustee in bankruptcy presented a petition requiring Bremer's Sons to deliver the remaining 26 bales to him, as property belonging to the bankrupt estate, after the notes were due and unpaid; and they deny his right to such delivery upon the ground that they have a vendor's lien upon the 26 bales not delivered, notwithstanding the receipts above given, and the fact that the notes were not due at the time the Portuondo Company was adjudicated a bankrupt.

There is a further reason urged by the bankrupt why Bremer's Sons should not be allowed to successfully interpose this right—for the reason that during the proceedings he claimed title as well as possession, and that the court had no jurisdiction, because of the fact that the goods were in the possession of an adverse claimant. This statement of claim was made by former counsel, but the referee finds that it was simply a statement of counsel, not acted upon by any of the parties to the proceedings.

It is further asserted that the vendor's lien was abandoned by Bremer's Sons by having set up a defense to the delivery of the 26 bales—that they intended to rescind the contract for fraud and misrepresentation in its inception. The referee, however, finds that Bremer's Sons did not urge this defense, nor did the trustee act upon the fact that it was suggested in an answer filed in a former proceeding. The referee also finds that the notes were not taken in full payment.

Under the facts hereinabove set forth, we are of the opinion that the referee is right in holding that the trustee is not entitled to the delivery of this property. It strikes us that it would be a most inequitable proceeding to require Bremer's Sons to deliver their goods, of which they have held possession from the time the contract was made to the present, to this trustee, in order that other creditors should be paid out of the proceeds, and they be compelled to present their overdue notes, and share pro rata with others in a fund which they furnished for distribution. We think the proposition is so clear that it is

unnecessary to cite authorities to support it. The following, however, may be mentioned as in point: *White v. Welsh*, 38 Pa. 396 (lower court, 399; Supreme Court, 420); *Patten's Appeal*, 45 Pa. 151, 84 Am. Dec. 479; *Wanamaker v. Yerkes*, 70 Pa. 443; *McElwee et al. v. Metropolitan Lumber Co.*, 69 Fed. 302, 16 C. C. A. 232.

The notes not having been taken in full payment for the merchandise, and the vendor having held possession of the property to the present time, of course he retained his lien for the purchase money upon the tobacco not delivered. The facts do not show any circumstance that Bremer's Sons at any time either waived or lost this lien, and the title to the property could only pass to the trustee subject to the vendor's existing right of lien for the unpaid purchase money. But even if it be held that this was such an extension of credit to the purchaser as imposed upon the vendor a waiver of his lien, and the tobacco was permitted to remain in the possession of the vendor until the expiration of the credit, the vendor's lien, which was waived by the grant of the credit, revives upon the expiration of the term, even though the buyer may not be insolvent. *Benjamin on Sales*, § 1227, referred to in *McElwee et al. v. Metropolitan Lumber Co.*, *supra*. And in that view, before the expiration of the credit, while the vendee is entitled to both possession and property, yet, if the actual possession is in the vendor, and the vendee becomes insolvent, he has a right to retain possession to secure the payment of the purchase money, and, if the merchandise is in transit, he has a right of stoppage before the vendee secures actual possession; and a vendor's right to retain possession against the trustee in bankruptcy of the vendee is the same under like conditions. *In re Bearns*, 2 Fed. Cas. 1190.

The trustee, however, claims that the filing of an involuntary petition is no evidence of insolvency, and that, while it may be that the right of a vendor's lien may revive as to the vendee after the expiration of a credit, yet, as to a trustee in bankruptcy of the vendee, it is not so, and, at the time the notes came due, as both the right of possession and the right of property had become vested in the trustee, the vendor, upon the trustee's application, must deliver the goods.

It was decided by Judge Choate, District Judge of the Southern District of New York, in *Re Bearns*, 2 Fed. Cas. 1190, that for goods arriving on a vessel for the vendor, which were sold, and upon their arrival were placed in a bonded warehouse selected by the vendee, in the name of the vendor, to be delivered as called for by the vendee, and a credit extended for two months by taking the vendee's notes for the purchase money, the right of stoppage in transitu exists in favor of the seller to prevent the assignee in bankruptcy of the vendee from obtaining possession of the merchandise after the note became due, where there had been a voluntary petition in bankruptcy filed, and an adjudication had, and the assignee appointed prior to the date upon which the period of credit expired; and it was held in *White v. Welsh*, *supra*, that:

"Judges do not ordinarily distinguish between the retainer of goods by the vendor, and their stoppage in transitu, on account of the insolvency of the vendee, because these terms refer to the same right, only at different stages of perfection and execution of the contract of sale. If a vendor has a right

of stoppage in transitu, a fortiori he has a right of retainer before any transit has commenced."

Exceptions to the referee's report dismissed, and the petition of the trustee to compel Bremer's Sons to deliver 26 bales of tobacco, as set forth, is refused.

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In re EDES.

(District Court, D. Maine. March 4, 1905.)

No. 4,288.

**BANKRUPTCY—POWERS OF COURT—SALE OF PROPERTY.**

A court of bankruptcy is not limited in its sales of assets of bankrupts by Act March 8, 1898, c. 225, 27 Stat. 751 [U. S. Comp. St. 1901, p. 710], which provides that all sales of real estate made under any order, judgment, or decree of a United States court shall be by public auction, after prescribed notice; but the bankruptcy act confers upon such courts full equitable powers in the administration of estates, and they may, for good cause shown, order either real or personal property sold at private sale.

In Bankruptcy. On question certified by referee.

Brown & Brown, for bankrupt.

Frank E. Guernsey, for trustee.

HALE, District Judge. This case now comes before the court upon the report of John F. Sprague, Esq., referee in bankruptcy. That report is as follows:

"I, John F. Sprague, the referee in bankruptcy to whom this matter was referred, do hereby certify that in the course of the proceedings in said case before me the following questions arose, pertinent to the said proceedings: A petition was duly filed with me, praying for authority to sell a portion of the bankrupt's estate, to wit, certain parcels of real estate situate in the towns of Foxcroft and Guilford, at private sale. At the hearing upon said petition which had been given in accordance with the bankrupt act, I ordered the petition dismissed.

"An act of Congress approved March 3, A. D. 1898, entitled 'An act to regulate the manner in which property shall be sold under orders and decrees of any United States court,' provides that all real estate or any interest in land under any order or decree of any of the United States courts shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct. Act March 8, 1898, c. 225, 27 Stat. 751 [U. S. Comp. St. 1901, p. 710]. The language of the third section of this act is as follows: 'That hereafter no sale of real estate under any order, judgment or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued, and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall among other things describe the real estate to be sold. The court may in its discretion direct the publication of the notice of sale herein provided for to be made in such other papers as may be proper.' Section 70b of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 8451], provides that real and personal property shall, when practicable, be sold, subject to the ap-

proval of the court. My opinion is that there are no provisions in the bankrupt act that supersede or repeal the act of 1893, but that that act controls all sales of real estate made by the bankrupt court. General order No. 18 (89 Fed. viii, 82 C. C. A. xx) authorizes the trustee, upon application of the court, and for good cause shown, to sell any specified portion of the bankrupt's estate at private sale. Section 80 of the bankrupt act (80 Stat. 554 [U. S. Comp. St. 1901, p. 8434]) conferred upon the Supreme Court of the United States the power to prescribe rules, forms, and orders for carrying this act into effect, but it is well-settled law that these rules and orders cannot act as judicial legislation. Collier on Bankruptcy [4th Ed.] 286, and cases there cited. This general order cannot be construed to repeal the law.

"The trustee Frank E. Guernsey, contends that under the provisions of the bankrupt act relating to sales of property, and general order No. 18, the referee is empowered to order real estate sold at private sale, and excepts to the order that I have made in this case dismissing this petition; and the said question is certified up to the Honorable Clarence Hale, judge of this court, for his opinion thereon.

"Dated at Monson this 9th day of February, A. D. 1905."

This report of proceedings brings before the court the question, is a court in bankruptcy limited in the conduct of its sales of assets of bankrupts by the act of Congress of March 3, 1893, which provides that all real estate shall be sold at public sale, and which provides fully for the methods of such sale? Section 70b of the bankruptcy act provides that:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by and report to the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."

The evident intention of Congress in passing the bankrupt law in 1898 was to provide an ample and complete method of administering and disposing of the assets of bankrupts. The court created by this law was given jurisdiction which is in the broadest sense equitable. It is the evident intention of Congress to place the details of the administration of the estate within the jurisdiction of the court. Under the general rules of construction, it must be held that, if Congress had intended to limit the sales of property under the bankrupt law to the provisions of the act of 1893, it would have said so in clear terms. The only limitation imposed by the bankruptcy statute is that such sales must be "subject to the approval of the court." Collier on Bankruptcy, 520, and cases cited. The bankrupt law is the last expression of the legislative will upon the subject. It clearly does not intend to limit the method of sales of property by the provisions of the act of 1893. If it did, referees and trustees would be very much limited and harassed in their disposition of property—particularly in the disposition of perishable property—and the purpose of the law would be in a large degree defeated. A new statute which affirmatively grants a larger jurisdiction or power or right is held to prevail over any prior statute by which a limited power or jurisdiction or right less ample has been granted. Sutherland on Statutory Construction, § 254, and cases cited. It must be held that the bankrupt law, in ordering sales, is not limited by the act of March, 1893. General order in bankruptcy 18, provides as follows:



"(1) All sales shall be by public auction unless otherwise ordered by the court. (2) Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee. (3) Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."

While this general order has no force as legislation, and while it is not even a judicial interpretation of the statute, it is an order of the Supreme Court of the United States, based upon the bankruptcy statute. It cannot be held to be in derogation of such statute. Under its provisions a perishable estate may be sold, even without notice to the creditors, and the courts have been very liberal in their construction of what is "perishable." The federal courts have in fact liberally interpreted the whole statute, as giving full equitable powers to the court. For instance, although section 58, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], provides that creditors shall have notice of all proposed sales of property, still, under the general powers and discretion given by the court in section 70b, it is the custom to order sales of perishable personal property even without notice. There can be no question but that a bankruptcy court, under the broad powers given by the bankrupt law, may order a sale of either real or personal property at private sale.

Under the fair and obvious construction of the statute, the order of the referee in dismissing the petition to sell at private sale must be overruled. It is so ordered.

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#### UNITED STATES v. SEATTLE BREWING & MALTING CO.

(District Court, D. Washington, N. D. February 27, 1905.)

No. 2,765.

#### ACTION FOR PENALTY—BAR—ACQUITTAL OF CRIMINAL OFFENSE.

Where defendant was acquitted in a criminal prosecution for causing to be transported certain casks containing bottled beer falsely marked as containing bottled soda water, such acquittal was a bar to the subsequent maintenance of an action by the United States to forfeit the property and recover a penalty for the same act imposed by Rev. St. § 8449 [U. S. Comp. St. 1901, p. 2277].

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1078.]

#### On Demurrer to Special Plea.

Civil action by the United States to collect a fine of \$500, for which the defendant is alleged to have become liable under section 8449, Rev. St. [U. S. Comp. St. 1901, p. 2277], for having caused the transportation of certain casks containing bottled beer from its place of business, in the city of Seattle, to a place in Chelan county, in this state; said casks being falsely marked and designated as containing bottled soda water. In its answer the defendant pleads as an affirmative defense that previous to the commencement of this action the defendant was indicted by a grand jury of the United States in this court, and, having entered its plea of not guilty, a trial was had, resulting in a verdict of not guilty, upon which a final judgment was entered in favor

of the defendant; that all the matters and things set forth and charged in the information in this case were set forth and charged in said indictment, and are identical with said matters and things therein set forth and charged; and that all of the evidence which will be necessary to establish the allegations of the information in this case would have been competent to establish the charges of said indictment. Heard upon a demurrer to said special plea. Demurrer overruled.

Alfred E. Gardner, Asst. U. S. Atty.  
G. M. Emory, for defendant.

HANFORD, District Judge. The question whether the government, after having been defeated in the prosecution of a criminal case against a defendant for the doing of a prohibited act, may, by waging a civil action against him, enforce the provisions of a penal statute by condemnation of property as forfeited, and compelling the defendant to pay a fine, was learnedly discussed and finally determined by the Supreme Court of the United States in the case of Coffey v. United States, 116 U. S. 436, 444, 6 Sup. Ct. 437, 29 L. Ed. 684. In later decisions by the Supreme Court the Coffey Case has been referred to, but without modifying or departing from the rule which it established. See Stone v. United States, 167 U. S. 178, 196, 17 Sup. Ct. 778, 42 L. Ed. 127. The affirmative allegations of the answer bring this case fairly and fully within the rule of the Coffey Case, and this court cannot hesitate in its duty to overrule the demurrer interposed in behalf of the government.

The learned attorney for the United States appears to have understood this court as expressing an opinion that a civil action might be maintained against the defendant to recover the penalty for having transported beer under a false description, at the time of rendering its decision upon the trial of the criminal case, when the court directed the jury to render a verdict of not guilty. It was then said by the court that:

"There is an abundance of evidence to support a verdict that the defendant sold and shipped the beer, and as a corporation, it is chargeable with all the civil liability from the business transaction. The criminality, however, charged in this indictment, is in marking the beer and shipping it under a false description; and, as to the fact of shipping in that manner, there is no evidence to charge the corporation with that as a corporate act."

That decision was based upon uncontradicted evidence proving that the false marking of the casks which were removed for transportation from the defendant's brewery was the unauthorized and clandestine act of one of the defendant's employes, and there was no intention to violate the law on the part of the defendant as a body corporate, as no officer or agent invested with the corporate powers participated in or had knowledge of the transaction. The court did not say, nor intend to indicate, that a mistake had been made in the form of procedure, nor that a civil action could be maintained to collect the fine or any forfeiture. If the defendant incurred liability to the government for any loss or subtraction of revenue by means of the transaction, the verdict and judgment in the criminal proceeding constitute no bar to the recovery in a civil action of money equivalent to the loss, but an action by the government to recover compensation for the loss of property is quite

different from an action to collect a fine, as a mere punishment for the doing of an unlawful act. A civil action by the government to recover the value of its property wrongfully converted was sustained by this court, and a judgment in favor of the government was rendered against a defendant who had been previously acquitted in a criminal prosecution against him for a violation of law in unlawfully cutting and removing timber from the public lands of the United States, and that judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, and by the Supreme Court of the United States; the case being *Stone v. United States*, above cited. In the progress of the civil action, the Coffey Case was pressed upon the attention of the different courts, but they all concurred in holding that the cases were distinguishable by the fact that in the civil case the government was not prosecuting to punish a criminal, but merely to recover compensation for a loss of property. The distinction between an action to recover compensation and a proceeding to punish for the doing of a prohibited act was in the mind of the court at the time of directing a verdict in favor of this defendant, and I consider that it was suggested, and that nothing else was indicated in the remark above quoted.

Demurrer overruled.

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In re ANDREWS.

Ex parte HARDY et al.

(District Court, D. Massachusetts. February 8, 1905.)

No. 8,277.

**BANKRUPTCY—PROVABLE CLAIMS—PREFERENCES.**

A debtor, within four months prior to his bankruptcy, knowing himself to be insolvent, and with intent to give preferences, made payments on pre-existing debts by returning goods bought. The creditors, at the time of receiving the payments, knew that the debtor could not pay his debts as they matured, and that he had dealt with goods received by him on memorandum in violation of his contracts, and in one case the creditor was given a statement which showed the debtor's assets but slightly above his liabilities. *Held*, that such creditors had reasonable cause to believe the debtor insolvent, and that the payments constituted preferences which must be surrendered before they could prove claims against the estate, although they may in fact have believed him solvent.

In Bankruptcy. On review of decision of referee.

See 130 Fed. 383.

Alexander Whiteside, for trustees.

Morse & Friedman, for creditors.

LOWELL, District Judge. The question raised in this case concerns preferences alleged to have been given two creditors. In both cases goods were returned to them by the bankrupt in part payment of pre-existing debts. That the debtor was then insolvent was not disputed. That he knew he was insolvent I find as a fact, and that he intended to give a preference. His testimony was disingenuous, and I attach no weight to it. (See his account of the Hardy transaction, vol.

1, p. 10 et seq.) The referee, who heard the witnesses, informed me in conference that he agreed with these findings.

It follows that a preference was given which must be surrendered before proof, if the creditor then "had reasonable cause to believe that it was intended thereby to give a preference." If the debtor is insolvent, he intends preference by any payment of a pre-existing debt. If the creditor has reasonable cause to believe that the debtor is insolvent, then the creditor has reasonable cause to believe that a preference is intended. Under the circumstances here presented, the court has to determine only if these two creditors severally had reason to believe the bankrupt insolvent at the time the payments were made to them by him. If the question is answered in the affirmative as to either, that creditor must surrender his preference.

The creditor Hardy knew that the bankrupt had sold goods received on memorandum, and, contrary to his agreement, had appropriated proceeds which did not belong to him. He knew that the bankrupt did not pay his debts. The bankrupt said he could not, and Hardy was satisfied that this was true. He made no inquiry about the bankrupt's solvency. The payment alleged to be preferential was not made by cash on account in the ordinary course of business, but by a return of goods. Hardy testified in substance that he believed the bankrupt to be solvent at the date of the preference, and the referee, with whom I have conferred, was favorably impressed by Hardy's testimony, and believed it to be true. I do not find the contrary, but the undisputed circumstances mentioned above, as well as others contained in the testimony, establish that Hardy, whatever his actual belief, had reasonable cause to believe that Andrews was insolvent, and I so find.

The creditor Mayer knew that the bankrupt could not pay his debts, and that he had pawned goods sold to him on memorandum. He doubted if he could himself legally retain a payment made to him by the bankrupt, consulted a lawyer on the matter, and was told that, to make the payment legal, the debtor must show the creditor that the former was solvent. His attention was thus particularly directed to the question of the bankrupt's solvency. He made a slight examination of some goods in the bankrupt's store, and received from the bankrupt a statement which showed \$33,000 worth of property and \$31,000 of debts. This statement, quite incorrect, was the best that the debtor could make, and the smallness of its credit balance, taken with the other circumstances just stated, seems to me sufficient to give the creditor reasonable cause to believe in the bankrupt's insolvency. This I find. That the creditor actually believed Andrews solvent was the opinion of the referee, and on that point I need not find the contrary.

Judgment of the referee reversed.

## THE GLADYS.

TOOKER et al. v. PHILADELPHIA &amp; R. RY. CO.

(District Court, S. D. New York. February 23, 1905.)

**1. COLLISION—SUIT FOR DAMAGES—EFFECT OF FAILURE TO PRODUCE TESTIMONY.**

The failure to take the testimony of those navigating a tug, in a suit for collision between her tow and another vessel, tends against her, in the absence of equivalent testimony.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 258.]

**2. SAME—TUG WITH LONG TOW—CARE REQUIRED.**

A tug navigating the ocean at night, with three tows on a single line, the whole 4,000 feet in length, is to be regarded as one vessel, and is required to exercise extreme care to avoid collision with crossing vessels.

**3. SAME—TUG WITH LONG TOW AND CROSSING SCHOONER—FAULT OF TUG.**

An ocean tug, with three barges in tow in a line, the whole being some 4,000 feet in length, held in fault for a collision between one of the barges and a schooner on a converging course off Barnegat, N. J., in the night for failure to exercise the care to keep out of the schooner's way required of her in view of the great length of her tow. The contention of the tug that the schooner was an overtaking vessel, and so required to keep out of the way of the tow, held not sustained by the evidence.

In Admiralty. Cross-suits for collision.

James Armstrong and Pierre M. Brown, for Philadelphia & R. Ry. Co.

Wing, Putnam & Burlingham, for the Gladys.

ADAMS, District Judge. The first of the above entitled actions was brought by the Philadelphia & Reading Railway Company, the owner of the barge Oak Hill, to recover from the schooner Gladys, the damages caused to the barge by a collision, which occurred between those vessels on the 24th day of August, 1904, about 10:15 o'clock P. M., off Barnegat, New Jersey. The second action was brought by the owners to recover the schooner's damages in the collision.

The Oak Hill was being towed, in company with two other barges, the Phoenix and Buck Ridge, by the Philadelphia & Reading Company's tug Carlisle from Philadelphia to points East of New York. The length of the tug was 173 feet. The hawser between the tug and the first barge, the Phoenix, was from 180 to 200 fathoms; between the Phoenix and the Oak Hill, it was about 175 fathoms, and between the Oak Hill and the Buck Ridge about 160 fathoms. The barges were each about 196 feet long. The whole tow was about 4,000 feet in length. The barges were loaded with coal. They all had sail set and drawing at the time of the collision.

The Gladys was a three masted schooner, 163 feet long. She was bound from Savannah, Georgia, to New York, with a cargo of lumber, under and on deck. The deck cargo was about 7 feet high. The schooner had all her sails set, excepting the fore and main topsails, which had been furled to delay her arrival in New York until the next morning.

The weather was warm and exceptionally fine, with a full moon. The sea was smooth. It had been quite calm during a part of the day.

The tug and tow passed Barnegat Light, some  $5\frac{1}{2}$  or 6 miles distant, about 7:30 o'clock P. M. and laid a course of N. E.  $\frac{1}{4}$  E. for Fire Island Light. Her speed was probably in excess of 6 knots per hour.

The schooner, after being becalmed until about 4 o'clock in the afternoon, obtained a slight breeze from the S. W. and made about 8 knots on a N. by W.  $\frac{1}{2}$  W. course, up to about 8 o'clock. The wind then veering more to the westward, she steered N. N. W., and, the wind increasing, made somewhat better speed, probably about  $3\frac{1}{2}$  knots, until just before the collision, when it was greater, probably about 5 knots. About 8:30 o'clock P. M. the lookout reported a light to windward. It was in the neighborhood of 5 miles away, and turned out to be on the Carlisle. Both vessels kept their courses until in the extremity of collision, when the schooner put down her helm and she shortly thereafter, about 10:15 or 10:20, collided with the Oak Hill. Both vessels were seriously injured and the question of liability is to be determined.

The tug contends that the schooner was first observed on the star-board beam of the Oak Hill, overtaking the tow, that when she reached a point not quite abreast of the first barge, she attempted to go about on the other tack, with the result that her bow struck the barge and she was in fault because, being an overtaking vessel, she did not keep out of the way of the tug and tow.

The schooner denies that she was an overtaking vessel and contends that the tug was going faster and the vessels being on converging courses, it was the tug's duty to avoid the schooner by passing under her stern.

The tug and barges must be regarded as one vessel and as such required to exert the utmost prudence. The Samuel Dillaway, 98 Fed. 138, 38 C. C. A. 675.

The schooner's testimony shows that towards the end and just before the collision, she was, according to some estimates, sailing nearly, if not quite, as fast as the tow was going, but it does not seem that she was ever an overtaking vessel under Art. 24 of the International Rules, which provides:

"Art. 24. Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel she is overtaking that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way."

All the testimony taken on behalf of the tug was from the Oak Hill and it was agreed in court that the testimony of the wheelmen of the other barges, if called, would corroborate the Oak Hill's contention, but no testimony whatever was taken from the tug and from the omis-

sion to examine the witnesses who were charged with the duty of navigation on her part, it must be presumed that if produced, they would not have aided their vessel. The omission, in the absence of other equivalent testimony, tends against the tug. *The New York*, 175 U. S. 187, 204, 20 Sup. Ct. 67, 44 L. Ed. 126.

The testimony taken on behalf of the tow is to the effect that the schooner was first seen about abeam of the Oak Hill and worked forward so that she nearly reached the tug. Even if that were so, she was not an overtaking vessel within the rule and it was still the tug's duty to avoid her and doubtless the best way for her to have done so was by going under the schooner's stern. *The Prudence* (D. C.) 124 Fed. 939, 942, affirmed December 12 1904. We have not the tug's testimony, so can not determine from her point of view how far abaft her own beam the schooner may have been at any time, but regarding the tow as one vessel, some two-thirds of a nautical mile long, the schooner was certainly never, after the vessels sighted each other, two points abaft the beam of such vessel.

There has been some discussion in the case as to the propriety of the schooner's movement to port instead of to starboard, in the endeavor to avoid collision, when it became evident that the tug was proceeding without regard to her, but there is a conflict of testimony upon the point, the schooner contending that it was the best course to pursue under the circumstances and the tow that it was imprudent navigation. The testimony rather weighs in favor of the schooner's contention but it is not necessary to determine the question as, in any event, the manoeuvre was made in extremis, brought about by a failure on the tug's part to fulfil her duty.

The libel of the Railway Company is dismissed and that of Tooker et al. sustained, with an order of reference.

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In re HARK et al.

(District Court, E. D. Pennsylvania. March 18, 1905.)

No. 2,065.

**1. INVOLUNTARY BANKRUPTCY—PETITION—PROVABLE CLAIMS—MATURITY.**

Where an involuntary bankruptcy petition stated that the claims of the creditors signing the same were for goods sold and delivered, and that the alleged bankrupts purchased the same within a year from the date of the petition, it conformed to general order 37 (18 Sup. Ct. x), and was not objectionable for failure to state when the several amounts became due, the amount of the securities held, nor the manner in which the value of the securities was fixed.

**2. SAME—ACTS OF BANKRUPTCY.**

Allegations of acts of bankruptcy in an involuntary petition in the language of the act, without setting forth any other facts or circumstances, are insufficient.

**3. SAME—CONCEALMENT OF ASSETS.**

An involuntary bankruptcy petition, alleging that the alleged bankrupts within four months next preceding the filing of the petition committed an act of bankruptcy, in that within certain dates they removed, transferred, and concealed a large portion of their property, consisting

of pieces of woolen goods, silks, linens, etc., from their place of business, with the intent to hinder, delay, and defraud creditors, and that petitioners are informed and believe that the goods removed, transferred, and concealed were of the value of at least \$10,000, and that petitioners have been unable to ascertain to what place the goods have been removed, was not demurrable on the ground that it stated merely conclusions, and not facts constituting an act of bankruptcy.

In Bankruptcy. Demurrer to petition.

Reber & Downs, for petitioners.

Henry N. Wessel, for alleged bankrupts.

HOLLAND, District Judge. This is a demurrer to the petition, the second reason of which alleges that it does not set forth when the money which is alleged is owing to the several creditors became due, nor the amount of securities held by the petitioners, nor the manner in which the value of the securities is fixed, nor does it set forth when the goods were sold. The petition in this respect conforms to the language prescribed by the Supreme Court under general order 37 (18 Sup. Ct. x). It is stated that the claims are for "goods sold and delivered," and that "Hark Bros. purchased the same within one year from this date," to wit, the 21st day of October, 1904, the date of the execution of the petition. It is not necessary to state when the several amounts became due, as it is alleged they have "provable claims"; nor is there anything to require them to state the amount of the securities held, nor the manner in which the value of the securities is fixed. This objection is overruled.

It is further objected that the act of bankruptcy set forth is defective, informal, and insufficient, in that the petition does not aver any facts showing any act of bankruptcy, but merely states legal conclusions, using the phraseology as set forth in the act of Congress. The manner of setting forth the specifications of acts of bankruptcy in involuntary petitions, and specifications filed against the discharge of bankrupts, are very fertile sources of contention as to the sufficiency of these specifications, and a definition of "sufficiency" cannot be framed as a certain guide to be followed in all cases. There is one rule, however, followed by all the courts—that allegations of acts of bankruptcy in a petition in the language of the act, without setting forth any other facts or circumstances, are insufficient. An act of bankruptcy specified in section 3 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]) must be set forth in a petition showing that the bankrupt committed an act of bankruptcy, as defined in that section, in language to state a triable issue, and to give notice to the alleged bankrupt as to what he will be expected to meet; but, as has been said by Judge McPherson, of this district, in *Milgraum & Ost* (D. C.) 129 Fed. 827, "to compel nicety of pleading in specifications of objections to a discharge is more likely to lead to the escape of dishonest men from their liabilities, than to protect honest debtors from the spiteful attack of disappointed creditors." This was said in a decision sustaining specifications against the discharge of a bankrupt, wherein the specifications set forth that the bankrupt, "within four months



of filing the petition, \* \* \* transferred, removed, destroyed, or concealed, or permitted it to be removed, destroyed, or concealed, their property, with intent to hinder, delay, and defraud their creditors, in this: that said bankrupts did on or about December 1, 1903, or about one week prior to the filing of the petition against them, and at other times, remove and conceal large quantities of merchandise to the house of Leon Wiesen, No. 529 North Sixth street, in the city of Philadelphia, with the intent to hinder, delay, and defraud their creditors; and in this: that said bankrupts did further, on the 19th day of November, 1903, and at other times, remove and conceal, or permit to be removed and concealed, large quantities of merchandise, consisting of toys, notions, and pens, from their place of business, at 303 Market street, Philadelphia, with the intent to hinder, delay, and defraud their creditors." In addition to the language of the act, there are facts and circumstances set forth here to notify the bankrupt what he is expected to meet, how the property was transferred, the person to whom it was transferred, and the place wherein it was concealed, designating the merchandise as "consisting of toys, notions, and pens," and the place from which it was taken is also given. The specifications objected to in this case are as follows:

"And your petitioners further represent that the said Benjamin W. Hark and Harry A. Hark, individually and trading as Hark Brothers, are insolvent, and that within four months next preceding the date of this petition the said Benjamin W. Hark and Harry A. Hark, individually and trading as Hark Bros., committed an act of bankruptcy, in that they heretofore, to wit, between the 10th day of October, A. D. 1904, and the 15th day of October, 1904, and at other times, removed, transferred, and concealed a large portion of their property, consisting of pieces of woolen goods, silks, linens, etc., from their place of business, at 821 Cherry street, Philadelphia, with intent to hinder, delay, and defraud their creditors. Your petitioners are informed and believe that said goods removed, transferred, and concealed are to the value of at least \$10,000, and your petitioners have been unable to ascertain to what place said goods have been removed."

It will be noticed that the facts set forth here to show a transfer with intent to hinder, delay, and defraud creditors are that between the 10th of October and the 15th of October, 1904, they removed, transferred, and "concealed" large portions of property, consisting of pieces of woolen goods, silk, linens, etc., from their place of business, at 821 Cherry street, Philadelphia. The specifications in Milgram & Ost, supra, are the same as in this case, except that in the former the place to which the property was removed and "concealed" is named, and in the latter this fact is omitted, but it is stated that the petitioners have been unable to ascertain where the goods are concealed; but the allegation is made that goods of a specified kind "are concealed," to the amount of \$10,000.

Exceptions to the petition dismissed.

PHILADELPHIA & READING RY. CO. v. PEALE, PEACOCK & KERR,  
Incorporated.

(District Court, E. D. Pennsylvania. March 1, 1906.)

No. 67.

1. SHIPPING—CONTRACT FOR CURRENT RATE OF FREIGHT—DELAY IN DELIVERY.

A barge laden with coal to be carried from Philadelphia to Boston, which had started in tow, and proceeded down the river for two or three miles, when she was injured by floating ice, causing a delay in delivery, had entered upon the voyage, and was protected by a provision of the bill of lading excepting "accident or danger of the sea, river or steam navigation"; and, under a further provision of the contract by which she was to receive the market rate of freight, she was entitled to the rate current when the voyage was commenced, unless the delay was caused by her own negligence.

2. SAME—NEGLIGENCE IN BEGINNING VOYAGE—FLOATING ICE.

A barge laden with coal started on a voyage from Philadelphia to Boston in tow of a powerful steamship at a time when there was floating ice in the Delaware river. Two or three miles down the river, heavier ice was encountered; and in the first, unsuccessful attempt of the steamship to force her way through, the barge was injured, making it necessary for her to stop for repairs. The steamship then successfully passed through the ice, and proceeded alone. *Held*, under the evidence, that the condition of the river was not such as to render the barge negligent in starting, in view of the size and strength of the vessels; it being her duty to make every reasonable effort to deliver the cargo promptly.

In Admiralty. Suit to recover freight and demurrage.

James F. Campbell, for libellant.

John G. Johnson and J. Wilson Bayard, for respondent.

J. B. McPHERSON, District Judge. The respondents, who are coal dealers in the city of Philadelphia, made a contract with the libellant in January, 1903, by which the libellant undertook to carry a load of the respondents' coal in one of its seagoing barges from Philadelphia to Brookline, Mass., and the respondents agreed to pay the market rate of freight for this service. Accordingly the barge Kohinoor took on board 1,900 tons of coal, and began the voyage on January 18th, in tow of the steamship Harrisburg, a vessel also belonging to the libellant. The bill of lading agreed to deliver the coal at Brookline, "the restraint of governments, collisions, fire at sea or in port, or any other accident or danger of the sea, river or steam navigation, of whatever nature or kind soever, excepted." And it was also provided in the bill that:

"If a proper berth for said seagoing barge be not procured by consignee of said cargo, and the cargo be not discharged by him from the barge within five working days (dating from the hour that the barge is ready to deliver cargo), for each day thereafter, Sundays and legal holidays not excepted, 17 and <sup>60</sup>/<sub>100</sub> dollars per day demurrage will be charged."

When the voyage began, the steamship and the barge were seaworthy, and were properly manned, equipped, and supplied for the voyage. At that time some ice was running in the Delaware river at Port Richmond, from which point the tow started; and it was known by the libellant's officers and agents, and by the master of the Harris-

burg, that navigation below was obstructed to some extent, but the information they had on this subject did not indicate that there was serious danger to vessels as large and strong as the steamship and the barge. Near Washington Park, however, two or three miles down the river, ice of unusual thickness and in large quantity was encountered, and in the effort to force a passage the steamship stuck fast; and the barge, being unable to stop her way, came down with the ebb tide and collided with the steamship, doing her some damage, and injuring herself so severely that it became necessary to interrupt the voyage until the indispensable repairs should be made. The barge was partially unloaded, and was taken without delay to a shipyard, where the work of repairing the injury was prosecuted with diligence; but it was not until January 31st that the work was finished, and, as no power could then be had, it was not until February 5th that the voyage could be resumed. The barge reached Boston Harbor on the evening of February 10th, and the cargo was tendered to the consignee the next morning, but he refused to receive it because of the delay. The respondents were immediately notified of his refusal, and were asked for instructions; but they gave none until February 20th, when they directed the libellant to deliver the cargo at Portland, Me., and agreed to pay the extra charges for towing. The barge finally discharged at Portland on February 26th and was taken back to Boston; the service of towing to and from Portland being done by the Commercial Towboat Company at a charge of \$205, as the libellant had no power of its own available at Boston when the direction to deliver at Portland was received.

When the voyage began, on January 18th, the current rate of freight was \$2 per ton, but this was changed on January 27th to \$1.50 per ton; and the principal subject of dispute is which of these sums furnishes the measure of respondents' liability for freight. There seems to be no controversy over the amount of demurrage that is due, \$157.50. The towing charges between Boston and Portland are also objected to, apparently on the ground that libellant charged the same rate on cargoes of coal from Philadelphia to Portland as from Philadelphia to Boston; but, aside from the fact that this rate applied only to cargoes that were originally destined for Portland, the respondents' liability for the extra towage charges rests upon their express promise to pay them. This is found in the following letter, dated February 20th, and addressed to libellant's shipping and freight agent in Philadelphia:

"Dear Sir: In accordance with instructions from our Boston office, please deliver barge Kohinoor to Messrs. Sargent, Dennison & Co., Portland, Me. We will be responsible for towing bill in making this delivery.

"Yours truly,

E. E. Walling,  
"General Sales Agent."

The real contention, I think, must be over the libellant's alleged negligence in undertaking the voyage under the circumstances surrounding the navigation. It seems to me to be certain that the voyage had actually begun. I had occasion to consider this question recently in *The Buckingham* (D. C.) 129 Fed. 975, and some authorities on the subject will be found collected in the report of that case, to which may be added *Wood v. Hubbard* (C. C. A., 3d Circuit) 62 Fed. 757, 10

C. C. A. 628. This being so, the rate of freight then current, \$2 per ton, applied to the venture, and must be paid, unless a sufficient excuse can be shown for the respondents' failure to comply with these terms. The bill of lading expressly protects the libellant from liability caused by dangers of the sea, river, or steam navigation, of whatsoever nature or kind; and, as the interruption of the voyage was unquestionably occasioned by a danger of river navigation, the contract relieves the libellant, unless its negligence has been shown. There was no fault in the work of repairing the barge; and the single question is, therefore, whether the presence of ice in the river made it negligent to begin the voyage at all. This is, of course, a question of fact, to be decided according to the evidence; and I need only state my conclusion after having considered all the testimony on this subject. In my opinion, the danger was not so great as to require the voyage to be postponed. Vessels as large and powerful as the Harrisburg are intended to encounter dangers, and I see nothing in the evidence to indicate that anything more than the ordinary peril from ice in the winter season was to be expected. When ice of unusual thickness was met, it was not practicable to turn around; and it was not negligence, I think, to attempt to break through. Indeed, the Harrisburg did break through in a second attempt the same day, and went on to Boston alone. The libellant's duty was to make every reasonable effort to take the cargo to Boston as speedily as possible, and, if the respondents had lost a market while the barge was waiting for the ice to move out, they would have been entitled to complain that no attempt had been made to open a channel by force. That the first attempt failed is true, but it was not negligence to make it, for the libellant must be judged, not by the result, but by the conditions that then existed. As was said in *Holland v. 725 Tons of Coal* (D. C.) 36 Fed., on page 790:

"The vessel owed diligence and promptitude in delivering. She was bound to diligent effort, and was obligated to deliver during that season of navigation, unless prevented by stress of weather, endangering the safety of the cargo, or preventing further progress. Exposure to inclement weather, or fear of encountering ice or cold, constitutes no excuse. *The Maggie Hammond*, 9 Wall. 435, 19 L. Ed. 772."

A decree may be entered in favor of the libellant, with costs.

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#### GRAHAM v. OREGON R. & NAVIGATION CO.

(District Court, S. D. New York. March 1, 1905.)

#### ADMIRALTY JURISDICTION—MARITIME CONTRACT.

A contract on the part of respondent, a railroad company operating a line of road having a seaport terminus, to furnish to libellant all the cargoes which it then had or might thereafter have at such port during the term of the contract for shipment over sea, and on the part of libellant to furnish steamships to carry such cargoes, is maritime, and an action for its breach is within the admiralty jurisdiction.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, § 156.]

Admiralty jurisdiction as to matters of contract, see notes to *The Richard Winslow*, 18 C. C. A. 847; *Boutin v. Rudd*, 27 C. C. A. 530.]

In Admiralty. On exceptions to amended libel.

Thomas D. Rambaut and J. Parker Kirlin, for libellant.  
Maxwell Evarts and Robert D. Benedict, for respondent.

ADAMS, District Judge. The original libel herein was filed on the 11th day of August, 1904. Exceptions thereto were duly filed by the respondent, alleging in substance that a maritime cause of action was not set forth and the court consequently had no jurisdiction. These exceptions were brought on for argument and sustained in an opinion, dated the 16th day of December, 1904. A decree was subsequently entered thereupon, granting leave to the libellant to amend within twenty days. This leave was availed of and an amended libel filed the 22nd day of December, 1904.

The amended libel substitutes new allegations for the first three paragraphs of the original libel. The libel in such respect now reads as follows:

"First: The libellant, Robert A. Graham, is a resident of the City of New York, and the respondent, the Oregon Railroad & Navigation Company, at all the times hereinafter mentioned, was, and it still is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and has an office and property in this District. At the times mentioned, the respondent was engaged in operating a system of railway of more than one thousand miles in extent in the northern portion of the United States, and had a terminus at Portland, Oregon, with wharves suitable for the use of Ocean going steamships. It was also at such times engaged in obtaining from various places in the United States, and forwarding from its terminus in Portland, cargoes of merchandise destined for points in China and Japan, and it was likewise engaged in receiving at its terminus in Portland, cargoes which had been brought by steamships from ports in China and Japan to the port of Portland.

Second: Prior to, and on October 1, 1900, the libellant, Robert A. Graham, and the respondent, the Oregon Railroad & Navigation Company, acting through its duly authorized agents, were engaged in negotiations for the purpose of forming a contract for the furnishing of vessels by the libellant to carry cargoes which the respondent represented to the libellant that it had, and would have regularly, from time to time, for shipment from Portland to points in China and Japan. The respondent then and there represented to the libellant that the above mentioned cargoes would amount to four thousand tons, or more, per month, all which it promised that it would ship on the vessels to be furnished by the libellant. On October 1st, 1900, these negotiations culminated in a contract between the libellant and the respondent, under and in pursuance of which it was agreed between the parties that the libellant should furnish five steam vessels, each capable of carrying four thousand tons of measurement cargo, to be operated in a monthly service between Portland, Oregon, and ports in China and Japan, to carry cargoes to be furnished by the respondent for shipment at Portland on the west bound voyages. It was further agreed that the respondent should furnish exclusively to the vessels so to be provided by the libellant, the cargo or cargoes that it then had, and all the cargo or cargoes that it might thereafter have at Portland for shipment to China and Japan, which it was represented would amount to four thousand tons or more per month, to be carried by the libellant's vessels, and that the respondent should also receive at Portland any and all cargo destined for inland points of the United States, which the vessels of the libellant might bring from ports in China and Japan to the port of Portland, and there deliver to the respondent on its terminal wharves. The duration of the contract, it was agreed, should be three years from October 1st, 1900.

It was further agreed that the libellant's vessels should receive as compensation for the carriage over sea of the cargoes taken from or brought to

Portland one-half of the through freight on all goods shipped under through bills of lading from interior points in the United States to China and Japan, and one-half of the through freight on all cargo which the libellant or its agents might obtain for shipment in China and Japan, to interior points in the United States, and that the vessels should receive the entire freight on all westbound cargo that originated in Portland, and on all eastbound cargo which was not destined for points beyond Portland.

Certain stipulations and regulations for the establishment and operation of the steamship service contemplated by the foregoing agreement and for the government of certain incidental matters in connection therewith, were, on that day, drawn up and embodied in a memorandum, a copy of which is hereto annexed, marked Appendix A, and made a part of this amended libel; but the terms and stipulations of this memorandum were conditioned and based on the undertaking of the respondent, which constituted an essential part of the agreement between the parties, that the respondent should furnish to the libellant's vessels, for shipment at Portland, all the cargo or cargoes which it then had, or might thereafter have, during the life of the contract, for shipment from Portland to points in China and Japan, and should receive at Portland all through cargoes which the vessels might bring to that port.

Third: Thereafter, pursuant to the terms of the aforesaid agreement between the libellant and the respondent, the libellant furnished to the respondent five steamers, each capable of carrying 4,000 tons of measurement cargo, for the establishment of a steamship service between Portland, Oregon, and ports in China and Japan, and cargoes were furnished for the said steamships by the respondent, in pursuance of said agreement, for several months thereafter, and until about the 10th of April, 1901, and in doing so delivered, under through bills of lading, cargoes and merchandise to the libellant at Portland for transportation by his said line of steamships, and received at said port cargoes from said steamships which had been brought from Asiatic ports, and paid freight on such cargoes to the libellant.

The name of the line under which the steamers were operated, in pursuance of the agreement between the parties, was the Oregon & Oriental Steamship Company."

The respondent has filed exceptions to the amended libel as follows:

"I. That it appears upon the face of the libel herein that this Court is without jurisdiction of the cause of action set forth in said libel.

II. That the contract and agreement alleged in said libel is not a contract and agreement civil and maritime, and that an action for damages for the breach thereof is not within the admiralty and maritime jurisdiction of this Court.

III. The respondent further excepts to the first sentence of the Second Article as immaterial, and not stating any part of the alleged agreement, or of the alleged cause of action for the breach thereof.

IV. And the respondent further excepts to the second sentence of the second article, and also to the allegation in said second Article 'which it was represented would amount to four thousand tons or more per month', as immaterial, no cause of action in said amended libel being alleged as founded on either representations or promises of the respondent, outside of the alleged agreement."

The respondent contends that the amended libel adds nothing to the original libel as to the libellant's part of the agreement, nor as to the respondent's part of the same but simply modifies one of the former allegations and urges that Appendix A still contains all the particulars of the agreement now set forth and even if that is not so, it is certainly alleged by the libellant that Appendix A continues under the amended libel to form a part of the agreement between the parties. It is further urged that the contract now alleged is nothing but a traffic agreement covering as well the land transportation on the railroad as the

maritime transportation on the steamships; that neither can be separated from the other and that the question now presented has been practically decided in the sustainment of the former exceptions.

The allegations of the amended libel, however, are quite different from those of the original. The agreement contained in Appendix "A," instead of being a statement of the terms of the agreement as formerly alleged, is now described as merely incidental to the main contract, which is set forth in the paragraphs quoted above. The allegations of the new libel set forth a contract for the furnishing of cargoes on the respondent's part and of steamships on the libellant's part to carry the cargoes. Such a contract is essentially maritime within the authorities. *Quirk v. Clinton*, 20 Fed. Cas. 146; *Patterson v. Baltimore Steam Packet Co.* (D. C.) 101 Fed. 296; *Id.*, 106 Fed. 736, 45 C. C. A. 575, 66 L. R. A. 193; *Id.* (D. C.) 106 Fed. 957.

With respect to the immateriality of certain statements in the amended libel alleged in the respondent's 3rd and 4th Exceptions, I do not deem it necessary at this time to consider the exceptions in such respect. When evidence is offered to establish the criticised parts, the question of materiality can be determined.

Exceptions overruled.

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GRAHAM v. BEAVER HILL COAL CO.

(Circuit Court, D. Oregon. February 24, 1905.)

No. 2,754.

**1. VENDOR AND PURCHASER—RESCISSION OF CONTRACT—USE AND OCCUPATION.**

Complainant, while in possession of certain land under contract of purchase, erected certain buildings thereon, which were occupied by defendant, and thereafter rescinded the contract and relinquished to the vendor all rights, issues, and profits theretofore arising from the land. Complainant then recovered from the vendor all moneys paid by him on the contract of purchase, with interest, and then sued defendant for use and occupation of such building. *Held*, that the profits derived from such use and occupation belonged to the vendor, and, he having demanded that defendant attorn to him therefor, complainant was not entitled to recover.

**2. SAME—ACTS OF AGENT—DEFENSES.**

Where the improvements for the use of which suit was brought had been constructed by complainant while he was manager of defendant, and paid for with defendant's money, the buildings so constructed, so far as complainant was concerned, were the property of defendant, for the use of which defendant was not liable to complainant.

E. B. Watson, for complainant.

Williams, Wood & Linthicum and J. S. Coke, for defendant.

BELLINGER, District Judge. This is a suit for an accounting for the use and occupation by the defendant of some 30 dwelling houses, four cabins, a store, garden house, carhouse, cattle yard and pens, and garden and pasture, for a period from the 3d day of December, 1897, to the 9th of April, 1902. It is alleged that the reasonable value of the use and occupation in question is \$17,464.36.

The averments of the answer are to the following effect: From

March 21, 1885, to April 9, 1892, Graham, the complainant, was in possession of the tract of land upon which the buildings in question were erected, under a contract with one Merchant, the owner, by which the latter agreed to convey said land to Graham upon certain payments stipulated as the price therefor. About April 9, 1902, the complainant rescinded the contract, and "relinquished and surrendered to Merchant all rights, issues, and profits theretofore arising from said land." Graham brought an action against Merchant, and recovered judgment for all moneys paid by him on the contract of purchase, with interest. During Graham's possession of the land in question, and prior to 1897, he was the general manager of the defendant company, and during such time he built, with the defendant's money, the dwellings and other buildings for the use and occupation for which the suit is brought. These improvements have been occupied from time to time by miners employed at the mine of the defendant and at the mine of the Beaver Coal Company, of which latter company Graham was also at the time manager, and the defendant has received as rents for such use various sums aggregating \$1,463.67. During a portion of the years 1898 and 1899, one W. W. Catlin was the receiver of the property of the defendant in a suit wherein said Graham was plaintiff and this defendant and others were defendants, and during such receivership such receiver rented the improvements referred to, to the Beaver Coal Company, at an agreed rental aggregating \$856.95. Graham was the manager of the latter company at the time. The receiver never, in fact, collected this rental. He recovered judgment therefor, but, because of the bankruptcy of the Beaver Coal Company, nothing was ever collected on the judgment. The answer further alleges that Merchant, the owner of the premises, has demanded that the defendant attorn to him for such occupation and use. It is also alleged that the complainant ought not to be permitted to assert any claim "for said alleged rents, issues, profits, or any other matters or things whatsoever happening or occurring prior to the 8th day of June, 1899, for that on said date said complainant, for good consideration, executed and delivered a written release to and in favor of this defendant, wherein and whereby he acknowledged full and complete satisfaction of all claims and demands which he then had or might claim to have against this defendant." The complainant excepts to the answer for insufficiency.

As stated in complainant's brief, "The rescission put an end to the contract, and the parties thereafter stood in the same relation to each other as they would if there had never been any contract between them." The property and its earnings belonged to Merchant, precisely as though no contract of purchase ever existed. To the extent that these earnings are in the form of a liability from those who have had the use of the premises, Merchant, as the person entitled to them, may compel payment to himself. The complainant, for all that appears, may be an irresponsible person, and it would be a remarkable procedure if a court of equity should lend its aid to him to collect what in fact belongs to Merchant,



contrary to the latter's wish and against his interest. If Merchant is satisfied to look to the defendant for the earnings in question, Graham's responsibility ceases, and he cannot complain. He can have no interest in compelling payment to himself, notwithstanding Merchant's willingness to look to the defendant for the rentals, unless he expects to collect what is due from the defendant and then plead the judgment in his action against Merchant in bar of Merchant's right to recover from him, and, of course, to such an expedient equity will not give its aid.

The fact that the improvements for the use of which this suit is brought were made by Graham while he was the manager of the defendant, and paid for with defendant's money, is a good defense. The buildings so constructed belonged, so far as Graham is concerned, to the defendant. Without a rescission of the contract of purchase between him and Merchant, the most that he could claim from defendant under such circumstances is the value of the use of the premises without the improvements.

The exceptions to the answer are overruled.

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**DERK P. YONKERMAN CO., Limited, v. CHARLES H. FULLER'S ADVERTISING AGENCY.**

(Circuit Court, N. D. Illinois. February 28, 1905.)

**No. 27,848.**

**1. FEDERAL COURTS—JURISDICTION—PARTNERSHIP—CITIZENSHIP.**

Where a declaration by a partnership organized under Comp. Laws Mich. 1897, c. 160, §§ 6079, 6089, providing for the organization of limited partnerships in joint-stock corporations, etc., alleged that plaintiff was such a partnership, organized as stated, having its principal place of business in K., and authorized to sue and be sued in the name of Y. Company, Limited, and that each and every member and partner of such association was a citizen of Michigan, such allegation sufficiently charged the citizenship of the parties comprising the firm to confer jurisdiction; such associations being quasi corporations.

[Ed. Note.—Averments of citizenship to show jurisdiction of federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 261; *Mason v. Dullaghan*, 27 C. C. A. 308.]

**2. SAME—PLEA IN ABATEMENT.**

Where a declaration in an action by a partnership averred that the members thereof were all citizens of the state of Michigan, the defendant was entitled to challenge such averment, under the Illinois practice, by plea in abatement, unless waived by pleading to the merits.

**3. SAME—ASSUMPT—MONEY RECEIVED.**

An original declaration contained ordinary common counts on promises, after which complainant filed an amended declaration alleging the employment of defendant as plaintiff's advertising agent under an agreement to pay defendant the actual cost price of such advertising, and 10 per cent. additional as compensation, and alleged that defendant fraudulently rendered false accounts of the cost of advertising inserted, and that plaintiff, being wholly ignorant thereof, overpaid defendant large sums of money sued for, which defendant unlawfully withholds from plaintiff,

and for which it refuses to account. *Held*, that the averment of fraud in the amended declaration should be disregarded as immaterial, and that both declarations therefore stated a similar cause of action to recover money under a quasi contract.

Charles C. Gilbert, for plaintiff.

Arthur W. Underwood, for defendant.

SANBORN, District Judge. Demurrer to amended declaration. Plaintiff is a partnership association organized under chapter 160, Comp. Laws Mich. 1897, §§ 6079 to 6089. Such associations are legal entities, and are quasi corporations, controlled by the law applicable to corporations rather than partnerships. *Staver, etc., Mfg. Co. v. Blake* (Mich.) 69 N. W. 508, 38 L. R. A. 798; *Rouse, Hazard & Co. v. Detroit Cycle Co.* (Mich.) 69 N. W. 513, 38 L. R. A. 794.

The amended declaration alleges that the plaintiff is a partnership association organized as above stated, having its principal place of business in the city of Kalamazoo, and authorized to sue and be sued under the name of Derk P. Yonkerman Company, Limited, each and every member and partner of which partnership association is a citizen of the state of Michigan. This allegation is challenged by the demurrer on the ground that it does not properly state or set forth the citizenship of the parties, and that it appears that the plaintiff is a partnership composed of more than one person, and none of such persons is made a party to said suit, or named in the declaration, or either count thereof. If the name of the partners had been given in the declaration, there could be no question of the sufficiency of this allegation to show jurisdiction. While it is usual to give the names of the parties whose citizenship is alleged, as in *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 479, 20 Sup. Ct. 690, 44 L. Ed. 842, yet as stated by Judge Caldwell in *Carnegie, Phipps & Co., Limited, v. Hulbert*, 53 Fed. 10, 3 C. C. A. 391, "when a copartnership sues, the citizenship of the parties composing it must be averred, and must be such as to confer the jurisdiction." No reason is perceived why the allegation is not sufficient, since the averment is express that each and every member and partner of the plaintiff association is a citizen of the state of Michigan. *Thomas v. Board of Trustees*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. —. In the *Great Southern Hotel Case* it is said, "It was necessary to set out the citizenship of the individual members of the partnership association which brought this suit." While it is not sufficient to aver that a company or association is a citizen of a particular state, an additional averment that it is a corporation being necessary, yet this rule does not seem to extend to the case of an individual.

The defendant may challenge the averment that the members of the association were not at the beginning of the suit citizens of Michigan by plea in abatement, under the Illinois practice. In states which have adopted the Code of Civil Procedure, such allegation may be challenged by general or special denial in a plea to the merits, but under the common-law system of procedure all pleas in abatement to the jurisdiction are waived by pleading to the merits. *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; *Southern Pacific Co. v.*

Denton, 146 U. S. 209, 36 L. Ed. 377, 13 Sup. Ct. 47; Mexican Cent. Ry. v. Pinkney, 149 U. S. 206, 37 L. Ed. 704, 13 Sup. Ct. 864; Greene v. Tacoma (C. C.) 53 Fed. 563; Jones v. Rowley (C. C.) 73 Fed. 288.

To the point that a plea in abatement is waived by pleading to the merits, as a general rule, see *Allen v. Watt*, 69 Ill. 655; *Lindsay v. Stout*, 59 Ill. 491; *Hawkins v. Albright*, 70 Ill. 87; *Thomas v. Lowy*, 60 Ill. 512.

A further ground of demurrer is that the amended declaration is framed as an action of trespass on the case, while the original proceeding was an action of trespass on the case upon promises. The original declaration contained the ordinary common counts on promises. The amended declaration states an agreement by which defendant was to become plaintiff's advertising agent. Defendant was to cause to be inserted in divers newspapers and magazines advertisements at the lowest prices which could be obtained. The plaintiff agreed to pay the defendant the actual cost price for such advertising matter, and 10 per cent. additional as compensation. It is further alleged that the defendant procured to be inserted such advertising matter in numerous papers and magazines, and rendered plaintiff accounts therefor at the end of each month during the advertising period, and that it was the duty of the defendant to obtain the lowest possible prices, and truly state the same in said accounts, but the defendant, disregarding its duty in that behalf, did not state the true prices for the advertising matter, but, on the contrary, falsely and fraudulently, and with intent to deceive and defraud the plaintiff, rendered false, fraudulent, and fictitious accounts, well known to the defendant to be false, fraudulent, and fictitious; the plaintiff being wholly ignorant of the true prices, and relying on the statements and accounts rendered by the defendant. Under these circumstances it is alleged the plaintiff overpaid the defendant large sums of money, being not less than \$10,000, which the defendant unlawfully withholds from the plaintiff, and for which it refuses to account. I think the averment of fraud is entirely immaterial, and that the suit is an action on the case in assumpsit to recover the amount of the overpayments alleged to have been made. In effect, the declaration alleges benefits to the defendant paid by the plaintiff in ignorance of the true situation. This would give the plaintiff the right of recovery quasi ex contractu, whether or not the defendant acted fraudulently. Even where money or goods have been wrongfully taken from the plaintiff, so that an action of tort would lie, yet, in all cases where the defendant has received the benefits of the transaction, either by sale or retention of the property converted, or in some other manner, the plaintiff has the election to waive the tort and sue in assumpsit. *Horne v. Mandelbaum*, 13 Ill. App. 607; *Morrison v. Rogers*, 3 Ill. 317; *Kellogg v. Turpie*, 93 Ill. 265, 34 Am. Rep. 163; *Johnston v. Salisbury*, 61 Ill. 316. See, also, *Carter v. White*, 32 Ill. 509; *Willenborg v. I. C. R. R.*, 11 Ill. App. 302; *Sherburne v. Tobey Furniture Co.*, 19 Ill. App. 619.

There are two further grounds of demurrer, to the effect that the remedy is solely in equity, and that the declaration is obnoxious to the statute of frauds. The above considerations seem to dispose of both

of these grounds of demurrer against the defendant. Defendant may, if so advised, plead specially in abatement to the jurisdiction or to the merits, and the ordinary rule to plead over will be entered.

Demurrer overruled.

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THE CHELSEA.

(District Court, S. D. New York. March 4, 1905.)

**COLLISION—STEAMER AND SCHOONER MEETING—EXCESSIVE SPEED IN FOG.**

A steamer held in fault for a collision with a schooner in Long Island Sound in a fog because of her excessive speed of 10 knots, and her change of course after the schooner was seen on nearly a meeting course. The schooner held not chargeable with contributory fault, although her speed was about six knots, it appearing that the fog was not thick where she was, and that she was reducing sail as she entered the dense fog.

[Ed. Note.—Collision rules—Speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

In Admiralty. Suit for collision.

Peter S. Carter, for libellants.

Carpenter, Park & Symmers, for claimant.

ADAMS, District Judge. This action was brought by C. W. Crane & Company, as managing owners of the 3 masted schooner A. P. Emerson, to recover from the steam-propeller Chelsea, the damages caused to the schooner by a collision which happened between the vessels in Long Island Sound, about  $\frac{3}{4}$  of a mile southwest of Execution Rock Light, about 7 o'clock in the evening of the 8th day of April, 1904. The tide was ebb.

The schooner was 125 feet long and 29.6 beam and bound to New York from St. John, New Brunswick, with a load of lumber, partly on deck. She was sailing free, with her booms on the starboard side. At the time of the collision, she had all her lower sails set, consisting of a spanker, mainsail, foresail, fore head sails, fore stay-sail, jib, flying jib and outer jib. The topsails were furled as the schooner was passing Execution Light and the last of them was being clewed up when the lights of the steamer were first seen. When in the vicinity of the collision the schooner was steering a S. W. course. The wind was about North-east by East or East North-east. It is claimed by the schooner that she was sailing just before the collision, at the rate of  $4\frac{1}{2}$  or 5 knots, the weather being rainy and nasty but lights easily seen. The master was at the wheel and a lookout duly stationed forward. A Hell Gate Pilot and his son were also on deck. Her proper lights were set and burning. It is also claimed by the schooner, that the Chelsea's masthead light appeared shortly before the collision, about  $\frac{1}{2}$  or  $\frac{3}{4}$  of a point on her starboard bow; that the steamer's green light then appeared and subsequently red so that at the time of the collision, she was showing both. The schooner was struck by the steamer's stem on the starboard side forward of the fore rigging. The schooner commenced to sound fog signals when in the vicinity of Execution Light.

The Chelsea was a screw propeller 144 feet long, bound from New York to New London and Norwich, Connecticut, laden with freight and carrying passengers. Her ordinary speed in still water was about 10 knots. She claims that a few minutes after passing Stepping Stones she met with fog, and there changed her course to N. E.  $\frac{1}{4}$  N. to pass Execution Light; that a few minutes later, it shut in thick and she commenced to blow fog signals. No change was made from full speed and she was going according to the master's estimate, at the rate of 8 knots, when the lookout reported a whistle or horn forward, which the master told him must be Execution Light, on account of its being long drawn out. A few seconds afterwards the lookout reported again that he thought he heard 3 whistles, 3 horns, on the starboard bow. The master looked but did not see anything and kept his course. In a few seconds, both lights of the schooner appeared, about half a point to the starboard and the master ordered the steamer's wheel to starboard, which order was obeyed to the extent of two spokes, when the schooner's green light disappeared to the steamer and the red came out plain. The master then ordered the steamer's helm to be ported and just at that time the red light commenced to disappear and a bell was given on the steamer to slow and suddenly the green light showed up and the steamer gave three bells and a jingle. The master estimates that when the lights were first seen they were about 1200 feet away but elsewhere says that he could see lights or objects on the water  $\frac{1}{2}$  or  $\frac{3}{4}$  of a mile away. The schooner was struck on the starboard bow. It is estimated that the steamer at the time of collision had been reversing about 50 seconds, with the effect of bringing her quick water forward to the gangway about 35 feet aft of the stem. The steamer was loaded by the stern so that she drew there 11 feet while only drawing  $6\frac{1}{2}$  forward. The master explains the retention of full speed by the necessity of keeping the time of the run from Stepping Stones to Execution Light and because, trimmed as she was, she would not steer very well if slowed down.

The steamer's master admitted that he knew from the whistles he heard, that there was a sailing vessel coming towards him with a fair wind. There is no serious contention about the steamer's faults in several respects, principally in proceeding at full speed in a fog, which is claimed to have been dense, but an apportionment of the damages is sought, because of the schooner's speed, which, it is contended by the steamer, was at least 6 or 7 knots per hour, which rate in fog has been condemned by the authorities.

The speed of the schooner is therefore the only point that requires consideration.

The master of the schooner testifies that the fog signals were commenced on the schooner when she was two or three miles E. N. E. of Execution Light; that the fog then began to shut down and the signals were started; that he began to take in topsails at Execution Light and had them all in but not hauled snug to the masthead at the time of collision; that at Execution Light it was quite thick and he hauled to the South-west to get into the chan-

nel, which gave the wind a better hold on his sails and sent the vessel a little faster forward. He afterward said it lightened up a little off Execution Light, so that he could see at least a mile away. It appears that a log had been kept by the mate, who was examined out of court for the libellant, and this was called for by the claimant but not produced, because the master claimed it had been destroyed, with other papers, by water getting into his cabin from the collision, but the master's testimony differs from the mate's and is somewhat to be doubted in this respect, at least. The mate testified that the entries concerning this occurrence were made in the morning of the next day. He also said that the schooner was making 7 or 8 knots when Sands Point was abeam. The lookout estimated the speed at 6 knots. The Hell Gate Pilot, who went aboard at a point opposite Eatons Neck, estimated the speed at not over 5 miles, and at time of collision not over 5 knots, from 5 to 6 miles. He describes the weather misty and foggy, "not exactly foggy but mist with a fog, just coming on to be foggy." The light keeper at Execution Light testified that when the Emerson passed he saw her plainly and with glasses could read her name; that at the time he could see Sands Point Light  $\frac{7}{8}$  of a mile away and other lights in the vicinity; that after she passed by him she went into the fog, possibly  $\frac{1}{4}$  of a mile away, and was shut out from his view; that before the Emerson went by, he started his fire to get up steam for the fog whistle kept there, which he started at 7:15 o'clock.

It appears by the chart that Eatons Point Light on Eatons Neck, is about 20 nautical miles from Execution Light and as the collision occurred a little to the westward of the latter and the schooner passed the former about 4 o'clock, a speed of something over 6 knots appears. At the time of collision, the schooner was still carrying all of her lower sails and as they were receiving some benefit from the change of course at Execution Light, it may safely be assumed that when the vessels came together, the schooner was going as much as 6 knots.

The question to be determined is whether the schooner under the circumstances was in fault for excessive speed. The claimant so contends, citing several cases where such a rate in a fog has been held to be condemnatory. The difficulty with the steamer's contention is, that she assumes the schooner to have been sailing in a dense fog. The preponderance of the testimony is to the effect that the schooner was not sailing in such a fog. She was doubtless sailing into the one of that character in which the steamer had been navigating, but the schooner had not reached the dense part at the time of collision. The testimony indicates that the steamer was coming out of it. Probably the schooner, in the exercise of greater precaution, should have reduced sail before she did, but her action in this respect is not so obviously negligent as to involve her in the responsibility for the collision, which can be fully accounted for by the steamer's plain faults.

The steamer was on a course which would have carried her safely clear of the schooner, starboard to starboard, and she starboarded

her wheel slightly to give further margin. She suddenly, however, changed because the steamer's master said the schooner, after showing both her lights, about  $\frac{1}{2}$  point to the starboard, changed to the red alone, when he ported. Then, he says, the red commenced to disappear and the green showed up, when he gave stopping and reversing bells. The testimony for the schooner, however, shows that she did not change her course, which seems to be true in this respect. The schooner not changing, why the steamer should have made her last change is not apparent, unless it was to avoid another schooner, which was sailing in the same direction as the Emerson, on her starboard side.

Under all the circumstances, I do not consider it a case in which the schooner should be held as a participant in the negligence, which caused the damages.

Decree for the libellant, with an order of reference.

LATHROP-SHEA & HENWOOD CO. v. PITTSBURG, S. & N. R. CO. et al.

(Circuit Court, W. D. New York. March 7, 1905.)

**FEDERAL COURTS—REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.**

Where, in an action against a railroad and a construction company for services under a contract made between plaintiff and the latter, the citizenship of the construction company only was diverse, and plaintiff alleged in a single cause of action that he performed services and furnished material for the railroad company, and that the construction company acted as agent of the railroad company, and sought to recover against defendants jointly, the complaint did not allege a separable cause of action, and the action was not, therefore, removable.

[Ed. Note.—Separable controversy, ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

Motion to Remand Action to the State Court.

Bushnell & Metcalf, for plaintiff.

C. Walter Artz, for defendant Interior Construction & Improvement Company.

HAZEL, District Judge. The facts, stated in a few words, are as follows: The plaintiff, a domestic corporation, brings this action to recover on contract against the Pittsburgh, Shawmut & Northern Railroad Company, a domestic corporation, and the Interior Construction & Improvement Company, a corporation organized under the laws of the state of New Jersey. The action was originally instituted in the state court by personal service of the process upon the defendant railroad company, and by substituted service upon the defendant construction company. Thereupon a motion was made in the state court to set aside the substituted service, which was denied. This decision being affirmed on appeal by the Appellate Division (91 N. Y. Supp. 1101), the defendant construction company removed the action to this court under the act of March 3, 1875, c. 137 (18 Stat. 470), as amended by act approved August 13,

1888 (25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 507]), on the ground that it is a separable controversy, wholly between citizens of different states. This proposition is controverted by the plaintiff. The complaint in one cause of action substantially alleges that plaintiff performed services and furnished materials for the railroad company, though the contracts for such services, etc., were made with the defendant construction company, which acted as agent for and representative of the railroad company. This is an action at law, and hence the rules of pleading in force in the courts of the state of New York are binding upon this court. As indicated in the complaint, the plaintiff in a single cause of action has elected to pursue its remedy against the defendants jointly. A joint recovery is demanded, the contention being either that the contracts in suit were binding upon both defendants or upon the railroad company alone or upon the construction company alone. The case of *Tew v. Wolfsohn*, 174 N. Y. 272, 66 N. E. 934, recently decided by the Court of Appeals, is strongly analogous. In that case a joint recovery for breach of contract was sought by the plaintiff against the defendants, who were husband and wife. A demurrer to the complaint was interposed by the husband on the single ground that several causes of action were improperly joined in the complaint. It was held through O'Brien, J., that as it was alleged in the complaint that the defendants entered into a contract the complaint was not demurrable, although it appeared from the body of the pleading that the husband conducted the business as agent for the wife. The pith of the complaint was that the husband pretended to conduct the business in his own behalf without disclosing his said wife as principal. There was much discussion upon the point that the wife was an undisclosed principal and joint recoveries could not be had; but that fact, in the opinion of the court, did not change the legal effect of the allegation that the husband acted merely as agent. The court used this language:

"It was quite possible and competent for the husband when making the contract to bind himself and his wife jointly. In that case there would be but one contract and but one cause of action, and possibly that was the theory upon which the learned counsel for the plaintiff constructed the complaint. It may be that he will not be able to establish such a contract at the trial. But the question here is whether such a contract is not stated on the face of the complaint."

This principle would seem to hold good in this case. As already indicated, the plaintiff has selected his forum, and his complaint in a single cause of action evidently proceeds upon the theory that both defendants are bound by the contracts entered into between the plaintiff and the construction company. The plaintiff being entitled to one recovery only, it is quite probable that an election of parties defendant may be necessary, but this need not be done until the close of the case. *Tew v. Wolfsohn*, 77 App. Div. 454, 79 N. Y. Supp. 286. Under these circumstances the complaint does not disclose a divisible controversy, and the motion to remand must prevail. *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 523; *Louisville & Nashville Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; *Little et al. v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269.



The cause of action is remanded to the state court. The motion to dismiss the substituted service of process, heard at the same time, is denied. So ordered.

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**FIRST NAT. BANK OF BALTIMORE v. TERRY.**

(Circuit Court, E. D. Pennsylvania. March 18, 1905.)

No. 87.

**SURETYSHIP—CONTRACT—FRAUD—ENFORCEMENT.**

Where, in an action on a contract securing certain corporate indebtedness, defendant, a stockholder, alleged that he was induced to sign such contract by false and fraudulent representations made in plaintiff's presence by the president of the corporation with reference to its solvency and ability to pay debts, and that plaintiff, well knowing such representations to be false and fraudulent, stood by in silence, and permitted defendant to be induced to sign such agreement for plaintiff's benefit, such allegation stated a defense to the action.

Dismissing Rule for Judgment for Want of a Sufficient Affidavit of Defense.

Wm. Y. C. Anderson and Wm. Jay Turner, for plaintiff.  
Hampton L. Carson, for defendant.

HOLLAND, District Judge. On February 5, 1901, the Blue Mountain Iron & Steel Company, of which the defendant was a large stockholder, was indebted to the plaintiff in the sum of \$12,000, with interest thereon from October 22, 1900, and there was pending and undetermined in the superior court of Baltimore City a suit by said plaintiff against said Blue Mountain Iron & Steel Company for the recovery of said indebtedness. On said date an agreement in writing was entered into by and between said Blue Mountain Iron & Steel Company, as party of the first part, Charles R. Elliott and Henry C. Terry, the defendant, as parties of the second part, and the plaintiff, as party of the third part, wherein it was provided that the pleas theretofore filed by said Blue Mountain Iron & Steel Company in said suit in the superior court of Baltimore City should forthwith be withdrawn, and the aforesaid indebtedness be liquidated by the payment of \$500 upon the delivery of said agreement and further payments of \$500 at consecutive intervals of 30 days until the full debt, with interest and costs, should have been paid; the parties of the first and second parts to said agreement obligating themselves jointly and severally to make said payments, and authorizing the plaintiff to enter judgment in said suit upon the failure of said parties to make said payments or perform the other stipulations of said agreement. By November 7, 1901, there was paid upon this agreement by Elliott \$500 and by Terry \$4,500. The balance was \$7,000, which, with interest to date, is \$7,667.11, after which date nothing was paid on account of this agreement either by Elliott or the defendant Terry, except the cost in obtaining judgment in Baltimore against the steel company, which was paid by

Terry on March 12, 1902. He also paid the interest on that judgment to April 1, 1903, since which time neither the defendant nor Elliott nor the steel company has paid anything to the plaintiff on account of either the judgment in Baltimore or interest thereon. At the time the agreement was executed by Elliott and Terry to the plaintiff in this case, Elliott was president of the steel company and Terry was a stockholder. Suit was brought against Terry on his agreement with plaintiff, and, among other things, he sets up in his affidavit of defense:

"That the defendant was induced to sign the agreement upon which this suit is brought by reason of certain false and fraudulent representations verbally made to the defendant by Charles R. Elliott, one of the parties to the agreement, said statements being made in the year 1901, at and before the signing of the agreement and in the presence of the plaintiff. That said representations were that the said Blue Mountain Iron & Steel Company was then possessed of sufficient assets under all circumstances to pay all its debts, including the debt due by it to the plaintiff in the present action; whereas in truth and in fact the said company was not possessed of sufficient assets to pay its debts, including the debt due by it to plaintiff in the present action, but was insolvent, and utterly unable to pay its debts. That the said Charles R. Elliott knew that the said statements and representations were false and fraudulent at the time that the same were made, and made the said statements in order to induce the defendant to sign the agreement; and the defendant, relying upon said false and fraudulent representations, and believing the same to be true, signed the agreement. That said false and fraudulent representations were made by the said Charles R. Elliott with a knowledge of their falseness, and were made in the presence of the plaintiff, and the plaintiff well knew at that time that the said representations were false and fraudulent, and that they were made with intent to deceive the defendant, and to induce him to sign the agreement; and that, but for the defendant's belief in the truth of the said false and fraudulent representations, the defendant would not have executed the contract; and the plaintiff, at the time of the execution of said agreement attached to its statement of claim, fraudulently suppressed and concealed from the defendant its knowledge of the false and fraudulent character of said representations, which were made for the purpose of inducing the defendant to sign the said agreement, and which said agreement was for the further advantage and protection of the plaintiff, the plaintiff knowing full well that, had it informed the defendant of the false and fraudulent character of the said statements, the defendant would not have executed the said agreement. That it permitted the said defendant to act upon said false and fraudulent representations because it would gain an advantage thereby, in that the defendant would sign the said agreement."

The plaintiff in this case stood by in silence, and permitted the defendant, by false and fraudulent representations on the part of the president of the steel company, to be induced to sign an agreement for plaintiff's benefit, and at the time, as alleged in the affidavit of defense, the plaintiff knew these representations to be false. If this defense be established, it is a bar to a recovery. Among the numerous authorities for this proposition, the case of *Hartranft v. Fussell*, 180 Pa. 552, 37 Atl. 1118, is cited as almost identical with the case at bar.

The rule for judgment for want of a sufficient affidavit of defense is dismissed.

In re SHULTS et al.

(District Court, W. D. New York. March 1, 1905.)

No. 1,512.

**1. BANKRUPT—CLAIMS—TRANSFER.**

Where one indebted to a bankrupt firm on certain notes took an assignment of a certificate of deposit issued by the bankrupts to his wife, which he claimed as an offset against his indebtedness, the burden was on him to show that the certificate was transferred before the bankrupts suspended payment, and without knowledge of their insolvency.

**2. SAME—REFEREE—FINDINGS—CONCLUSIVENESS.**

The findings of a referee in bankruptcy as to the date of a transfer of a claim against the bankrupt's estate will not be disturbed on petition to review, unless manifestly against the weight of the evidence.

**3. SAME—EVIDENCE.**

A referee's finding that a claim against a bankrupt's estate was transferred by the claimant to her husband, with knowledge of the bankrupt's insolvency, for the purpose of enabling the husband to set it off against an indebtedness to the bankrupt, *held* sustained by the evidence.

In Bankruptcy.

See 132 Fed. 573.

C. W. Stanton, for petitioner.

H. V. Pratt, for trustee.

HAZEL, District Judge. The petitioner, P. J. Rocker, has filed a claim in the sum of \$1,944.61 against the bankrupts, who, for some years prior to their adjudication in bankruptcy, were engaged in the business of private bankers. The claim is chiefly made up and based upon a certificate of deposit issued by said bankrupts on April 17, 1903, for the sum of \$1,938.27, payable to the order of M. Lizzie Rocker, wife of the claimant. The petitioner claims to hold said certificate by reason of a transfer to him by his wife, and that it is a legal set-off against an indebtedness of \$1,555, which he owed to the bank at the time it closed its doors, on five promissory notes made by him.

The solution of the questions presented concededly depends upon whether the testimony of the petitioner and his wife regarding the time of her transfer to him of the certificate of deposit is to be believed. The referee, basing his conclusions upon the evidence, found that such transfer was made after the bank suspended payment, and with knowledge of the insolvency of the bankrupts. Assuming these facts as found by the referee, the disallowance of the petitioner's claim was admittedly proper. The petitioner, however, contends that important errors were made by an inexperienced stenographer in taking the testimony or in transcribing the stenographic notes. No special attention need be directed to this point, for it appears that, after the decision was rendered, a rehearing was had before the referee, both sides being heard, and some corrections were made in the testimony. Subsequently the referee reaffirmed his conclusions upon the facts, and hence the petition for review by this court.

The referee plainly stated in his report that he disregarded the testimony of the claimant upon the disputed point, and it is evident that

he gave no probative force or weight to the asserted corroboration by his wife. From his standpoint, a fair deduction from the record establishes that the transfer of the certificate mentioned was a subterfuge to enable the claimant to offset the same against his liability on certain notes held by his relatives, the bankrupts. Irrespective of the petitioner's testimony at the earlier hearing that the transfer was made a few weeks before the closing of the bank, and the alleged subsequent change in his testimony as to the time of transfer, there was such evident indefiniteness in his declarations that a comparison of the same with the testimony of his wife was justified. Her testimony tended to show that the transfer was made in May, and for the sole purpose of paying a \$500 note upon which she was indorser. The note referred to, however, was renewed in the following month of June. The inference that the transfer of the certificate was after the renewal in June is irresistible. The burden of proof rested upon the claimant, and though, as a general rule, the referee would be bound by the positive uncontradicted evidence of the petitioner, still if in his judgment such testimony was so indefinite and his statements so conflicting as to raise doubts of the petitioner's sincerity, then he was justified in disbelieving and disregarding such discredited testimony. The cases hold that a referee must exercise sound judicial discretion in disposing of questions of fact, and his conclusions ordinarily will not be disturbed unless manifestly against the weight of evidence. Such is not the showing here. The question considered was peculiarly within the province of a court who had the important advantage of hearing the witnesses and observing how their testimony was given, thus enabling him to base his conclusions upon the impressions received at the time of giving testimony. This principle clearly appears in *Kavanagh v. Wilson*, 70 N. Y. 177; *Quock Ting v. U. S.*, 140 U. S. 417, 11 Sup. Ct. 733, 35 L. Ed. 501. Moreover, the petitioner and his wife are not disinterested. The claimant is the son-in-law of Catherine Shults, and brother-in-law of Rose Mark, the bankrupts. Under the circumstances of this case, the referee was not bound to adopt the statements of the petitioner and his wife as to the time when the transfer of the certificate was made. His conclusion that it was after the bank closed its doors was sufficiently supported by the circumstances.

The questions submitted for review are answered in the affirmative.

## DENNISON MFG. CO. v. SCHARF TAG, LABEL &amp; BOX CO.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1905.)

No. 1,338.

**TRADE-MARKS—SERIES OF NUMBERS USED TO DESIGNATE STYLE OF GOODS—UNFAIR COMPETITION.**

Series of numbers used by a manufacturer of labels in its catalogues and in connection with its corporate name on the boxes containing its labels, not primarily to indicate origin, but to designate the color, shape, and size of the label, each kind being given a different number, do not in themselves constitute good trade-marks, and such manufacturer is not entitled to an injunction to restrain the use of the same numbers in the same way and for a similar purpose by another in connection with its own name, either on the ground of infringement of trade-mark or of unfair competition, there being no attempt to deceive in dress or style of package, and the labels themselves being such as it is open to any one to make.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trademark Names, §§ 9, 22, 74, 82, 83.]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lar. v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is a second appeal. The former was from a decree sustaining a plea of res adjudicata and dismissing the bill. That decree we reversed for reasons appearing in our opinion reported under same style in 121 Fed., at page 813 et seq., 57 C. C. A. 9. When the case was remanded the defendant filed a demurrer. This was irregular after the former plea. But no objection was made below and no error assigned here.

Briefly, the object of the bill is to restrain the defendant company from using a certain series of numbers in connection with the sale of a series of labels for jars and bottles, upon the ground that their use by the defendant constituted an infringement of complainant's exclusive right in said numbers in connection with the sale of such labels as valid common-law trade-marks, and also because, whether technical trade-marks or not, their use by the defendant in connection with labels like those made and sold by complainant constituted unfair competition. The demurrer interposed went upon the ground that no case was stated for relief upon either ground of the bill.

Both complainant and defendant are makers of labels and tags. One class of labels made by complainant are intended for use on jars and bottles. They are made in many styles and sizes. One such class has a red border and is made in seven sizes or shapes. These are designated by a series of numerals, namely 2,001, 2,002, 2,003, 2,004, 2,005, 2,006, and 2,007. Their size, shape and color are shown by a page from complainant's catalogue here set out.<sup>1</sup>

It is charged that defendants make and sell labels of a like kind and use the same series of numbers in connection with their sale. Touching the purpose for which complainants have used this series of numbers the bill avers "that its said numbers, all and singular, have been used and availed of in the same way from the first, each number having been continuously and always employed in connection with a label having a red border and of a particular size and shape, and that each number has continuously and always, in addition to giving notice of and indicating the origin of the label

<sup>1</sup>The red border is printed in black ink in the exhibits herewith.



2001



2002



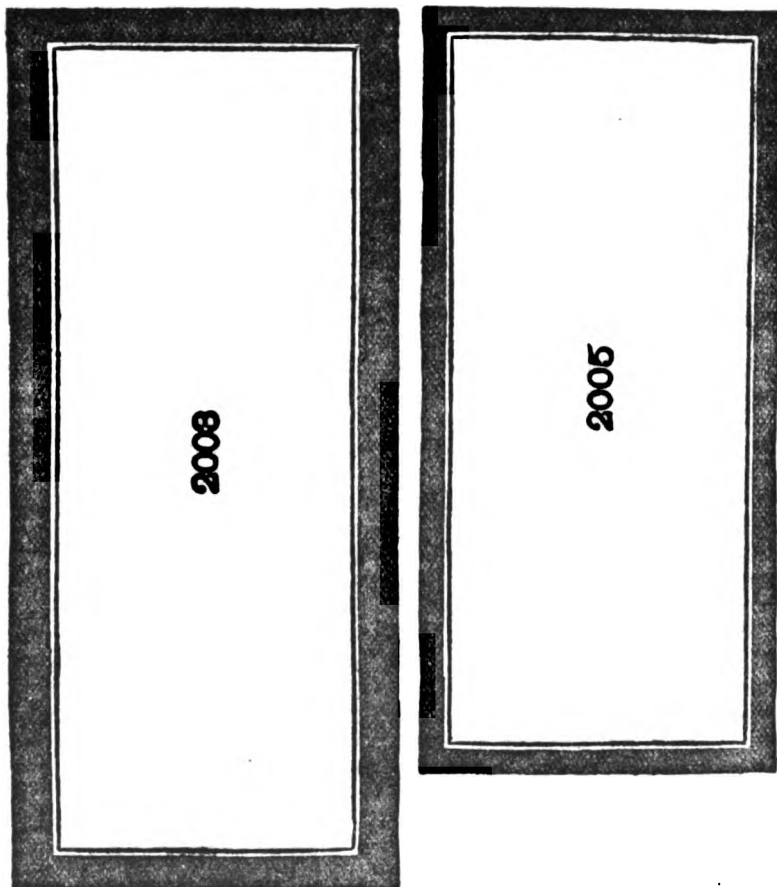
2006



2004



2007



as being your orator's manufacture, given notice of and indicated the color of border, size, and shape of the label."

The double use thus averred is illustrated by the next paragraph of the bill, where it is averred: "That in the purchase and sale of its said labels the different numbers aforesaid indicating origin, color of border, size, and shape have been and are used by consumers and the trade. For instance, a consumer desiring a 'Dennison' label having a red border and of particular size and shape will make use of the designation '2.001,' and a consumer desiring a 'Dennison' label having a red border and of another size and shape will ask for and use the expression '2.002,' and so on as to all the other numbers hereinbefore mentioned and referred to as your orator's numbers and trade-marks. And your orator further says that it is and has long been a custom, for many years observed, for each manufacturer of labels like those hereinbefore mentioned, as well as each manufacturer of steel pens, pencils, buttons, ornamental nails, and other articles which are necessarily made in a great many different sizes, shapes, and styles, to prepare and use as his trade-marks or designations a series of numbers or marks in the way in which your orator's said numbers or marks have been by it used, as hereinbefore explained, which custom had its origin in the necessities of trade, and has been and is of essential and fundamental importance, and

which has long been an established custom and observed in the trade to which the labels of your orator and those of the defendant appertain." Though not clearly stated, it is inferable that those numbers do not appear upon the labels themselves, but only upon the outside of packages containing them and in illustrated catalogues. That the seven numbers here involved do not comprise all of the numbers used and claimed as trade-marks is made evident by an averment that many other numbers are claimed to distinguish and identify other of its labels and tags in addition to those here in issue, and that its rights in respect of such other numbers is not waived by limiting its bill in this case to a particular set of numbers.

Archibald Cox, for appellant.

James Whittimore, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Combined with a name, a word, or some other sign or symbol a numeral may well become a vital part of a valid trade-mark. This is as far as the cases cited by appellant actually go. Boardman v. Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270; Lawrence Mfg. Co. v. Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 362; Shaw Stocking Co. v. Mack (C. C.) 12 Fed. 707, 712; Humphreys Specific Co. v. Wenz (C. C.) 14 Fed. 250; Gillott v. Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553; Humphrey's Specific Co. v. Hilton (C. C.) 60 Fed. 756.

But the contention here is not for a numeral in connection with a sign, symbol, or word, but for a bare numeral. Neither do the complainants limit their claim to one number as an arbitrary sign signifying origin, but for a multitude of numbers, where each number is used only in connection with a particular article of manufacture. A trade-mark must be designed and used to give notice of origin or ownership.

In Deering Harvester Co. v. Whitman & Barnes Co., 91 Fed. 376, 380, 33 C. C. A. 558, we said:

"The essential thing is that it shall be designed and used to indicate the origin of the article, and that all articles having the same mark come from a common source."

It must, by its own intrinsic qualities or by association, point distinctly to the origin or maker of the thing to which it is applied, and if it does not do this it falls short of the purpose of such a short trade-name. "The reason of this is," said the court in Canal Co. v. Clark, 13 Wall. 311, 323, 20 L. Ed. 581, "that unless it does neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived." Mfg. Co. v. Trainer, 101 U. S. 51, 54, 25 L. Ed. 993. See, also, Mill Co. v. Alcorn, 150 U. S. 460, 463, 14 Sup. Ct. 151, 37 L. Ed. 1144.

By long use numerals have come primarily to be signs of descriptions, and when designed to indicate origin they have, so far as the reported cases go, been used in connection with a name, or word, or some arbitrary or fanciful sign or symbol, or have been printed in some peculiar style or form distinguishing it from ordi-



nary numerals. *Humphreys Specific Co. v. Hilton* (C. C.) 60 Fed. 756; *Browne, Trade-Marks*, § 225. Thus, in *Kinney v. Allen*, 1 Hughes, 106; s. c., 14 Fed. Cas. 608—the numeral symbol “½” printed in large, bold red characters, in a certain form and style, was held entitled to protection as a trade-mark when so printed, but that the same numeral printed in ordinary manner was not an infringement.

In *Humphreys Specific Co. v. Wenz* (C. C.) 14 Fed. 250; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270; *Lawrence Mfg. Co. v. Lowell Co.*, 129 Mass. 325, 37 Am. Rep. 362; and *Shaw Stocking Co. v. Mack* (C. C.) 12 Fed. 707—the trade-mark protected was a number in combination with other words, signs, or symbols, the numeral being only a part of the general design.

*Gillott v. Esterbrook et al.*, 48 N. Y. 374, 8 Am. Rep. 553, comes nearer supporting the contention that a bare number is capable of being a valid trade-mark than any other case to which we have been cited. Yet the case is far from going to such an extreme. The case belongs rather to the line of unfair competition cases than to the technical trade-mark cases. The numeral “303” stamped on Gillott’s pens was, said the court, “selected and used by the plaintiff as his trade-mark, to indicate, in connection with his name, the origin and ownership of the said pens so manufactured by him, and not to designate their quality merely, and that the defendants, by the adoption thereof, have done it in fraud of his rights, and the plaintiff, upon all the facts found by the judge, was entitled to the injunction granted.” Now, the facts found were that the Gillott pen was of peculiar style or pattern, on which was impressed the number 303, and the words “Joseph Gillott, Extra Fine.” These pens were put up in black paper boxes holding one gross each, on the top of which was a label, in the center whereof is the plaintiff’s name in larger letters than either prints thereon, and above the name is No. (meaning number), and below it in large and conspicuous type are the said numerals 303. The court found that the pen made by the defendant “in size, shape, color, pattern, flexibility, and firmness of point so closely resembles the said pen of the plaintiffs as to require an expert to distinguish them in those respects.” And that defendants had also “impressed upon their pen the said numerals 303, and the name of the defendants’ firm, Esterbrook & Co., and the same words, “Extra Fine,” as upon the said pen of the plaintiff. It was also found that the defendants put their pens in boxes similar in design and print as that of the plaintiff, and that on the bottom of the box was the word “Caution,” as upon the box of the plaintiff. Thus it is apparent that there was a close imitation of the pen, marking, package, and label of the plaintiff, the name of the defendant alone distinguishing the product. Upon this showing we can readily understand why the New York Commissioners of Appeals might agree that “upon all of the facts found” the plaintiff was entitled to his injunction. But in the case before us the plaintiff’s name is not used in connection with a number, or, if so, it is only used upon the outside of packages containing

blank labels; for the label itself, being such a label in size, color, and form as was open to anybody to make, contains neither a name nor a number.

We may also, from the language of the bill and admissions of counsel at the bar, infer that the defendant only uses the same numbers on the outside of packages and in catalogues in connection with its own corporate name. Thus we are confronted with the question whether plaintiff is entitled to protection against defendant's use of a bare number, when used in connection with its own corporate name.

The difficulty of using bare numbers for the purpose of pointing out the origin of the article to which they are attached has been more than once observed. *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270, and *Lawrence Mfg. Co. v. Lowell Mills*, 129 Mass. 325, 327, 37 Am. Rep. 362. But if it be difficult to give to a bare number the office of pointing out distinctly the origin of the article to which it is attached rather than some character, it is still more difficult to show that it was originally designed for that purpose.

But in this case all of these difficulties are magnified because the complainant has not adopted one sign, symbol, or numeral as an unchanging indicia of origin, but a multitude of arbitrary numbers, one such number being applied to each article made by it, which is distinguishable from like articles of its manufacture by reason of size, shape, color of border, or the purpose for which it was designed. Thus, if the numeral "2,001" is to be understood as pointing out the labels contained in the package to which it is attached as a label made by the Dennison Company, what would be the conclusion of one who saw another package bearing the number "2,002" and no more? Extend this system of distinguishing each style, color, and size of label by a separate numeral, and how is it possible that such a scheme can serve the office of designating the Dennison Company as the common source of origin? But that is precisely what the complainant insists it has done, and for such a multitude of numerals it is seeking protection as valid trademarks.

Complainant's counsel insist very strenuously that as this hearing is upon a demurrer the averments of fact in the bill are conceded, and in the printed brief it is urged that the opinion of the Circuit Court goes upon the theory that the numerals adopted by complainant are used descriptively, whereas the allegations of the bill are "that the numerals as a matter of fact do alone point to the origin of the articles." Undoubtedly a demurrer admits matters of fact well pleaded and all reasonable inferences to be drawn therefrom, but not mere arguments or conclusions of law as made or drawn by the pleader. *Dennison Co. v. Thomas Co. (C. C.)* 94 Fed. 651, 654. General averments of fact must be taken as qualified and limited by other statements, and especially by specific facts set out for the purpose of showing how and why this system of numerals is used. *U. S. v. Des Moines Co.*, 142 U. S. 511, 544, 12 Sup. Ct.

308, 85 L. Ed. 1099; *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. Ed. 546.

We have looked in vain for any clear and specific averment that complainant's numerals were originally designed as a mark of origin. Upon the contrary, the most specific averment is "that its said numbers, all and singular, have been used and availed of in the same way from the first, each number having been continuously and always employed in connection with a label having a red border and of a particular size and shape, and that each number has continuously and always, in addition to giving notice of and indicating the origin of the label as being your orator's manufacture, given notice of and indicated the color of border, size, and shape of the label." Here is a plain admission that these numerals were not designed solely to indicate origin, but that they were also designed to indicate the style, size, and color of a label. That a word or phrase or number incapable of exclusive appropriation as a trade-mark because of its descriptive character may come by association to have a secondary significance pointing to origin is true. But this will not make it a good trade-mark, though its use, in this secondary sense, by another in such way as to amount to a fraudulent effort to deceive and mislead the public into believing that the goods of one are the goods of another will, in a proper case, be restrained.

We have had occasion more than once to point out this distinction in respect of the rights of a complainant in the use of a word which by reason of its descriptive or geographical meaning was not subject to the exclusive appropriation of any one. *Plant Co. v. May Co.*, 105 Fed. 375, 44 C. C. A. 534; *Computing Scale Co. v. Standard Computing Scale Co.*, 118 Fed. 965, 967, 55 C. C. A. 459; *Vacuum Oil Co. v. Climax Refining Co.*, 120 Fed. 254, 56 C. C. A. 90; *Royal Baking Powder Co. v. Royal*, 122 Fed. 337, 58 C. C. A. 499.

In *Computing Scale Co. v. Standard Computing Scale Co.*, cited above, we said:

"If the complainant has a technical trade-mark in the word 'computing,' its use by others will be restrained, for a wrongful intent in so using it will be presumed. But when the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has by use come to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his article as the product of another."

The doctrine is well supported by the case of *Elgin Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

In the case of *Columbia Mill Co. v. Alcorn*, 150 U. S. 461, 463, 14 Sup. Ct. 151, 152, 37 L. Ed. 1144, it is said "that if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark."

In *Lawrence Mfg. Co. v. Tennessee M. Co.*, 138 U. S. 537, 547, 11 Sup. Ct. 396, 400, 34 L. Ed. 997, the court said:

"Nothing is better settled than that an exclusive right to the use of word letters, or symbols to indicate merely the quality of the goods to which they are affixed cannot be acquired. And while if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality is not of itself sufficient to debar the owner from protection, and make it the common property of the trade; yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture, or ownership, but was placed upon the article to denote class, grade, style, or quality, it cannot be upheld as technically a trade-mark."

The case of *Deering Harvester Co. v. Whitman & Barnes Co.*, decided by this court and reported in 91 Fed. 376, 33 C. C. A. 558, involved substantially the question here to be decided. There it was sought to appropriate a series of letters and numbers used in connection with the different parts of reapers and mowers as valid trade-marks. Relief was denied upon the ground that the primary design was to distinguish the several parts of such machines and facilitate the ordering of repairs for broken parts.

In respect to the adaptability of the series of numerals and letters there involved to point out origin of manufacture we said:

"The claim that inasmuch as these marks are found only in 'association' with machines which do bear the trade name or mark, or both, of the Deering Harvester Company, they thereby serve to indicate that company as the common source of all articles having a like designation, is not sufficient to justify their appropriation as trade-marks. Any office which these marks perform as designations of origin is purely accidental. The fact that no two distinct parts in the same machine bear the same numerals is altogether persuasive of the fact that their purpose is not that of indicating the producer. Without explanation, such a multitude of different marks would convey no meaning. When explained, as they always have been and always must be, the explanation is that they are intended to designate size, shape, and place in the machine, and are to be used to distinguish one piece or part from another having a different function. This purpose does not tend, in any way but the most remote way, to indicate the producer or maker. If each of such parts had some common symbol in addition to the varying marks indicating place and size and shape, we would have marks capable of the double duty claimed for those actually used. The system of so defining the place, size, and shape of a part of a machine is not original with appellants. It is common to many other manufacturers. The purpose is to facilitate replacements."

The cases of *Humphrey Specific Co. v. Hilton* (C. C.) 60 Fed. 756, and *Smith & Davis Co. v. Smith* (C. C.) 89 Fed. 486, may be also consulted.

Without deciding whether the adoption of a numeral with the alleged double purpose of both indicating origin and quality is fatal to the bill, it is enough for the purposes of this case to find, as we do, that the averments of this bill, considered as a whole, do not show a case of the use of a number or word or sign or symbol designed, "as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others." *Mill Co. v. Alcorn*, 150 U. S. 468, 14 Sup. Ct. 152, 37 L. Ed. 1144. Complainant's numbers used in association with the name of the complainant subverted

no purpose in indicating origin, for that was made plain by the name itself. Without the name of the maker, the number, especially when one of a large number used severally in association with the sale of other articles having same origin, would be meaningless without explanation. The usual office of a number, whether one of a series or one arbitrarily selected, is to indicate grade, quality, quantity, or some other characteristic. These numbers having been adopted and use for the ordinary purpose of a numeral could point to origin only in a secondary way, and used in this sense they are not good trade-marks. Neither is a case for restraining the use of these numbers in their secondary sense by the defendants. The labels themselves in shape, size, color of border, etc., are not the subjects of a monopoly. The use made of the numbers in question by defendants is descriptive wholly, for the only way in which it is shown that they are used by the defendants is in connection with their own corporate name upon the outside of packages of labels and in catalogues. So far as they are descriptive of size, color, style, etc., and are used in this significance only, they are open to use by any one. Averments that they have been used for the purpose of deceiving purchasers, defrauding the public, or injuring complainants are not borne out by the specific facts stated as to how defendants use said numbers. Such general averments are epithetic, not specific, and are to be read in the light of the specific things stated.

Decree affirmed.

NOTE.—The following is the opinion of the Circuit Court:

SWAN, District Judge. In this cause a decree sustaining a plea of *res judicata* and dismissing the bill was reversed and the cause remanded for further proceedings. The defendant, without leave, filed a demurrer to the bill. Complainant has practically waived this irregularity, saying: "We think this demurrer should be overruled because after a plea it should not have been filed. But the bill sets forth our case, as we understand it, and we discuss the questions presented in the hope of securing an expression of opinion which will shorten, if not terminate, what has proved to be a very long litigation." Complainant, premising that the only question presented is whether the bill sets forth a cause of action, summarizes the grounds of demurrer into two propositions, viz.: "(1) That the bill does not set forth any valid trade-mark rights; (2) that the acts of the defendant set forth in the bill do not constitute unfair competition in trade." To the discussion of these propositions complainant's brief is unreservedly addressed, and, in compliance with the suggestion of complainant, the questions will be disposed of upon the demurrer.

The questions arising on this demurrer were examined at length and decided adversely to complainant upon a demurrer to a previous bill for infringement of trade-mark and to restrain unfair competition, the allegations of which are substantially the same as those contained in the present bill, except as to the numerals charged to have been used by defendant. Complainant appealed from a decree sustaining the demurrer to the first bill, but dismissed its appeal and renewed the litigation, founding its right to relief upon other numerals of its order system. To the present bill a plea of *res judicata* was sustained, but on appeal this was held error for the reasons stated in *Dennison Manufacturing Company v. Scharf Tag, Label & Box Company*, 121 Fed. 813, 57 C. C. A. 9.

The single point in judgment determined by the Court of Appeals was the sufficiency of the plea of *res judicata*. It held that the estoppel of the judg-

ment on demurrer to the first bill "extended only to the exact point raised by the pleadings as described, i. e., the use of the identical numerals complained of in the first suit, and that the plea went to the whole bill and all relief under it. It is therefore too broad, and the court erred in sustaining it." Complainant submits some additional authorities to those presented on the first demurrer, and these may be briefly considered.

Complainant's first contention is: "(1) The numbers constitute valid trade-marks. The allegations in regard to the numerals involved are in part that they were arbitrarily selected to indicate origin, that they have been continuously used for many years as trade-marks, and that as trade-marks they have been known, respected, and availed of by the trade and the public. The mere fact that the marks in question consist of numerals will hardly be used as justifying their appropriation by the defendant."

To this proposition *Gillott v. Esterbrook*, 48 N. Y. 375, 8 Am. Rep. 553; *Lawrence Co. v. Lowell Mills*, 129 Mass. 325, 37 Am. Rep. 362; and other cases were cited.

Again, \* \* \* the bill alleges "that such number has continuously and always, in addition to giving notice of and indicating origin of the label as being of your orator's manufacture, given notice of and indicated the color of border, size, and shape of the label." This, being admitted by the demurrer, it is claimed is decisive of complainant's right to the relief prayed.

I cannot yield to the contention that the numerals alone constitute a trade-mark. It is well settled that "the office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, or, in other words, to give notice who was the producer. \* \* \* In all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vender as those of another, and that it is only when this false representation is directly or indirectly made that party who appeals to a court of equity can have relief." *Canal Co. v. Clark*, 13 Wall. 322, 20 L. Ed. 581; *Manufacturing Co. v. Trainer*, 101 U. S. 54, 25 L. Ed. 993.

It is as true of the use of the numerals in this case as it was of the letters claimed as trade-marks in the case last cited, that they do not "themselves suggest anything and require explanation before any meaning can be attached to them." 101 U. S. 55, 25 L. Ed. 993. They do not alone point to origin or complainant's ownership. They give that information only when preceded by the proper name "Dennison's." By adding that name they "give notice who was the producer." The vital part of the alleged trade-mark is therefore not the numeral but the name of the maker. The bill concedes that the numerals themselves are but "short trade phrases between buyer and seller," and, further, that they serve to designate to the manufacturer the color and size of the labels desired by the customer. They have no significance to the general public outside the trade, nor even to those of the trade who are not customers of complainant. When coupled with defendant's name, and designated "Scharf's No. 2,004," etc., they warn the trade and the public of the origin and ownership, and proclaim that Scharf, not Dennison, is the producer. *Liggett & Myers Co. v. Finzer*, 128 U. S. 184, 9 Sup. Ct. 60, 32 L. Ed. 395; *Mfg. Co. v. Trainer*, 101 U. S. 54, 25 L. Ed. 993.

Each manufacturer thereby notifies his customers that an order for labels of a given number will be filled by labels of a certain color and size.

There is nothing in *Lawrence v. Lowell Mills Co.*, 129 Mass. 325, 37 Am. Rep. 362, nor in *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553, that sustains the proposition that numerals alone are valid trade-marks. The first case holds merely that numerals arbitrarily selected and used on goods in combination with other devices to denote the origin of the goods, and not their quality, are a valid trade-mark. In that case the numbers were associated with designs stamped upon the goods of both parties, prominent features of which were an eagle and a scroll or wreath. "The only question," said Judge Colt in that case, "presented upon this report [of the judge who tried the cause], therefore, is whether the plaintiff's stamp including the figures constitutes such a trade-mark as the law will protect. In the second case, as in the first, the numeral '303' was impressed upon the article

of manufacture—the steel pen. The defendants made and sold a steel pen which in size, shape, color, pattern, flexibility, and fineness of point so closely resembles the said pen of the plaintiff as to require an expert or adept to distinguish them in those respects." There was also evidence of a studious imitation of the stamp of plaintiff calculated to mislead, and of a striking similarity in the size and appearance of the boxes in which plaintiff's pens were packed.

It is further said by Judge Colt: "The difficulty of giving to bare numbers the effect of indicating origin or ownership, and of showing that the numbers were originally designed for that purpose, was recognized in *Boardman v. Meriden Britannia Co.*, 35 Conn. 402 [95 Am. Dec. 270]. \* \* \* The numbers in that case, however, were associated with the name of the plaintiff, and with the form, color, and general arrangement of the labels used, and were held by virtue of that connection to form an important part of the trade-mark itself."

In *Shaw Stocking Co. v. Mack* (C. C.) 12 Fed. 707-711, Judge Coxe holds that "names, ciphers, monograms, pictures, and figures may be used" (as trade-marks). No authority, however, is cited which supports the broad proposition that numerals alone may be adopted as a trade-mark. The decisions in 48 N. Y. (8 Am. Rep.), 35 Conn. (95 Am. Dec.), and 129 Mass. (37 Am. Rep.), which that case invokes, rest their conclusions upon the fact that the figures were part of the trade-mark itself, and evidenced, with other features of the trade-mark, the infringement of complainant's rights.

In *Humphrey's Specific, etc., Co. v. Wenz* (C. C.) 14 Fed. 250, referred to by complainant, it is not held that numbers alone constitute a trade-mark, but the contrary. Judge Nixon's language is: "Mere numbers are never the objects of a trade-mark when they are allowed to indicate quality, but they may be where they stand for origin or proprietorship, in combination with words and other numerals." The great weight of authority denies the sufficiency of numerals used descriptively to constitute a trade-mark.

In *Coats v. Merrick Thread Co.*, 149 U. S. 572, 18 Sup. Ct. 969, 87 L. Ed. 847, it is said: "\* \* \* It is clear that no such monopoly trade-mark could be claimed of mere numerals used, and therefore not capable of exclusive appropriation because they represent the number of the thread, and are therefore of value as information to the public. \* \* \* Clearly the plaintiffs cannot, as patentees, claim a monopoly of these numerals beyond the life of the patent; and it is equally clear that when used for the purpose of imparting information they are not susceptible of exclusive appropriation as a trade-mark, but are the common property of all mankind." The numerals used by complainant in this case are equally descriptive to customers of the sizes and colors of the labels made by complainant, and therefore not claimable as trade-marks.

The same principle is applied to a somewhat different state of facts in the *Deering Harvester Co. v. Whitman*, 91 Fed. 376, 380, 33 C. C. A. 558.

In line with the foregoing cases are *Humphrey's Homeopathic Co. v. Hilton* (C. C.) 60 Fed. 753, and *Smith & Davis Mfg. Co. v. Smith* (C. C.) 89 Fed. 486.

The system of complainant which substitutes the "short trade phrases" expressed in the numerals for a description by color and dimensions is neither novel nor indication of original ownership, so as to be capable of exclusive appropriation. It is "a useful contrivance for the dispatch of business" between the seller and his customer, but complainant's and defendant's numeral designations of their respective labels do not convey the same information. Any one may use the system, which is one of purely arbitrary numerals. *Perris v. Hexamer*, 99 U. S. 675, 25 L. Ed. 808.

2. Does the bill state a case of unfair competition in trade? As any one may make and sell labels of any size, shape, and color—when at least the design or configuration is not protected by patent—and as it is not claimed that in either of these features complainant's labels depart from types common to trade, it is not apparent how the defendant can be guilty of unfair competition by employing the same numerals as complainant as "short trade phrases" to designate to its customers the size and colors of its manufactures. It is not charged that it represents to the public that its goods are made

by complainant in any other manner or by any other means than by the adoption of the short phrase system, which is not original with complainant, but old, well known, and widely used. The name of each manufacturer notifies the origin or ownership of the goods. The charge that the numeral is used "fraudulently" "is not material," as is said in *Globe Wernicke Co. v. Fred Macey Co.*, 119 Fed. 704, 58 C. C. A. 304, which presents a striking parallel to complainant's contention, "if the complainant has a right to do that which is complained of." The defense here is infinitely stronger than in that case, in that the complainant's grievance is not that its manufactures are simulated, but only that its numerical system of designating its wares to customers is utilized by defendant with its customers for a like purpose—as a "short trade phrase" denoting the size and color of label required or sent. If the public have been misled into the purchase of defendant's labels for complainant's, as the bill charges, when the catalogues and packages of each party plainly announce the manufacturer's name, the fault is that of the purchaser and the error gives no right to equitable relief. *Globe Wernicke Co. v. Fred Macey Co.*, supra.

The insistence of complainant that the use by defendant of the same numbers to designate the same sizes and colors of labels as those which complainant employs for its sizes and colors is unfair competition does not differentiate the case made by the present from that set up in the former bill.

For the foregoing reasons and those given for sustaining the demurrer to the first bill the demurrer is sustained and the bill dismissed, with costs.

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#### **ÆTNA INDEMNITY CO. v. LADD et al.**

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,103.

##### **1. ASSIGNMENTS—CONSTRUCTION—OPERATION.**

General agents of a surety company were authorized and directed by their principal to require any contractor for which it became surety to transfer to it his plant whenever he became unable to carry on the contract, in order that the surety company might prosecute the same to completion. A contractor for which the company became surety became financially embarrassed and unable to successfully prosecute its contract. Thereupon the general agents, by legal proceedings and arrangements, with the contractor and its creditors, took possession of the plant and entered on the completion of the contract. They also procured an advancement of money on the contract from the obligee. The instrument executed by the contractor to the surety company recited that the contract was assigned as security for the payment of such sum of money. The surety company did not in any way repudiate or disaffirm, but, rather, recognized, the acts of its agents in the premises. *Held* that, notwithstanding the recital in the instrument of assignment, the transaction in fact constituted an absolute assignment of the contract, and not merely an assignment for security.

##### **2. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—REPUDIATION.**

The act of a principal in protesting its general agent's draft for funds to be used on contracts undertaken by the agent did not constitute a repudiation of the action of the agent in assuming the contract, but was a ratification thereof, where the only reason assigned for dishonoring the draft was that the funds were not needed.

##### **3. APPEAL—HARMLESS ERROR.**

Where a witness had testified that defendant's agent had been carrying on the work on certain contracts, and that a subagent, as trustee, had been in immediate charge of the work, the refusal of a motion to exclude further testimony that the witness believed that the contract was completed by the subagent as trustee for defendant was, if error, harmless.



**4. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—TESTIMONY OF AGENT.**

An agent may testify that he acted for and in behalf of his principal in borrowing money, but such testimony does not bind his principal or prejudice its rights.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 39, 40, 413-416.]

**5. MONEY LENT—EVIDENCE—VARIANCE.**

Under a complaint alleging merely the advancement of money to defendant for its use and benefit, a bond executed by defendant to plaintiff, reciting defendant's need of the money, and the advancement of the same by plaintiff, is admissible to show the nature of the transaction between the parties.

**6. PLEADING—ELECTION—EFFECT.**

Where a complaint was in two counts—the first for money lent, and the second on a bond given to secure the payment of such money—an election to stand upon the first count did not constitute a waiver of the right to use the bond in evidence if it became necessary or proper to do so.

**7. PRINCIPAL AND SURETY—ACTIONS—EVIDENCE—JUDGMENTS.**

In an action against a surety to recover money loaned to it to complete contracts on the principal's becoming unable to perform the same, the record of a judgment, to which the surety appeared to be a party, was admissible, where it tended to show that the surety assumed to own and have possession of the property and plant of its principal.

**8. APPEAL—QUESTIONS NOT RAISED BELOW.**

An objection that the transcript of a judgment introduced in evidence was not properly certified cannot be first raised on appeal.

**9. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—INSTRUCTIONS.**

On the issue of the authority of the general state agent of a surety company, a charge defining a general agent as one empowered to transact all his principal's business was not misleading, as the jury must have understood it to refer only to the kind of business which the surety company was authorized to transact.

**10. SAME.**

Third persons acting in good faith are justified in relying upon the apparent authority of one held out as the general agent of his principal, notwithstanding secret instructions and restrictions placed by the principal upon such authority. The principal is bound for the acts of the general agent within the scope of his apparent authority, even though such acts are not reported by the agent to the principal. Such third persons may assume that the agent will promptly communicate to the principal all dealings entered into by him on the principal's behalf.

**11. SAME—INSTRUCTIONS—INCONSISTENCY.**

On the issue of the authority of the general agent of a surety company, the court charged that third parties cannot rely on the agent's assumption of authority, but must, at their peril, observe that the agent keeps within his powers, and that if plaintiffs loaned money to defendant's agent, and the agent did not have authority to borrow the money, the verdict must be for defendant. This instruction was qualified by a further charge that it was the agent's duty to protect their principal's interests, and whether, in the discharge of that duty, they were warranted in borrowing the money, was a question for the jury, and, if they were so warranted, the verdict should be for plaintiff. *Held*, that the qualification of the instruction was not erroneous or inconsistent with the instruction qualified.

**12. TRIAL—DIRECTED VERDICTS—TEST OF PROPRIETY.**

The test to determine whether a case shall be taken from the jury is whether or not the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict rendered in opposition to it.

**12. PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION—EVIDENCE—QUESTIONS FOR JURY.**

In an action against a surety company to recover money loaned to it through its general agent, evidence held sufficient to authorize the submission to the jury of the issue of ratification by the surety company of the agent's act in borrowing the money.

In Error to the Circuit Court of the United States for the District of Oregon.

See 128 Fed. 298.

The Aetna Indemnity Company, the plaintiff in error, a corporation organized under the laws of the state of Connecticut, having among other powers that of prosecuting a general surety business, and, as surety, to execute all classes of bonds and undertakings, including contractors' bonds, had prior to March, 1902, complied with the laws of the states of Washington and Oregon regulating foreign surety companies, and, through its agents, Clemens & O'Bryan, of Portland, Or., was engaged in the surety business in both said states. On January 7, 1902, the board of directors of the plaintiff in error had passed the following resolution: "Voted: That W. J. Clemens be and he is hereby appointed attorney in fact for this company, and that he be and he is hereby authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in the business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law required." On April 2, 1901, the board of directors passed the following resolution: "Voted: That W. J. Clemens and J. H. O'Bryan be and they hereby are appointed resident assistant secretaries of this company at Portland, Oregon, and that each one of them be and he is hereby authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law required, such bonds and undertakings, however, to be attested in every instance by W. W. Cotton, attorney in fact." On April 29th the plaintiff in error executed to their agents the following certificate: "This is to certify that Clemens & O'Bryan of Portland, Or., are hereby appointed agents for the Aetna Indemnity Company, and are authorized to perform all acts and duties incidental to such appointment." Clemens & O'Bryan, as such agents, had the power to appoint and did appoint their subagents at different cities in Oregon and Washington. Their subagents so appointed at Tacoma were Seeley & Co. Clemens & O'Bryan had been instructed by the plaintiff in error, in cases where the latter became surety for contractors, to take from such contractors collateral agreements or counter agreements executed in its own favor and for its own protection, and, in cases where such contractors became unable to complete or carry on their contracts, to take assignments of such plant as they might own, in order that the plaintiff in error might use the same in the prosecution of such contract to completion.

The Hardy Shipbuilding Company, a corporation of the state of Washington, was operating a shipbuilding plant at Tacoma. It was about to enter into contracts with the firm of Sudden & Christensen, of San Francisco, for the construction of a barkentine afterwards known as the "John C. Meyer," with A. W. Horn for the construction of a steamboat afterward known as the "Georgia," and with the Pacific Cold Storage Company for the construction of a barge. Bonds for the fulfillment of these contracts were required by Sudden & Christensen in the sum of \$15,000, by A. W. Horn in the sum of \$10,000, and by the Pacific Cold Storage Company in the sum of \$2,000. The Hardy Shipbuilding Company made application to Seeley & Co., subagents of the plaintiff in error, requesting that the latter become surety upon such

bonds. The application was transmitted to Clemens & O'Bryan, the general agents; and, in consideration of a premium of 1 per cent. paid on the amounts of said bonds, the plaintiff in error became the surety, and guarantied in those amounts the performance of said contracts. The Hardy Shipbuilding Company executed to the plaintiff in error in each case the counter agreement so provided for, in which it agreed, among other things, that, in case it became unable to complete its contracts, it would assign its plant and property to the plaintiff in error, in order that the latter might prosecute such contracts to completion, and it authorized the latter to receive all deferred payments in the event of such breach of contract or default on its own part. The applications, bonds, and counter agreements were forwarded by Clemens & O'Bryan to the home office of the plaintiff in error. About May 13, 1902, Clemens & O'Bryan were notified by their subagent at Tacoma that the Hardy Shipbuilding Company was in trouble. On the day following, Mr. O'Bryan went to Tacoma, and there ascertained that there were outstanding pay checks on the April pay roll of the shipbuilding company of about \$5,000, payable on May 10th, and that there were no funds available to pay the same. On examining the books of the shipbuilding company, and upon the representations of Mr. Hardy that the embarrassment was temporary only, he telegraphed to Sudden & Christensen, of San Francisco, requesting them to make an advance of \$6,000 upon the next payment to fall due upon the John C. Meyers contract. Sudden & Christensen answered that they would do so upon the authority of the Ætna Indemnity Company, which authority was accordingly given by Clemens & O'Bryan, as general agents of that company. A representative of Sudden & Christensen met Mr. Seeley, the subagent, and Mr. O'Bryan and Mr. Hardy, in Tacoma, on May 16th. O'Bryan presented an order which had been given him the day before by the Hardy Shipbuilding Company, addressed to Sudden & Christensen, and requesting them to pay as follows: "Please pay the \$6,000.00 that you have to-day consented to advance on barkentine contract to the Ætna Indemnity Company, who will disburse the money in payment for labor and material thereon." Sudden & Christensen thereupon paid to O'Bryan the \$6,000, and the money was deposited in a bank at Tacoma to the joint credit of the plaintiff in error and the Hardy Shipbuilding Company. The board of trustees of the Hardy Shipbuilding Company had on May 15th adopted a resolution reciting the facts in the case, and thus concluding: "Be it resolved: That the president and secretary of this company be, and they are, hereby authorized to execute in the name of the company an assignment of the interests of this company of the aforesaid contracts as security for the payment of the said sum of six thousand dollars." On May 16th the shipbuilding company executed to the plaintiff in error an assignment of all its right, title, and interest in the three contracts. O'Bryan then put Seeley & Co. in charge of the plant and the unfinished vessels, and returned to Portland. On May 27th Clemens & O'Bryan wrote to the plaintiff in error in regard to the embarrassment of the shipbuilding company and its unfinished contracts; stating that, in their opinion, there was a profit in each contract, and added: "However, as we helped them out by giving our authority to Sudden & Christensen to make an advance payment, we took an assignment of all their contracts, copy of which we enclose herewith, and at the same time, until these contracts are finished, all money of the firm is deposited in the name of the Hardy Shipbuilding Company and the Ætna Indemnity Company, and all checks are signed by Mr. Hardy, President of the Shipbuilding Company, and countersigned by our Tacoma agent, Mr. Seeley, and every check must show for just what contract it is for." On June 10th the plaintiff in error wrote, acknowledging the receipt of that communication. From and after May 16th, Seeley continued in possession and charge of the shipyard and the work on the vessels covered by the three contracts.

About the middle of June, one Ralph W. Smith, who held a chattel mortgage on the shipbuilding plant, proceeded to foreclose it, and placed the sheriff in charge of the yard, thereby causing the work therein to cease. Thereupon Mr. Clemens induced the Pacific National Bank, which held a mortgage on the real estate of the yard, to institute a foreclosure suit. The suit was begun, Smith was made a party defendant, and sale under his chattel mort-

gage was enjoined. By the authority of Clemens & O'Bryan, the firm of Remington & Reynolds appeared as attorneys therein for the plaintiff in error, and filed in its name a complaint in intervention, in which it was alleged as follows: "That on or about said 15th day of May, 1902, pursuant to and in accordance with the terms and provisions of the hereinbefore described agreement set out in paragraph 15 of this complaint, the said Hardy Shipbuilding Company and John B. Hardy, being unable to carry on the aforementioned contracts, or either of them, did duly assign, transfer, and set over to the said intervener both of the said shipbuilding contracts, together with the said shipbuilding plant, including all said shops, machines, tools, implements located on the premises hereinbefore described, and on or about said 15th day of May, 1902, did place the said intervener in possession of the said real estate, and did duly deliver to said intervener the actual, exclusive, undisputed, open, notorious, and visible possession of all shops, implements, tools, machines, materials, and supplies, and all personal property of every nature, kind, or description, located on the real estate above described, and ever since said date the said plaintiff in intervention has been in the open, notorious, and exclusive possession and control of all of said real estate and personal property, for the purpose of completing the said ships, in pursuance of and according to the terms of the said collateral agreements hereinbefore set forth." On June 24th a stipulation was filed in said foreclosure suit whereby it was agreed between the parties thereto that the temporary receiver therein forthwith turn over all the personal property in his possession to Claude M. Seeley, as trustee for the intervener, and on June 25th an order was entered in said suit according to such stipulation. Seeley thereafter continued to operate the shipyard as before. On July 7, 1902, Clemens & O'Bryan reported to the plaintiff in error the facts of the foreclosure suit as follows: "More than a week ago the writer was called to Tacoma owing to some complications which had arisen and which should not have arisen. The party holding a chattel mortgage had made an agreement with the Hardy Shipbuilding Company, by which the plant was not to be disturbed and these contracts were to be completed. However, the man by the name of Ralph W. Smith, who it now turns out, was the general agent of the American Bonding Trust Company, appeared on the scene and decided that, inasmuch as we had these contracts on our hands, it was a good time for him to get his money out of the plant. The plant, by the way, is easily worth \$80,000.00 and had Mr. Smith left us alone, we would have had no difficulty in completing our contracts without loss. On arriving in Tacoma, we found that Mr. Smith had foreclosed his chattel mortgage and had the sheriff in possession of the plant. He informed us that unless we paid off his claim, he would order the place shut down. After endeavoring to make some arrangement with him, by which the plant could continue, we found that he was a very unreliable man, and his statements could not be depended on. While negotiations were pending, he ordered the sheriff to close down the shop. The writer then interested the Pacific National Bank, which bank is a branch of our Ladd & Tilton Bank, and got them to foreclose their real estate mortgage, asked the court for a temporary injunction and restraining order to keep Smith from selling some of the real estate. We then filed an attachment suit, asked for a receiver, got another firm to attach them, finally secured a temporary receiver, and when Smith found we had matters all tied up, he stipulated with us to the end that we now have the record title to the whole plant and have practically made arrangements to sell the plant, together with our contracts, one of which is about completed. We will come out even, with all expenses of adjustment and attorney's fees paid. Will advise you more in detail shortly. The writer had to remain in Tacoma for over a week, and consequently things have piled up some. We needed the counter-agreements very much so that we could have put them on record; as we did not have them, we had to make other arrangements to secure possession of the plant, and did so. We have left no stone unturned and are absolutely secure from everybody. In order to get the Kingsford Foundry and Machine Works to release some of the machinery to us, which had been shipped the Hardy Shipbuilding Co., we told them we would pay the freight, as we had taken over the contracts and moneys on hand. What we wanted them to do was

simply to advise the Northern Pacific Railroad to release the machinery on payment of the freight. But it seems the agent signed his name and did not make this telegram clear. However, the matter has all been settled satisfactorily."

In the meantime the boilers and engines for the steamboat Georgia arrived in Tacoma. The Kingsford Foundry & Machine Works, the makers of the machinery, had notified the railroad company not to deliver the same until its bill of some \$6,000 was paid. There was no money to meet the bill. Mr. Clemens went to the defendants in error; told them that the plaintiff in error had taken over the contracts of the Hardy Shipbuilding Company, and that some money was needed at once in order to get the machinery for the Georgia, and to carry on other work in anticipation of the next payment to be made on the contracts. On June 24th the defendants in error agreed to advance sums of money up to \$10,000—the same to be repaid out of moneys derived from the contracts or otherwise—and on that date they advanced \$6,500 upon the agreement. The money was sent by Clemens & O'Bryan to Seeley, at Tacoma, who paid the bill of the machine works, amounting to more than \$6,000, and applied the remainder upon the pay rolls for work done on the Georgia and the John C. Meyers. On July 9th the defendants in error advanced an additional sum of \$3,000 to Clemens & O'Bryan, and that sum was paid on account of labor and supplies to the John C. Meyers and the Georgia contracts. Later it appeared that the Hardy Shipbuilding Company had not informed Clemens & O'Bryan of its true condition, and that other bills for materials and supplies remained outstanding and that the contracts were being completed at a loss. On August 4th Clemens & O'Bryan wrote to the plaintiff in error as follows: "What we meant to say in our last letter was that we would complete this contract to the best of our ability, and we had the record title to the plant in the name of Seeley & Company, trustee for the Ætna Indemnity Company, and arrangements have been made for the sale of this plant for enough to pay for any indebtedness and any loss on the contract and it now appears that there will be a loss, and to pay our expenses in the matter, which were quite heavy, owing to the necessary lawsuits to obtain possession of the property, we are having to advance some money to complete the contract and are having a detailed statement of the amount and situation prepared and will forward them to you shortly." On August 5th Clemens & O'Bryan wrote the plaintiff in error as follows: "But the thing that troubles us is that we will have to put up some more money in order to carry the work along, as everything we buy we seem to have to pay cash for, and, of course, we have to keep the labor paid up." On September 19th the plaintiff in error telegraphed to the defendants in error: "Copy obligation dated June 24 purporting to bind this company, just received. You are hereby advised same is not valid." On the following day the defendants in error telegraphed to the plaintiff in error in answer thereto as follows: "Telegram yesterday received. Do we understand that you repudiate the actions of your agents Clemens & O'Bryan in their dealings with us in your behalf?" No answer was sent to this inquiry. Further facts pertinent to the assignments of error are stated hereinafter in the opinion. On November 29, 1902, the defendants in error brought the present action against the plaintiff in error to recover upon the bond so executed on June 24, 1902, which bond reads as follows: "Know all men by these presents, that the Ætna Indemnity Company, a corporation created and existing under the laws of the State of Connecticut, and whose principal office is located at Hartford, Conn., is held and firmly bound unto Ladd & Tilton, Bankers, of Portland, Oregon, in the full and just sum of ten thousand dollars (10,000.00) good and lawful money of the United States of America, to the payment of which sum, well and truly to be made, the said Ætna Indemnity Company binds itself, its successors and assigns, jointly and severally firmly by these presents, signed sealed and dated this 24th day of June, A. D. 1902. Whereas, the Ætna Indemnity Company, owing to the failure of John B. Hardy and the Hardy Shipbuilding Company, to complete two contracts, viz.: One to build a barkentine for Sudden & Christensen, and one to build a steamer for Captain Horn, is now completing said contracts, and it becomes necessary to

furnish money for the prosecution of the work, payment of materials and other miscellaneous items, and Ladd & Tilton, Bankers, are advancing on account of the aforesaid contracts, money, not to exceed in the aggregate principal and interest, ten thousand dollars (\$10,000.00). Now, therefore, if the said money shall be repaid out of the money received for the aforesaid contracts or in any other manner, then this obligation shall be void; otherwise to remain in full force and effect." And the defendants in error, in their complaint, alleged that in conformity with said bond they had advanced to the plaintiff in error, by Clemens & O'Bryan, its general agents, on June 24, 1902, the sum of \$3,500, and on July 3, 1902, the further sum of \$3,000, all of which moneys were expended by the plaintiff in error upon said vessels, and were necessary for such purpose. The plaintiff in error answered, denying that it had executed said bond or that it was liable thereon. The case was tried before a jury, and a verdict was returned for the defendants in error for the sum of \$9,500, with interest thereon, upon which judgment was entered by the court.

Campbell & Powell and Frederick V. Holman, for plaintiff in error.

Williams, Wood & Linthicum and W. C. Bristol, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned as error that the trial court permitted the witness Clemens to testify that the money received from the defendants in error was paid out for the benefit of the plaintiff in error on contracts for which it had become surety, and which had been assigned to it. It is urged that the contracts had been assigned merely as security for an advancement of \$6,000 by Sudden & Christensen to the Hardy Shipbuilding Company, and for no other purpose. It is true that the assignment, in its terms, recites that it was made as security for the payment of said sum of \$6,000. But from and after its date, the evidence shows, it was in fact treated by both the parties thereto as an absolute assignment for the benefit and protection of the plaintiff in error. Clemens & O'Bryan, the general agents of the plaintiff in error, had general authority to require any contractor for which it became surety to transfer to it his plant whenever he became unable to carry on the contract, in order that the surety company might use the same in the prosecution of the contract to completion. On March 6, 1902, the plaintiff in error had written to its general agents as follows:

"When executing bonds of this character, you must always bear in mind that the Surety Company signing such a bond becomes a co-contractor, and in the event the contractor defaults on any part of the work, the company must step in and complete it or else stand the loss."

On April 25, 1902, it had written its general agents in reference to another bond as follows:

"At any time should you perceive indication that the work is not progressing in a satisfactory manner, we shall rely on you to take immediate steps to protect our interests."

On the same date, in reference to another bond, it had written:

**"If, at any time, there should be an indication that the work is not progressing to the satisfaction of the obligee, kindly take immediate steps to safeguard our interest."**

On June 16, 1902, it had directed its agents to take whatever action may be necessary in the premises "to save us from any ultimate loss." There were other communications of a similar nature, all tending to show that the plaintiff in error at all times had in contemplation the contingency of assuming the completion of any of the contracts upon which it was surety, whenever it became necessary to do so for its own protection, and that it looked to its general agents to act for it in that capacity. Evidence went to the jury tending to show that the home office was advised of the actions of its general agents in carrying on and completing the contracts. Thus on May 27th the agents wrote, notifying the company of the advance made by Sudden & Christensen and the assignment of the contracts. They added:

**"Until these contracts are finished, all money of the firm is deposited in the name of the Hardy Shipbuilding Company and the Ætna Indemnity Company, and all checks are signed by Mr. Hardy, president of the Shipbuilding Company, and countersigned by our Tacoma agent."**

On July 7th they wrote:

**"We now have the record title to the whole plant, and have practically made arrangements to sell the plant, together with our contracts. \* \* \* In order to get the Kingsford Foundry & Machine Works to release some of the machinery to us, which had been shipped the Hardy Shipbuilding Company, we told them we would pay the freight as we had taken over the contracts and moneys on hand."**

On August 4th they wrote:

**"What we meant to say in our last letter was that we would complete this contract to the best of our ability."**

On August 5th they wrote:

**"But the thing that troubles us is that we will have to put up some more money in order to carry the work along as everything we buy we seem to have to pay cash for, and of course we have to keep the labor paid up."**

During all this time no answer was made by the plaintiff in error disaffirming any of the acts of its general agents. It is true that on or about August 21st it protested its general agent's draft of \$5,000 to be used on the contracts, but on August 23d it explained its action in so doing by telegraphing to its agents as follows:

**"Sufficient money appears to be left to complete Hardy contracts. You must arrange for advances from the owners."**

This answer, so far from repudiating the action of the general agents in assuming the contract, was clearly a ratification thereof, since the only reason assigned for not advancing the money was that it was unnecessary to do so. On August 25th the agents telegraphed to the plaintiff in error as follows:

**"Ladds Bank advanced money for material and labor. Owners scared, won't pay anything. Bank insists immediate payment. Must shut down works."**

To this the plaintiff in error replied:

**"Prorate payment due among materialmen, authorizing owners to pay them direct."**

On August 26th the plaintiff in error wrote the general agents as follows:

**"We will be pleased to have you forward a report showing just what portion of the work has been completed, together with the payments made, also the date of the letter and advice as to whether such payments have been properly applied in settlement of bills for labor and materials."**

Further correspondence followed, but in none of it did the plaintiff in error deny the authority of its agents to assume the completion of the contracts. We find no error, therefore, in the ruling of the court admitting in evidence the testimony so objected to.

It is contended that the court erred in permitting the witness Clemens to answer the question, "By whom was the boat Georgia completed?" to which he answered, "The boat was completed by Mr. Seeley, trustee for the Ætna Indemnity Company, as we believe." It is urged that, in so answering, the witness stated a legal conclusion, and that the court should have sustained the motion of defendant in error to strike out the answer. The question so propounded did not necessarily call for an answer stating a legal conclusion. The witness had previously testified that Clemens & O'Bryan had been carrying on the work on these contracts, and that "Mr. Seeley, trustee, had been in charge of the plant at Tacoma." In answering that the work was completed "by Mr. Seeley, trustee for the Ætna Indemnity Company, as we believe," he was but stating his understanding of the capacity in which he and his partners had acted in completing the contract. If it was error to deny the motion to exclude the testimony, it was harmless error, which could not have prejudiced the plaintiff in error.

Of similar import is the assignment that the court erred in permitting the witness Clemens to testify in answer to the question on whose behalf the additional sum of \$3,000 was obtained from the defendants in error, to answer, "Ætna Indemnity Company." It was proper for the witness to testify in what capacity he was acting in obtaining this money, for whom he acted when he borrowed it, and his understanding of the relation he bore to the transaction. His statement could not bind the plaintiff in error, nor prejudice its rights.

It is assigned as error that the court admitted in evidence the bond which was executed to the defendants in error at the time when they made their first advance of money to be expended on the contracts. The complaint in the present action contained two counts. In the first it was alleged that the plaintiff in error applied to the defendants in error for moneys wherewith to pay for material and laborers, and that in accordance therewith the money had been advanced to the use and benefit of the plaintiff in error. In the second count the defendants in error declared upon the bond. At the beginning of the trial, counsel for the plaintiff in error moved that the defendants in error be required to elect on which cause



of action they would stand. The motion was allowed, and the defendants in error elected to stand upon the first. It is urged that thereby they abandoned all cause of action, if any they had, on the bond, and waived all rights thereunder, and that therefore the bond became inadmissible in evidence for any purpose. But it appears that on the cross-examination of the witness Clemens the plaintiff in error drew out the fact that a bond had been given, guarantying the money so loaned, and that in addition thereto the notes of Clemens & O'Bryan had been required by the defendants in error, and that the notes had not been paid. It was upon the redirect examination of the witness that the defendants in error offered the bond to show what the transaction was, since that instrument represented in its recitals that the Ætna Indemnity Company was assuming to complete the contracts; that it needed money, and was about to obtain the same from defendants in error. We think it was clearly admissible as showing the nature of the transaction between the parties, and upon what the defendants in error acted. By electing to stand upon the first count of their complaint, the defendants in error cannot be said to have waived all right to use the bond in evidence whenever it became proper or necessary to do so.

It is contended that the court erred in admitting in evidence the transcript of the proceedings in the superior court of the state of Washington, in and for Pierce county, in the suit instituted by the Pacific National Bank to foreclose its mortgage on the plant of the Hardy Shipbuilding Company, in which suit the plaintiff in error, by Remington & Reynolds, appeared to be an intervener. Objection to the transcript was made on the ground that it was incompetent, irrelevant, and immaterial, and because no authority was shown in Remington & Reynolds to act for the plaintiff in error. The transcript was offered in evidence at the close of the deposition of F. S. Blattner, a witness for the plaintiff in error. He had deposed, without objection, that, in the litigation so referred to, "Remington & Reynolds represented the Ætna Indemnity Company." When the transcript was offered in evidence by defendants in error, the court inquired whether Remington & Reynolds were employed by the company or by the general agents, to which counsel for the defendants in error replied, "It does not say in that deposition." Counsel for the plaintiff in error contended that it could not be shown that authority was given by any one but Clemens & O'Bryan. The court admitted the transcript in evidence, but stated to counsel for plaintiff in error, "You may show, if you can, afterward, that the parties who acted for the Ætna Indemnity Company derived their authority from these same agents." Counsel for the plaintiff in error complied with this suggestion by introducing the testimony of Mr. Pegram, the secretary of the plaintiff in error, who testified that no one was authorized to appear for the plaintiff in error in that litigation. No motion was made to strike the transcript from the record at any subsequent time. When it was afterward read to the jury, objection was made, not on the ground that the attorneys assuming to represent the plaintiff in er-

ror therein had no authority to do so, but on the ground that the transcript itself was incompetent, irrelevant, and immaterial evidence. From the record as it comes to us, we cannot say that the court erred in ruling as it did when the transcript was first offered in evidence, supported as the transcript was at that time by the statement of the witness for the plaintiff in error that Remington & Reynolds appeared in the litigation as its attorneys, nor in subsequently permitting the transcript to be read to the jury, for the evidence so offered was not incompetent, irrelevant, nor immaterial, since it was a judgment record to which the plaintiff in error appeared to be a party, and it tended to show that at the time of that litigation the plaintiff in error assumed to own and to have possession of all of the property and plant of the Hardy Shipbuilding Company. Again, while no direct authority from the plaintiff in error to the attorneys who appeared for it in that suit was shown, it was proven that on July 7th the plaintiff in error was advised of that litigation, and was informed that Clemens & O'Bryan had induced the Pacific National Bank to bring its foreclosure suit, and had, on behalf of the plaintiff in error, filed an attachment suit therein, asking for a receiver, and had, by stipulation at the end of the litigation, obtained "the record title to the whole plant." It must have known that it was impossible to accomplish all this without representation by an attorney in the litigation. It was advised also by the letter of its agents of August 4th that the latter had incurred heavy expenses, "owing to the necessary lawsuits to obtain possession of the property." The objection that the transcript was not properly certified, not having been made in the court below, cannot be heard in this court, since the defect was one which might have been remedied if timely objection had been made.

It is contended that the court erred in instructing the jury as follows: "A general agent is defined under the law to be one empowered to transact all his principal's business." It is said that by this instruction the jury were informed that Clemens & O'Bryan had all the authority of the president, the secretary, and the board of directors of the plaintiff in error, and that, even if the instruction were correct as applied to a natural person, it could not apply to a corporation. The instruction so given is sustained by the text of 1 Parsons on Contracts (5th Ed.) 40; Story on Agency, § 17, and by Home Life Ins. Co. v. Pierce, 75 Ill. 435; Cruzan v. Smith et al., 41 Ind. 297; Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, 16 South. 29; Fire Ins. Co. v. Building Association, 43 N. J. Law 652; and numerous other decisions. In 1 Am. & Eng. Enc. of Law (2d Ed.) a general agent is defined to be "one who is authorized to do all acts connected with a particular trade, business or employment." We are unable to see how the jury could have been misled by the instruction, for they must have understood it to refer only to the kind of business which the plaintiff in error was by its articles authorized to conduct. That business in the states of Oregon and Washington was placed in the charge of Clemens & O'Bryan as general agents. The portion of the charge so excepted to must

be taken in connection with the remainder of the charge on the same subject. The court proceeded to say:

"(1) Where a person is by the principal held out to be the general agent of the principal, third persons acting in good faith are justified in relying upon the apparent authority of such agent, notwithstanding secret instructions and restriction in point of fact placed by the principal upon such authority. The principal is bound to third parties for the acts of his general agent within the scope of his apparent authority, even though such acts are not reported by the agent to the principal, for the acts of the agent are the acts of the principal. If you find from the evidence that Clemens & O'Bryan were held out by defendant to be its general agents, plaintiffs had a right to assume that such agents would promptly communicate with their principal all dealings entered into between plaintiffs and such agents assuming to act on behalf of the defendant, if you find that plaintiffs had any dealings with said Clemens & O'Bryan as general agents of the company. (2) I charge you that third parties dealing with an agent are put upon their guard by the very fact, and must do so at their own risk. They cannot rely upon the agent's assumption of authority, but are to be regarded as dealing with the powers before them, and must, at their peril, observe that the act done by the agent is legally identical with the act authorized by the power. Therefore, if Ladd & Tilton, the plaintiffs, loaned the ninety-five hundred dollars (\$9,500) sued for in this action, or any part thereof, to Clemens & O'Bryan, as agents for the defendant, and if you find that Clemens & O'Bryan did not have authority to borrow money for the defendant, then your verdict must be for the defendant, subject to the qualification which the instruction I will presently give you makes of this instruction."

Error is assigned to all of these instructions except the last, but they are believed to be correct and well sustained by authority. *The Distilled Spirits*, 11 Wall. 356, 367, 20 L. Ed. 167; *Dysart v. Mo., K. & T. Ry. Co.*, 122 Fed. 228, 58 C. C. A. 592; *Anderson v. National Surety Co. (Pa.)* 46 Atl. 307; and *Knapp v. Express Co.*, 55 N. H. 348, 353.

The foregoing instruction marked "2" was, with the exception of the qualification at the end thereof, given at the request of the plaintiff in error. It is contended that the court erred in qualifying that instruction by thereafter adding the following:

"It was the duty of Clemens & O'Bryan to protect the interests, so far as they were able, of the defendant company. Whether in the discharge of this duty they were warranted in borrowing the money for the recovery of which this action is brought in order to prevent default on the contract guaranteed by the company, and thus save the company from liability, is a question submitted to you. If the agents were warranted, under the circumstances, in borrowing such money, then your verdict should be for the plaintiffs."

It is said that these instructions are inconsistent, that the latter qualifies the former, and that the qualification itself is contrary to law. When the whole charge is considered in its bearing on these instructions, no error or inconsistency is found in them. In instructing the jury that, if they found that Clemens & O'Bryan did not have authority to borrow money for the defendant, their verdict must be for the defendant, the court had reference to authority, either actual or apparent. It was the duty of Clemens & O'Bryan, as it is of all agents, to protect the interest of their principal. It was for the jury to find whether there was either apparent or actual authority to borrow the money. If they found, under all the facts and circumstances disclosed in the evidence, that, upon

the proof of powers which were placed before the defendants in error, it appeared that the general agents were warranted in borrowing the money, the jury were told that it was their duty to return a verdict for the defendants in error. On the other hand, if the jury found that the dealings between the principal and its agents were such as to show that there was express authority to borrow money, the defendants in error were entitled to a verdict, and there was no occasion to consider the question of the apparent authority of the general agents.

It is contended that the trial court erred in denying the motion of the plaintiff in error that the jury be instructed to return a verdict in its favor. In other words, the contention is that there was no evidence before the jury to sustain a verdict for the defendants in error. In determining whether a case shall be taken from the jury, the test question is whether or not the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict rendered in opposition to it. *Elliott v. Chicago, Milwaukee, etc., Railway*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068. The evidence in the case has already, to some extent, been reviewed. In addition to what has been said, it may be observed, briefly, that Clemens & O'Bryan were appointed assistant secretaries of the plaintiff in error, and were made its general agents, and were by the plaintiff in error advertised as such. Before any of the contracts in the present suit were made, the plaintiff in error wrote to Clemens & O'Bryan, "We have written to Stratton that we have given you the general agency for Washington, and you may do as you see fit in regard to having him represent you." Clemens & O'Bryan were given authority to appoint subagents, and their appointments were recognized. On January 28, 1902, the plaintiff in error wrote them, "We do not interfere with anything in the territory of our general agents." The plaintiff in error, as we have seen, authorized the agents to take counterbonds from contractors, and informed them that its course of business was to provide for the contingency of becoming a co-contractor on every contract for which it became surety. It repeatedly advised them in regard to other contracts on which it had become surety through their agency, and directed them to take immediate steps "to protect our interests"; "to take immediate steps to safeguard that interest"; "We shall rely on you to take immediate steps to protect our interest;" "We would suggest that you follow the matter up closely and thereby safeguard our interest;" "Take whatever action may be necessary in the premises to save us from any ultimate loss." In the view which we take of the evidence bearing upon the motion for an instructed verdict, it becomes unnecessary to consider the question whether the general agency so created carried with it by implication the power to borrow money. There was evidence before the jury tending to show that the plaintiff in error, in its dealing with the general agents, recognized their power to borrow money, and acquiesced in their action in so doing. At the time when the plant of the Hardy Shipbuilding Company was seized under a chattel mortgage, and the general agents by legal proceedings obtained the

possession thereof, the plaintiff in error was informed of the main facts in that matter, and was advised that such possession had been taken, and that its general agents had incurred heavy expense in the litigation, and were proceeding to complete the contracts. It did not disaffirm or disapprove the action of its general agents in so doing. It is true that the secretary of the plaintiff in error testified that the general agents had no power to borrow money for the company under any circumstances, and that no such authority had arisen by virtue of any custom of such agents to borrow money. It may be assumed to be true, as this testimony shows, that no express authority was ever given the agents to borrow money on behalf of their principal. But it is also true that they were never forbidden to borrow money, and that the plaintiff in error, through all its dealing with them, contemplated the contingency of its becoming a co-contractor on any or all of the contracts upon which it became surety, and that it looked to them to safeguard its interests in such a contingency. It is not to be supposed that in undertaking such contracts the plaintiff in error, distant as it was from the scene of the operations, contemplated giving its personal attention to the contracts. The whole course of its correspondence and actions shows that it expected its general agents to act for it in every case where it might become a co-contractor. The completion of such contracts which were in default involved, or might fairly be expected to involve, the advancement and expenditure of money. In the case of the contracts under consideration in the present case, it did involve the advancement of money. All through the correspondence the plaintiff in error was notified that its agents were advancing money and incurring expense. It must have known that the money was advanced upon its own responsibility, and not upon that of its agents. When its agents drew directly upon it for funds to carry out the contracts, it did not deny its liability for such funds, nor did it deny the authority of its agents to draw upon it. It refused to make the advance solely upon the ground that sufficient money appeared to be left to finish the Hardy contracts, and that arrangement ought to be made for advances from the owners. Two days after so telegraphing, it directed its agents to "prorate payment due among materialmen authorizing owners to pay them direct." After the plaintiff in error had been notified by a dispatch sent August 25th that the defendants in error had advanced money for material and labor, and that they insisted upon immediate payment, it wrote to its agents: "We will be pleased to have you forward a report showing just what portion of the work has been completed, together with the payments made," and still later it wrote them that, "in the meantime, it can do no harm to suspend work on the contracts for a week." Under all the evidence so adduced, we find no error in the ruling of the trial court in denying the motion of the plaintiff in error for an instructed verdict.

The judgment is affirmed.

**BOATMEN'S BANK OF ST. LOUIS, MO., v. FRITZLEN et al.**

(Circuit Court of Appeals, Eighth Circuit. March 4, 1905.)

No. 2,081.

**1. REMOVAL OF CAUSES—WHEN JURISDICTION TRANSFERRED.**

Whenever, upon the filing of a petition for removal, the record discloses a removable cause, the jurisdiction of the state court ceases, and that of the federal court vests.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 204-206.]

**2. SAME—MOTIONS TO REMAND AND FOR REMOVAL DETERMINABLE BY PREPONDERANCE OF EVIDENCE, LAW, AND REASON.**

Motions to remand and for removal should be decided, not by the existence of doubts, but by the preponderance of the facts, the law, and the reasons which condition them, in view of the fact that the right to invoke the jurisdiction of the federal court is a valuable and constitutional one; that an erroneous affirmance of a claim to this right may be corrected by the Supreme Court upon a certificate of the question of jurisdiction, while a mistaken denial of the claim is not reviewable, and an error that may be corrected is less grievous than one that is remediless.

**3. JURISDICTION—COURT MAY ACT ON FRAUDULENT ATTEMPT TO EVADE, PATENT UPON RECORD.**

Where the fact is patent upon the face of the pleadings and record in a suit that an improper party has been joined, or a sham cause of action has been injected into the case, for the sole purpose of defeating the jurisdiction of the federal court over the real controversy, pleading and evidence of that fact allude are not indispensable; and the court may find the attempted fraud upon its jurisdiction from the record alone, and prevent its perpetration.

**4. FEDERAL COURT—JURISDICTION—INDISPENSABLE PARTIES ALONE TO BE CONSIDERED.**

In the determination of the questions involving the jurisdiction of the federal court or the removal of causes, indispensable parties only should be considered, and all others should be disregarded.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 71, 79, 80.]

**5. SAME—REMOVAL OF CAUSES—REARRANGEMENT OF PARTIES.**

In determining questions of jurisdiction and removal, the positions assigned parties by the pleader are immaterial. It is the duty of the court to ascertain the real matter in dispute, and to arrange the parties on opposite sides of it according to the facts and their respective interests.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 71, 79, 80.]

**6. PLEADING—GENERAL AVERMENTS LIMITED BY SPECIFIC AVERMENTS.**

In pleading, a general averment is always limited and controlled by specific allegations upon the same subject.

**7. FORECLOSURE OF MORTGAGES—PRIOR LIENHOLDER NOT NECESSARY PARTY.**

The holder of a prior mortgage or lien is not a necessary party to the foreclosure of a junior mortgage, because he has no right to redeem to be foreclosed.

**8. REMOVAL OF CAUSES—SEPARABLE CONTROVERSIES—WHAT ARE.**

Separate and distinct causes of action disclosed by the bill or complaint in a single suit, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the determination of the other, constitute separate controversies, within the meaning of section 2 of the Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [1 U. S. Comp. St. 1901, p. 509]; and

if either controversy, when the parties have been arranged upon opposite sides of it according to the facts and their respective interests, is wholly between citizens of different states, and can be fully determined as between them, the suit is removable.

[Ed. Note.—Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Vecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

**9. SAME—LOCAL INFLUENCE—RESIDENCE OF PLAINTIFF AND CO-DEFENDANTS IN SAME STATE NO BAR.**

A defendant who is a citizen of a state other than that in which the suit is brought may remove it for prejudice and local influence, notwithstanding the fact that the plaintiff and some of the defendants are citizens of the state in which the action was commenced.

[Ed. Note.—Prejudice or local influence ground for removal of cause to federal court, see note to *P. Schwenk & Co. v. Strang*, 8 C. C. A. 95.]

**10. PRACTICE—JUDGES OF CO-ORDINATE JURISDICTION OVERRULING EACH OTHER'S DECISIONS.**

The various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of property and practice, except for the most cogent reasons.

**11. PRACTICE—PRIOR ACTION IN STATE COURT CONSTITUTES NEITHER BAR NOR ABATEMENT.**

The pendency in a state court of a prior action between the same parties which involves the same subject-matter as a subsequent action in the federal court presents no bar, and furnishes no ground for the abatement of the later action.

[Ed. Note.—Pendency of action in state court as ground for abatement of action in federal court, see note to *Bunker Hill & Sullivan M. & C. Co. v. Shoshone Min. Co.*, 47 C. C. A. 205.]

**12. SAME—CONFLICT OF DOMINION TO BE AVOIDED, BUT CASE TO PROCEED.**

Wherever one of the courts secures by proper process the custody or dominion of specific property, which it is one of the objects of the suit in the other court to subject to its judgment or decree, the latter action should not be dismissed, but should proceed until the custody of the property is required, and should then be stayed until the proceedings in the court which has obtained the prior custody or dominion are concluded, or ample time for their termination has elapsed.

[Ed. Note.—Conflict of jurisdiction between state and federal courts, see note to *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 356.]

**13. CONFLICT OF JURISDICTION—POSSESSION MAY BE RETAINED UNTIL COURT ENTITLED REQUESTS.**

A court which has the actual custody and possession of property to which another court of concurrent jurisdiction has prior and superior right may lawfully retain the property until the latter court, through its proper officer, requests and offers to receive the actual possession and custody.

**14. COURTS OF CONCURRENT JURISDICTION—FIRST JUDGMENT RENDERS ISSUES RES ADJUDICATA.**

Where suits are pending between the same parties, which involve the same issues, in two courts of concurrent jurisdiction, it is the first final judgment, although it may be rendered in the second suit, which renders the issues res adjudicata in the other court.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

For opinion below, see 128 Fed. 608.

On October 9, 1903, the Boatmen's Bank of St. Louis, Mo., a corporation of the state of Missouri, brought an action of replevin in the United States

Circuit Court for the District of Kansas against D. G. Fritzlen, Edna P. Fritzlen, his wife, and W. H. Weldon, residents and citizens of the state of Kansas, to recover the possession of certain cattle and other personal property; and on October 16, 1903, the marshal took this property from the defendant D. G. Fritzlen, and delivered it to the plaintiff, pursuant to the command of a writ of that court which had been issued to him. The defendants answered, and thereafter, upon motion of D. G. Fritzlen and Edna P. Fritzlen, the court, on April 25, 1904, rendered a judgment of dismissal, and directed the property and its proceeds returned, on the ground that at the commencement of the action the district court of Clark county, in the state of Kansas, had exclusive jurisdiction over the subject-matter of the action. This writ of error has been sued out to reverse this judgment. It was rendered upon this state of facts: On November 30, 1901, the defendant D. G. Fritzlen gave a note for \$32,920.15, and secured it by a mortgage upon the personal property in controversy. The Boatmen's Bank held this note and mortgage. Some time in July, 1903, after this note had become past due, D. G. Fritzlen gave a note for \$3,750, and a mortgage on this property to secure it, to W. H. Weldon; and on July 23, 1903, Weldon commenced a suit in the district court of Clark county against D. G. Fritzlen, Edna P. Fritzlen, and the Boatmen's Bank, to set aside and avoid the mortgage of the bank, to enjoin it from taking or interfering with the property, and to foreclose the mortgage for \$3,750 upon it, and another mortgage made by Fritzlen and his wife upon a large amount of real estate to secure the same debt. On July 30, 1903, the probate judge of Clark county issued an order which restrained the defendants in that suit from interfering with or removing the personal property. On August 13, 1903, the Boatmen's Bank filed in the district court of Clark county a petition and bond for a removal of the suit on the grounds of a separable controversy, of local prejudice, and that the suit, in its entirety, was one in which the Boatmen's Bank was upon the one side, while Weldon and D. G. Fritzlen and Edna P. Fritzlen were upon the other side. On September 14, 1903, this petition for removal was filed in the United States Circuit Court for the District of Kansas, and on the same day the defendants Weldon, D. G. Fritzlen, and Edna P. Fritzlen made a motion to remand the suit to the state court, and the Boatmen's Bank made a motion to dissolve the restraining order. The court (Judge Lochren presiding) denied the motions to remand, and granted the motion to dissolve the restraining order. Thereupon the action in replevin here under consideration was commenced, and the mortgaged personal property was seized therein, and delivered to the bank, under a writ issued by the Circuit Court to the marshal, and the action proceeded to its dismissal. Meanwhile, on January 12, 1904, D. G. Fritzlen and Edna P. Fritzlen filed a plea to the jurisdiction in the suit of Weldon against the Fritzlens and the bank, by which they presented the same questions which were raised on their motion to remand. A replication to this plea was filed, and the court, in which then and thereafter Judge Lochren was not presiding, ordered that the issue which involved local influence should stand for hearing as though an answer denying the sufficiency of that plea had been interposed. On April 2, 1904, the court sustained the plea to the jurisdiction, and ordered the suit remanded to the state court.

James S. Botsford (B. F. Deatherage and O. G. Young, on the brief), for plaintiff in error.

D. R. Hite, for defendants in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The personal property which is the subject of this controversy was taken into the actual custody of the Circuit Court of the United States in the action of replevin by seizure under its writ of October 16, 1903.



That seizure was lawful, and the jurisdiction of that court over the property complete, unless the district court of Clark county then had plenary and exclusive dominion of the property in the Weldon suit. The suit which Weldon brought had then been removed from the court of Clark county, where it was commenced in July, 1903, to the Circuit Court, the motion to remand it had been heard and denied, and the restraining order which had been issued in it had been dissolved.

When a petition for removal and the bond required by the act of Congress are filed, and the record on its face shows the right of the petitioner to a removal, the jurisdiction of the state court ceases, and that of the federal court attaches. *Railroad Co. v. Mississippi*, 102 U. S. 135, 141, 26 L. Ed. 96; *Railroad Co. v. Koontz*, 104 U. S. 5, 14, 26 L. Ed. 643; *Steamship Co. v. Tugman*, 106 U. S. 118, 122, 27 L. Ed. 87; *Stone v. South Carolina*, 117 U. S. 430, 432, 6 Sup. Ct. 799, 29 L. Ed. 962.

If issues of fact arise upon the averments of the petition for removal, the jurisdiction to try them is in the federal court, and not in the state court. *Stone v. South Carolina*, 117 U. S. 430, 432, 6 Sup. Ct. 799, 29 L. Ed. 962; *Carson v. Hyatt*, 118 U. S. 279, 281, 6 Sup. Ct. 1050, 30 L. Ed. 167; *Crehore v. Ohio, &c., Ry. Co.*, 131 U. S. 240, 243, 244, 9 Sup. Ct. 692, 33 L. Ed. 144.

If then, the record in the Weldon suit at the time the writ of replevin was run disclosed upon its face a case which the bank had the right to remove to the federal court, the state court was without jurisdiction of the property replevied when it was seized by the marshal, and the action of replevin should have been tried and adjudged upon its merits. The first question for consideration, therefore, is whether or not the action of the Circuit Court in September, 1903, in taking jurisdiction of the suit which Weldon brought, and in refusing to remand that action to the state court, was right.

The suggestion presents itself here that this question should be considered in the light of the statements found in *Kessinger v. Vannatta* (C. C.) 27 Fed. 890, and *Fitzgerald v. Missouri Pacific Ry. Co.* (C. C.) 45 Fed. 812, 821, to the effect that, if there is doubt of the jurisdiction of a federal court when a motion to remand or a motion for removal is presented, the claim of jurisdiction should be denied. The remarks in these opinions, however, do not, after a thoughtful consideration of the subject, commend themselves to our judgment as a statement of the true rule that ought to govern the determination of such issues under the acts of Congress now in force. By the last paragraph of section 5 of the act of March 3, 1875, c. 137, 18 Stat. 472, 1 U. S. Comp. St. 1901, p. 511, every order of a Circuit Court which dismissed or remanded a cause was made reviewable by the Supreme Court by writ of error or appeal. This right to review a remanding order was withdrawn by section 6 and the last paragraph of section 2 of the act of March 3, 1887, c. 373, 24 Stat. 552, 553, as re-enacted for the purpose of correcting the enrollment by the act of August 13, 1888, c. 866, 25 Stat. 433, 435, 1 U. S. Comp. St. 1901, p. 510; and a party who is deprived of his right to the trial of a controversy in the federal court by an erroneous order which remands it to a court of a state is now left without remedy. *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S.

556, 581, 582, 16 Sup. Ct. 389, 40 L. Ed. 536. On the other hand if the federal court erroneously denies the motion to remand, or grants the petition to remove and retains jurisdiction, the aggrieved party has an efficient remedy by a writ of error from, or an appeal to, the Supreme Court, and a certificate of the question of jurisdiction by the Circuit Court, upon the entry of the final judgment, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827, 1 U. S. Comp. St. 1901, p. 549, 160 U. S. 582, 16 Sup. Ct. 396, 40 L. Ed. 542.

The remarks of the Circuit Judge in *Fitzgerald v. Missouri Pac. Ry. Co.* (C. C.) 45 Fed. 812, 819, 820, 821, to the effect that all doubts should be resolved against the jurisdiction of the national courts, were not made in the course of the discussion or decision of any question before him for determination, because there were no doubts in that case. The opinion of the District Judge in *Kessinger v. Varmatta* (C. C.) 27 Fed. 890, to a like effect, was based on the act of 1875; and one of the reasons for his conclusion was that, if he sustained the motion to remand, his order would be a final adjudication, which could be immediately reviewed by the Supreme Court, while the review of an order denying the motion would be delayed until after a trial and final judgment. The same argument would now lead logically to the conclusion that doubts should be resolved by retaining the jurisdiction, since orders refusing to remand and directing removals are now reviewable upon certificate of the question of jurisdiction to the Supreme Court, while orders renouncing or denying jurisdiction are not subject to review at any time or in any way.

The contention in these opinions that jurisdiction should be denied where any doubt arises, because the jurisdiction of the state court is always unquestionable, while that of the federal court may be subsequently successfully challenged, loses much of its force when the fact is considered that the erroneous retention by a state court of jurisdiction over a removable cause is reversible by the Supreme Court after the expense and delay of a trial in the court of first instance, and a hearing and judgment in the Supreme Court of the state. *Stone v. South Carolina*, 117 U. S. 430, 431, 6 Sup. Ct. 430, 29 L. Ed. 962. The question under consideration, however, is conditioned, and it should be determined by graver considerations and better reasons.

For purposes deemed wise by the founders and conservers of this nation, the Constitution and the acts of Congress have granted to its citizens the right to the hearing, the trial, and the independent judgment of the courts of the United States upon certain controversies which arise between citizens of different states, and have intrusted to these courts the protection and preservation of that right. No sound reason occurs why those whose oaths and duty require them to enforce this Constitution and these laws, and to sustain and give effect to this valuable and important right, should resolve every doubt against the enforcement of the Constitution and the acts of Congress, and against the protection and exercise of the right.

Experience, observation, the thoughtful consideration of the subject through many generations of men by publicists and statesmen, have produced a consensus of opinion throughout the civilized world that the final decision of grave issues should not be left to the court or judge

who first hears or tries them, however learned, able, wise, and impartial he may be, but that those disappointed in the first decision should be permitted to invoke the judgment of other unprejudiced minds upon the righteousness of the conclusion. The elaborate system of appellate courts maintained in this and other nations is a demonstration of the existence and the prevalence of this opinion.

Every conscientious judge, every thoughtful man, upon whom is laid the grave responsibility and the heavy burden of determining the rights of his fellows, rejoices in the thought, wherever such is the case, that his decision may be reviewed, and that, if erroneous, it will not work irreparable injustice to him whom he deems it his duty to defeat. When a case has been removed from a state to a federal court, and a motion to remand it is made, or when a motion to remove it is presented in the first instance to the federal court, the petitioner either has or he has not the right to the trial and decision of his controversy in that court. That right is of sufficient value and gravity to be guaranteed by the Constitution and the acts of Congress. If it exists, and the Circuit Court denies its existence, and remands or refuses to remove the suit, the error is remediless, and it deprives the petitioner of his constitutional right. If the right does not exist, and the court affirms its existence and retains the suit, the error may be corrected by the Supreme Court. An error that the aggrieved party may correct is less grievous than one that is without remedy. And the true rule is that motions to remand and for removal should be decided, not by the existence of doubts, but by the preponderance of the facts, the law, and the reasons which condition them, in view of the fact that the right to invoke the jurisdiction of the federal court is a valuable constitutional right, and an erroneous affirmance of the claim to that right may be corrected by the Supreme Court upon a certificate of the question of jurisdiction, while an erroneous denial of the claim is remediless.

A striking illustration of the wisdom of this rule may be found in the history of the case of *Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co.* (C. C.) 119 Fed. 209. That suit was commenced in the state court; was removed to the United States Circuit Court for the Western District of Missouri, where a motion to remand was heard and decided by Thayer, Circuit Judge, and Philips, District Judge. The grave and doubtful questions which the motion presented are disclosed by the opinion of the learned District Judge. The motion was denied. The decision subsequently received the approval of a majority of the Supreme Court in *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462. If the Circuit Court had denied its jurisdiction and remanded this case to the state court, it would have deprived the petitioner of its right, and left it without power to regain it. We turn to the consideration of the question whether or not the *Weldon* suit was removable to the federal court.

The petition for removal set forth the residence and citizenship of the parties, that the mortgaged property was worth \$80,000, and that the bank was entitled to the removal of the suit because there was a separable controversy, because there was prejudice and local influence, and because the only matter in dispute was such that, when

the parties were rearranged according to their respective interests, all those upon one side of the real issue were citizens of Kansas, and the only party upon the other side was a citizen of Missouri. The petition was verified, and it stated facts sufficient to present a prima facie case of prejudice and local influence, under the act of Congress. The record disclosed these further facts: The complainant, Weldon, had alleged in his bill that on July 2, 1903, the defendants D. G. Fritzlen and Edna P. Fritzlen had made their note to him for \$3,750, payable July 12, 1903, and had secured it by their mortgages on the real and personal property; and Weldon had prayed for judgment against them for the amount of his note, that his mortgages be declared to be a first lien upon all the property, and that so much as might be necessary should be sold to pay his judgment and the costs of the suit. He had also averred in his bill that the Boatmen's Bank claimed to have an interest in the property by virtue of certain mortgages thereon, but that the bank had "no right, title, or interest in or to any of said property, real or personal"; that whatever interest it claimed to have grew "out of certain transactions entered into between said bank and a certain partnership known as Elmore & Cooper, which said transactions, in so far as they relate to said mortgage liens, this plaintiff alleges to be wholly illegal and void; \* \* \* that the mortgages which the said Boatmen's Bank asserts are void, illegal, and of no effect"; that if the bank had any claim, right, title, or interest in any of the property, it was junior and inferior to the liens of the plaintiff; that the bank was about to take possession of the personal property by virtue of its "illegal and void mortgages," and to convert it to its own use, to the irreparable injury of the plaintiff; and, in view of these averments, the complainant prayed "that the pretended claim, lien, and interest of the said defendant Boatmen's Bank be declared to be illegal and void," and for further relief. The complainant, Weldon, had also filed an application for a temporary injunction, verified by his oath, in which he had stated that "the Boatmen's Bank, defendant herein, claims the legal title and right of possession of all of said personal property by virtue of certain chattel mortgages which it is alleged by said Boatmen's Bank constitute liens upon said personal property; that said chattel mortgages are illegal and void, and the consideration therefor is illegal and void, and said chattel mortgages do not constitute any lien upon said personal property."

This was the record in the Weldon suit when the petition for removal was filed, and the Circuit Court (Judge Lochren presiding) held that, upon the pleadings and upon the face of this record, this suit was a controversy between the plaintiff and the defendants D. G. Fritzlen and Edna P. Fritzlen, who were citizens of Kansas, upon the one side, and the defendant the Boatmen's Bank, which was a citizen of the state of Missouri, upon the other side, and that the bank had the right to remove it. That court held, in effect, that the alleged cause of action to foreclose the Weldon mortgage was nothing but a fraudulent device to evade the jurisdiction of the federal court, that the pretense that there was any dispute over the foreclosure of the Weldon mortgage between Weldon and the Fritzlens was without basis of fact

to support it, and that the only matter in dispute in the entire suit was the validity of the mortgages of the bank—a controversy in which Weldon and the Fritzlens were upon the one side, and the bank upon the other.

Justice is proverbially blind, but a court cannot, and ought not to, fail to see the patent facts which a record discloses, or to perceive the unavoidable deduction it compels; and, where the only rational inference from the pleadings and the record is that an improper party or a sham cause of action has been injected into a suit for the sole purpose of defeating the jurisdiction of the federal court over the real controversy, pleading and evidence to that effect aliunde are neither indispensable nor necessary, and the Constitution and the acts of Congress vest in the court the power, and impose upon it the duty, to find from the record alone the attempted fraud, and to prevent its perpetration.

Did not this record sustain the finding of Judge Lochren? The mortgages of the bank were made in November, 1901. They were past due. They secured an indebtedness of \$32,920.15. The mortgaged property was worth \$30,000. The personal property was of more value than \$10,000. All this property was in the possession of the Fritzlens. On July 2, 1903, they mortgaged this property to secure the payment of \$3,750 in ten days. On July 23, 1903, 11 days after the mortgages became due, and only 21 days after they were made, suit was brought to foreclose them, not against the holders of the right to redeem alone, but also against the bank, the holder of prior mortgages and an unnecessary party to the foreclosure, and Weldon applied for an injunction to restrain the bank from collecting its debt. Weldon and Fritzlen were residents of the same county. They did not make these mortgages to extend the pressed debtor's time to pay the \$3,750, for they made them due in 10 days from their dates. They did not execute them to secure or to pay Weldon the \$3,750, for, if this had been their purpose, it could and would have been more speedily accomplished by an immediate conveyance or delivery by the Fritzlens of some or all of the property in their possession, subject to the mortgages to the bank, without the delay or the expense of mortgages or foreclosure.

Men are presumed to intend the natural or inevitable consequences of their acts. They are presumed to have a rational purpose in their doings. What could have been the intention and purpose of Weldon and of the Fritzlens in making the mortgages to the former, and causing him to immediately bring the suit to foreclose them? Why have mortgages and foreclosures, and their inevitable expenses and delays through months or years of time, when a conveyance or delivery of a part or all of the debtors' property to Weldon would, without delay or expense, accomplish instantaneously every effect as security or payment of the mortgages and their foreclosure? These questions are susceptible of but one answer, and there is no other rational deduction. It is that the mortgages to Weldon, and the suit to foreclose them, were the parts of a deliberate scheme devised by the Fritzlens and Weldon for the sole purpose of depriving the bank of its right, under the Constitution and the acts of Congress, to the hearing and decision in the federal courts of the controversy between it and them over the validity

of its mortgages; that there was in fact no issue between Weldon and the Fritzens over the foreclosure of the mortgages to him; and that the only controversy in the Weldon suit was that over the validity of the mortgages to the bank. These were the conclusions of Judge Lochren upon the motion to remand, and they were not without strong support upon the record before him.

If, however, the concession is made that there was a bona fide suit to foreclose the mortgages to Weldon, and a real controversy between him and the Fritzens over that foreclosure, does not this bill disclose two controversies and two causes of action—one between the Fritzens and Weldon, which involved the foreclosure of his mortgages, and another between the Fritzens and Weldon, on one side, and the bank, upon the other, which involved the validity of the mortgages to the bank, and the avoidance of them for fraud, as clouds upon the title to the property? In a determination of the jurisdiction of the national courts, and the right to remove causes of action to them, indispensable parties only should be considered, because all other parties may be dismissed and disregarded if their presence would oust or restrict the jurisdiction or the right. *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 432, 23 Sup. Ct. 807, 47 L. Ed. 1122; *Bacon v. Rives*, 106 U. S. 99, 104, 1 Sup. Ct. 3, 27 L. Ed. 69; *Wormley v. Wormley*, 8 Wheat. 421, \*451, 5 L. Ed. 651; *Wood v. Davis*, 18 How. 467, 475, 15 L. Ed. 460; *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 82 Fed. 124, 126, 27 C. C. A. 73, 75.

The positions assigned to parties in a suit by the pleader are immaterial in determining the removability of a cause. It is the duty of the national court to ascertain the real matter in dispute, to arrange the parties on opposite sides of it according to the facts and their respective interests, and then to determine whether or not a controversy exists between citizens of different states which invokes the jurisdiction of that court. *Removal Cases*, 100 U. S. 457, 460, 25 L. Ed. 593; *Pacific Ry. Co. v. Ketchum*, 101 U. S. 289, 298, 25 L. Ed. 932; *Harter v. Kernochan*, 103 U. S. 562, 566, 567, 26 L. Ed. 411; *Evers v. Watson*, 156 U. S. 527, 532, 15 Sup. Ct. 430, 39 L. Ed. 520; *Black's Dillon on Removal of Causes*, § 90.

In a controversy between a junior incumbrancer and a senior mortgagee, in which the latter and the mortgagor are made defendants, the facts and the interest of the mortgagor place him on the side of the dispute occupied by the junior incumbrancer. *Removal Cases*, 100 U. S. 469, 25 L. Ed. 593.

The controversy between Weldon and the bank was not concerning the priority or superiority of their respective liens, but over the validity of the mortgages of the bank, and their avoidance for fraud. The bill was filled with averments of fraud and illegality which conditioned the mortgages and the lien which they evidence, and the only prayer which it contained regarding them was that the pretended lien, claim, and interest founded in them "be declared illegal and void."

It is true that after the complainant had averred that the mortgages were fraudulent and void, and had set forth the transactions which he alleged made them of that character, he also averred that,

if the bank had any claim or interest in the property, it was junior, inferior, and subordinate to the lien of his mortgages. If this had been the only averment concerning the claim of the bank, and if it had not been known by the pleader to be false when he made it, it might have formed the basis of an issue material to the suit for the foreclosure of his mortgage. But in view of the entire bill; of the specific allegations of the fraud, illegality, and invalidity of the mortgages; and of the specific prayer it contains that the claim, lien, and interest of the bank "be declared illegal and void"; that the complainant's mortgage be foreclosed; that so much only of the property be sold as should be necessary to pay the debt of the complainant; and in view of the entire absence of any prayer that the property be sold free of incumbrances, or that the proceeds be applied to the payment of the liens in their order—the only fair and logical construction of the pleading is that the only issue it tendered concerning the mortgages of the bank was that of their validity, just as the only relief it sought concerning them was a decree that they were void for fraud, and that the allegation that the claim and interest of the bank, if any, was junior and subordinate to that of the plaintiff, was but a general statement of the controversy presented by the specific averments of fraud and invalidity which preceded it, and hence that it presented no other question. In pleading, a general averment is always controlled and limited by specific allegations regarding the same subject-matter. *Mayer v. Ft. Wayne, C. & L. R. Co.* (Ind. Sup.) 31 N. E. 567, 568; *Reynolds v. Copeland*, 71 Ind. 422; *Pinney v. Fridley*, 9 Minn. 34 (Gil. 23); 4 Enc. of Pl. & Prac. 742. If the averment was more than this, and if it was intended to present the distinct issue whether or not the liens evidenced by the mortgages of the bank were prior in time to those of the plaintiff, it was false and sham, to the knowledge of the pleader, and could have been interposed for no other purpose than that of defeating the jurisdiction of the federal court; and, for the reasons heretofore stated, it cannot be permitted to have that effect. *Kelly v. Chicago & A. R. Co.* (C. C.) 122 Fed. 286; *Gustafson v. Chicago, R. I. & P. Ry. Co.* (C. C.) 128 Fed. 85; *Union Terminal Ry. Co. v. Chicago, B. & Q. Ry. Co.* (C. C.) 119 Fed. 209. For these reasons, the averment of the juniority and subordination of the bank's liens was, in our opinion, restricted to the issue of the invalidity of its mortgages, and it will not be further noticed.

Returning to the analysis of the bill, and the consideration of the number of controversies and causes of action it sets forth, in the light of the rules of law to which reference has been made, it clearly disclosed a controversy and cause of action regarding the foreclosure of the mortgages to Weldon, and another controversy and cause of action concerning the invalidity and avoidance of the mortgages of the bank for fraud. To the former cause of action the bank was not a necessary party. The purpose of the foreclosure of a mortgage is to bar the equity of redemption; to put a limit to the rights of those who are entitled to redeem from it. The holder of a senior mortgage is never a necessary party to such a suit, because he has no right to redeem. *Jerome v. McCarter*, 94 U. S. 734, 736, 24 L. Ed.

136; Jones on Mortgages, § 1439; Woodworth v. Blair, 112 U. S. 8, 5 Sup. Ct. 6, 28 L. Ed. 615; Hagan v. Walker, 14 How. 29, 37, 14 L. Ed. 312; Carey v. Railway Co., 161 U. S. 115, 132, 16 Sup. Ct. 537, 40 L. Ed. 638; Peters v. Bowman, 98 U. S. 56, 25 L. Ed. 91; Rose v. Page, 2 Sim. 471; Richards v. Cooper, 2 Beav. 304; Delabere v. Norwood, 3 Swanst. 144. The proposition is conceded that in exceptional cases a junior mortgagee may maintain a bill against the owner of the property, and both prior and subsequent incumbrancers, to marshal the liens, to sell the mortgaged property free from all incumbrances, and to distribute the proceeds to the lienholders in the order of their superiority. But such a suit is based on an administration bill. In reality it contains two causes of action—one to foreclose the junior mortgage, and another to redeem from the prior incumbrances. Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 754, 8 Sup. Ct. 337, 31 L. Ed. 309. Suffice it to say that the bill which Weldon exhibited contains no element of a bill to redeem, or of a bill to marshal liens or to sell the property free from incumbrances, or to distribute its proceeds to lienholders in the order of their rights. It not only contains no averments to warrant and no prayers for such relief, but it contains an express prayer that only so much of the mortgaged property as shall be necessary to pay the debt to the complainant shall be sold—a petition utterly inconsistent with the theory of an administration bill, or of a bill to sell the property free from incumbrances to discharge liens in their order. It follows that the bank was not an indispensable party to the controversy or cause of action for foreclosure which the bill presents, and that the only parties interested in that controversy or cause of action were Weldon and the Fritzlens.

The other and the main controversy and cause of action presented by the bill involved the avoidance of the mortgages of the bank for fraud. The facts and the respective interests of the parties arranged the bank, a citizen of Missouri, on one side, and Weldon and the Fritzlens, citizens of the state of Kansas, on the other side, of this controversy, because it was the interest of the bank to sustain, and that of Weldon and the Fritzlens to avoid, the mortgages. The suit to enforce this cause of action was one of which the Circuit Court for the District of Kansas had original cognizance, because it consisted of a controversy between citizens of different states which involved the requisite amount. 1 U. S. Comp. St. 1901, p. 508; Act March 3, 1875, c. 137, § 1, 18 Stat. 470; Act March 3, 1887, c. 373, § 1, 24 Stat. 552; Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433. The second section of the acts of 1887 and 1888 provides that when, in any such suit, "there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." 1 U. S. Comp. St. 1901, p. 509, § 2. Why was not this controversy between the bank and Weldon and the Fritzlens separable, and the suit removable? The answer to this question which counsel make is that this controversy was but an incident and a part of the cause of action to



foreclose the mortgage to Weldon, and hence that it was inseparable from the suit for that cause. In support of this contention, our attention has been called to the following authorities: *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462; *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; *Thurber v. Miller*, 67 Fed. 371, 14 C. C. A. 432; *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; *Thompson v. Dixon* (C. C.) 28 Fed. 5; *Ayers v. Chicago*, 101 U. S. 184, 25 L. Ed. 838; *Barth v. Coler*, 60 Fed. 466, 469, 9 C. C. A. 81, 83; *Wilson v. Oswego Township*, 151 U. S. 56, 65, 14 Sup. Ct. 259, 38 L. Ed. 70; *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Little v. Giles*, 118 U. S. 596, 601, 7 Sup. Ct. 32, 30 L. Ed. 269. The suit by Weldon was not founded upon an administration bill. It did not seek the sale of the entire property free of incumbrances, and the distribution of its proceeds to all parties interested according to their rights. In a suit founded on such a bill, every lienholder, senior or junior, and every person interested in the property, is a necessary party to the accomplishment of the main purpose of the suit, and the controversies between the complainant and the lienholders and claimants are inseparable parts of the main and single cause of action he presents. The first three cases cited above were of this nature. In *Graves v. Corbin*, 132 U. S. 571, 581, 10 Sup. Ct. 196, 32 L. Ed. 462, a simple contract creditor exhibited a bill against all the lienholders, claimants to the property of an insolvent limited partnership, to avoid all the alleged liens upon it, to sell the property free from all incumbrances, and to distribute the proceeds pro rata among all the creditors upon the theory that the property constituted a trust fund for the payment of all the creditors, share and share alike. The court logically held that a controversy between the complainant and the First National Bank, which claimed a lien upon this property, was an inseparable part of the complainant's single cause of action. In *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898, a judgment creditor filed a bill against the owners of, and those holding liens upon, the property of his debtor, to sell it free from the liens, to marshal the latter, to pay those who held liens prior to his judgment out of the proceeds of the property, and to apply the remainder, first, to the payment of his judgment; and, second, to the payment of subsequent liens. Upon the same principle the court held that controversies which arose in the suit between the complainant and the lienholders were but a part of his indivisible cause of action. *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528, presents another bill to administer the estate it describes. That was a suit for partition, and the court held that a controversy which arose in the suit between two or more of the parties relative to an undivided share of the property was a part of the complainant's cause of action for a division and distribution of the entire property. The decisions in these three cases fail to rule the case under consideration, because the bill does not seek a sale of the property free from incumbrances, and a distribution of the proceeds according to the rights of

the parties, but, on the other hand, presents two distinct causes of action—one to avoid prior mortgages for fraud, and the other to sell only such part of the property as may be necessary to pay the debt of the complainant.

Nor do the cases of *Thurber v. Miller*, 67 Fed. 371, 14 C. C. A. 432, *Thompson v. Dixon* (C. C.) 28 Fed. 5, and *Ayers v. Chicago*, 101 U. S. 184, 25 L. Ed. 838, reach the question which this case presents. In *Thurber v. Miller*, to the averment in a bill for a foreclosure that certain defendants had or claimed some lien or interest in the mortgaged premises, which, if any, had accrued subsequent to the lien of the mortgage, one of the defendants answered that he was the beneficiary in a mortgage which was prior to that of the complainant, and this court held that the controversy over the priority of the two mortgages was not separable from that involved in the foreclosure of the mortgage of the complainant. *Thompson v. Dixon* and *Ayers v. Chicago* involve analogous questions, less similar to that presented in the case at bar. The sound reason for the decision in *Thurber v. Miller* and in these cases is that the purpose of a foreclosure is to limit the right of owners and junior incumbrancers to redeem. An ascertainment and adjudication of the question who are junior incumbrancers, and who have the right to redeem, are indispensable to the foreclosure of that right. Hence a controversy which arises in the foreclosure suit over the priority of a lien of a defendant over that of the complainant is an essential part of the latter's cause of action, and inseparable from it. This, however, is not true of a controversy which involves the avoidance for fraud of mortgages which are prior to that which a complainant seeks to foreclose. The holder of such mortgages has no right to redeem, no equity to be foreclosed; and the determination of the validity of his mortgages constitutes no part of the suit to foreclose the junior mortgage, and is neither essential nor material to its purpose.

The other cases in support of the view of the appellees have no special relevancy to the issue before us. They but illustrate the familiar rules that suits for joint fraud or for joint trespass (*Barth v. Coler*, 60 Fed. 466, 469, 9 C. C. A. 81, 83; *Little v. Giles*, 118 U. S. 596, 601, 7 Sup. Ct. 32, 30 L. Ed. 269), for joint negligence (*Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121), or for the breach of a joint contract (*Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63), may not, by the denial of joint liability by the defendants, and by the presentation of separate defenses, be resolved into separable controversies, because the plaintiff may select and state his cause of action as he chooses in his pleadings, and it is not competent for the defendants, by interposing separate defenses, to make a controversy separable which the pleadings of the plaintiff show to be joint. No question of that nature is presented in the *Weldon* suit, and we return to the consideration of the controversies it discloses.

In *Barney v. Latham*, 103 U. S. 205, 214, 26 L. Ed. 514, the complainants brought a bill against certain individuals and a corporation. The charge of the bill was that the complainants were, in equity, the owners of  $\frac{1}{87}$  of certain lands earned by the construction of a railroad;

that the individuals had sold some of these lands, and received proceeds therefrom to the amount of \$129,500,  $\frac{1}{37}$  of which belonged to the complainants; and that these individual defendants had caused the title to the remainder of the lands to be vested in the corporation. The complainants sought to recover from the individual defendants  $\frac{1}{37}$  of the proceeds of the lands they had sold, and from the corporation  $\frac{1}{37}$  of the lands it had received. The Supreme Court decided that the controversy between the complainants and the individual defendants, notwithstanding the fact that they were the stockholders of the corporation, was separable from that between the complainants and the corporation, and said:

"With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined, as between the parties actually interested in it, without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company."

Blake v. McKim, 103 U. S. 336, 338, 25 L. Ed. 563; Hyde v. Ruble, 104 U. S. 407, 409, 26 L. Ed. 823.

Separate and distinct causes of action disclosed by the record in a single suit, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the disposition of the other, constitute separate controversies, within the meaning of the acts of Congress. Geer v. Mathieson Alkali Works, 190 U. S. 428, 432, 23 Sup. Ct. 807, 47 L. Ed. 1122; Gudger v. Western N. C. R. Co. (C. C.) 21 Fed. 81; Boyd v. Gill (C. C.) 19 Fed. 145, 149; Black's Dillon on Removal of Causes, § 143. In Geer v. Mathieson Alkali Works, *supra*, the Supreme Court declares the rule upon this question in these words:

"A suit may, consistently with the rules of pleading, embrace several distinct controversies. Barney v. Latham, 103 U. S. 205, 212, 26 L. Ed. 514. It was said in Hyde v. Ruble, 104 U. S. 409, 26 L. Ed. 824: 'To entitle a party to a removal under this clause [second clause of section 2 of the act of 1875, same as second clause in the act of 1887], there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other.' In other words, as expressed in Fraser v. Jennison, 103 U. S. 191, 194, 1 Sup. Ct. 171, 27 L. Ed. 131, 'the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun.' And when two or more causes of action are united in one suit, there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which, if it had been sued on alone, would be removable."

The Weldon suit fulfilled every requirement of this rule. Two causes of action were united in the same suit—one, to avoid prior mortgages for fraud; the other, to foreclose the junior mortgage. Neither was an essential part of the other, and the determination of neither was essential to the adjudication of the other. The cause of action to avoid

the prior mortgages for fraud presents a controversy, when the parties are lawfully placed according to the facts and their respective interests, wholly between citizens of one state upon one side, and a citizen of another state upon the other side, of it, which can be fully determined as between them. If a suit had been brought upon that cause of action alone, that suit would have been removable to the federal court. One of the defendants in that suit that is actually interested in the controversy which this cause of action presents petitioned for its removal to the federal court. The unavoidable conclusion is that the bill and the record which Weldon had made when the petition for removal was filed disclosed a separable controversy in his suit, wholly between citizens of different states, which could be fully determined as between them; that that suit was removable to the federal court; and that Judge Lochren rightly took jurisdiction of it and denied the motion to remand it.

There is another reason why Weldon was not entitled to a remand of his suit. It is that the bank had by its verified petition made a *prima facie* case of prejudice and local influence, which, although challenged by the defendant, had not been tried and determined by the court. The facts that the codefendants of the bank were citizens of the same state with the complainant, and that two of the District Judges have argued with marked force and ability, and have decided, that no case is removable under the fourth (the local influence) clause of the second section of the act of 1887 unless all the defendants are citizens of other states than that of the plaintiff (*Anderson v. Bowers* [C. C.] 43 Fed. 321; *Campbell v. Milliken* [C. C.] 119 Fed. 981, 985), have not been overlooked. There are, however, some suits which are removable under this section which are not originally cognizable in the federal courts—suits in which some of the defendants may be citizens of the same state as the plaintiff—notably those in which there is a separable controversy between citizens of different states. It is therefore not improbable that the same construction may apply to this paragraph of the section.

Prior to the passage of the act of 1887, suits involving controversies between citizens of different states were removable for prejudice or local influence by either "plaintiff or defendant" (Rev. St. § 639); and the removal could be had only where all the parties to the suit on one side were citizens of different states from those on the other; and, if on each side there were more than one person, then all the persons on one side were required to be citizens of the state in which the suit was brought, and all the persons on the other side, citizens of some other state or states, and all the latter who had the right of removal were required to unite in the petition. *Case of the Sewing Machine Companies*, 18 Wall. 553, 21 L. Ed. 914; *Vannevar v. Bryant*, 21 Wall. 41, 22 L. Ed. 476; *Myers v. Swann*, 107 U. S. 546, 2 Sup. Ct. 685, 27 L. Ed. 583; *Iron Co. v. Ashburn*, 118 U. S. 54, 6 Sup. Ct. 929, 30 L. Ed. 60; *Hancock v. Holbrook*, 119 U. S. 586, 7 Sup. Ct. 341, 30 L. Ed. 538. The act of 1887 deprives the plaintiff of this privilege, and gives it to any defendant who is a citizen of another state than that in which the suit is brought wherein there is a controversy between a citizen of

the state in which the suit is instituted and a citizen of any other state. It reads:

"And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the Circuit Court of the United States for the proper district."

This language appears to be clear and direct, and to strongly indicate that Congress intended that, in a suit in a state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant who is such citizen of another state may remove the suit to the federal court, whether his codefendants are citizens of the same state as the plaintiff or not. Congress broadly covered in its act every suit in which such a controversy arises between such parties, and granted the right of removal to any such defendant. It made no exception of suits in which some of the defendants were citizens of the same state as the plaintiff, and the legal presumption is that it intended to make no such exception. These and other considerations which are more exhaustively and convincingly set forth in the opinion of Judge Jackson (afterwards Mr. Justice Jackson of the Supreme Court) in *Whelan v. New York, L. E. & W. R. Co.* (C. C.) 35 Fed. 849, 851-861, 1 L. R. A. 65, and which it is unnecessary to repeat here, persuade that the true construction of this clause of the act of 1887 is that any defendant who is a citizen of another state than that in which a suit is brought may remove it to the federal court for local influence, although some of his codefendants are citizens of the same state as the plaintiff. This conclusion has received the approval of Judge Thayer in one of his lectures at the St. Louis Law School (*Campbell v. Milliken* [C. C.] 119 Fed. 986); of Pardee, Circuit Judge, and Newman, District Judge, in *Haire v. Rome R. Co.* (C. C.) 57 Fed. 321, 323; has at least escaped the disapproval of Chief Justice Fuller in *Wilder v. Iron Co.* (C. C.) 46 Fed. 687; and is sustained by the great weight of authority (*City of Detroit v. Detroit City Ry. Co.* [C. C.] 54 Fed. 15; *Bonner v. Meikle* [C. C.] 77 Fed. 485, 489; *Hall v. Chattanooga Agricultural Works* [C. C.] 48 Fed. 599, 605; *Adelbert College v. Toledo, etc., Ry. Co.* [C. C.] 47 Fed. 836, 845; *Fisk v. Henarie* [C. C.] 32 Fed. 417, 422; *Reeves v. Corning* [C. C.] 51 Fed. 774, 778).

The conclusion of this whole matter is that upon the filing of the petition for removal in the Weldon suit the record in that case disclosed a removable suit, the jurisdiction of the state court over the suit and the property it involved immediately ceased, the jurisdiction of the Circuit Court attached, and when, in October, 1903, that court renounced its jurisdiction in the Weldon suit, and seized the personal property under its writ in the action of replevin, it acquired lawful and exclusive jurisdiction of that property, and plenary jurisdiction to retain and apply it to the satisfaction of the judgment upon the merits which it should render in the action of replevin. The order to return this property to the state court and the judgment of dismissal of the action were therefore erroneous. The Circuit Court, which had once acquired the custody and jurisdiction of the property in the action of replevin,

had the power, and it was its duty, to retain it, to adjudicate the rights of the parties to it, and to apply the property to the execution of its judgment, and it could not lawfully renounce the power or evade the duty.

Nor does the fact that another judge of co-ordinate jurisdiction, who entertained views of the law different from those which inspired the action of Judge Lochren, who denied the motion to remand in September, 1903, subsequently, in April, 1904, granted another motion to remand the Weldon suit, more than five months after the seizure of the personal property under the writ of replevin, militate against this conclusion. The complication which results from the latter order is another illustration of the wisdom of the rule "that the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of property or of practice, except for the most cogent reasons." *Shreve v. Cheesman*, 69 Fed. 785, 791, 16 C. C. A. 413, 418; *Plattner Implement Co. v. International Harvester Co.* (C. C. A.) 133 Fed. 376. But the order which remanded the Weldon suit in April, 1904, transferred to the state court no jurisdiction over the personal property or its proceeds, because the Circuit Court then had no such jurisdiction in that suit. In October, 1903, it had lawfully renounced its jurisdiction of that property in the Weldon suit, and had legally taken actual custody and full jurisdiction of it under its writ in the action of replevin. Hence, when the Weldon suit returned to the state court, the custody and jurisdiction of the personal property and of its proceeds remained in the Circuit Court in the action of replevin, and the state court was without right, jurisdiction, or authority to take, receive, or interfere with it until the final judgment of the Circuit Court upon the merits of the controversy in that action had been rendered and executed.

Moreover, even if the state court had acquired and yet retained potential jurisdiction of the personal property in the Weldon suit, it had not taken or sought to take, and it had not acquired, the actual custody and possession of it; and until, by its receiver, sheriff, or other proper officer, it requested that custody and possession, the Circuit Court should have retained it or delivered it to the bank. It might have been that the state court would never have required or taken it. It would have been soon enough to have surrendered it in any event when an officer of the state court appeared and offered to receive and hold it under the order or authority of that court. Meanwhile, and until such an officer did appear, it was the plaintiff, and not the defendants in the action of replevin, that was entitled, under the defaulted mortgages to the bank, and the affidavit and bond in replevin, to the possession of the property, if the Circuit Court was to surrender it; and for this reason, also, the order to return it, not to the custody of the state court or of its officer, but to Fritzlen, the defaulting mortgagor, from whom the marshal had taken it, was erroneous.

Finally, if the jurisdiction and custody of the personal property had vested in the state court, that fact would have presented no sufficient ground for a dismissal of the action of replevin, and there was no other reason for that judgment. The custody, control, and jurisdiction of the property pertained not to the jurisdiction of the controversy, nor

of the action between the parties, to its trial, or to the decision of the issues it presented, but to the execution of the judgment that might subsequently be rendered in it. It was not more essential to the trial and adjudication of the issues than custody and jurisdiction of the money of a debtor required to pay a judgment that may be rendered against him upon a contract are to the jurisdiction and trial of the action upon the contract. It is no defense to an action for a debt that the debtor has not, and probably never will obtain, the means to pay it, and that the court has no jurisdiction of property to satisfy it. And it is no defense to an action against defendants for the possession and delivery of personal property that they have it, but that a prior action is pending between the same parties for the same cause of action in a state court, and the defendants cannot foresee what the decision and action of that court may be. The action in the state court may be dismissed. It may result in a decree which will exhaust but a part, and leave the larger portion of the property involved in the controversies to respond to the judgment in the subsequent action. The pendency in a state court of a prior action to determine the same issues pending in a subsequent action in the federal court between the same parties presents no bar and furnishes no ground for the abatement of the later action. When the state court secures by proper process the custody or dominion of specific property, which it is one of the objects of the suit in the federal court to subject to its judgment or decree, the latter action should not be dismissed; but it should proceed as far as may be without creating a conflict concerning the possession of the property, and then be stayed until the proceedings in the state court have been concluded, or ample time for their termination has elapsed. *Barber Asphalt Paving Co. v. Morris* (C. C. A.) 132 Fed. 945, 948; *Williams v. Neely* (C. C. A.) 134 Fed. 1; *Zimmerman v. So Relle*, 80 Fed. 417, 420, 25 C. C. A. 518, 521; *Gates v. Bucki*, 53 Fed. 961, 965, 4 C. C. A. 116, 120.

The issues presented by the pleadings in this action challenged the existence and validity of the mortgages of the bank, and its rights under them to the property described in the complaint. These issues were susceptible of trial and adjudication regardless of the possession of the personal property during the pendency of the suit. The jurisdiction of the two courts was concurrent. That of neither excluded that of the other to try the same issues between the same parties. It is not the final judgment in the first suit, but the first final judgment, although it may be in the second suit, that renders the issues in such a case res adjudicata in the other court. *Insurance Co. v. Harris*, 97 U. S. 331, 336, 338, 24 L. Ed. 959. Hence, so long as the issues in the action in replevin had not been finally adjudged by the state court in the *Weldon* suit, the bank had the right to their hearing and decision in the federal court. The power was vested in that court, and the duty was imposed upon it—a duty which it might not lawfully renounce or avoid—to proceed with all convenient speed to try and determine by the exercise of its own independent judgment the controversy between citizens of different states which the action in replevin presented. *Barber Asphalt Paving Co. v. Morris* (C. C. A.) 132 Fed. 945, 961, 966.

The judgment of dismissal and the order for the return of the prop-

erty must be reversed, and the case must be remanded to the Circuit Court for further proceedings not inconsistent with the views expressed in this opinion, and it is so ordered.

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MOORE et al. v. PETTY et al.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1905.)

No. 2,031.

1. EXECUTORS—ACTIONS IN FOREIGN COURT—AUTHORITY TO MAINTAIN.

An executor or administrator, in his representative capacity, cannot maintain an action in the courts of any sovereignty other than that under whose laws he was appointed and qualified, without obtaining an ancillary grant of letters in the state where the action is brought, unless the right so to do is conferred upon him by the law of the forum.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 2330-2333.]

2. SAME.

But whenever the cause of action declared upon by the foreign executor or administrator is one which involves an assertion of his own right, rather than one of the deceased, or which has accrued directly to him through his contract or transaction, and was not originally an asset of the estate in his charge, he may maintain an action in another state for the enforcement thereof, although express authority so to do may not be found in a statute of the forum.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 2330-2333.]

3. SAME—ACCRUAL OF ACTION.

A cause of action to recover from agents employed by executors the proceeds of a sale of real estate belonging to the decedent's estate accrues directly to the executors, and they may sue thereon in a state other than that of their appointment, without procuring new letters in that state.

4. PLEADINGS—AMENDMENT—DISCRETION OF COURT.

It was within the discretion of the trial court to allow the amendment at the trial of a petition alleging that a sale made by defendants as plaintiff's agents was in fact a sham concocted for the purpose of deceiving plaintiffs, and that, after accomplishing the same, defendants sold the land to others at a substantial advance, so as to allege that defendants, as agents, sold the land for the increased price, and received and retained such price.

5. PRINCIPAL AND AGENT—MISCONDUCT OF AGENT—ACTION IN SELF-INTEREST—REMEDIES OF PRINCIPAL.

Where agents, during the continuance of their agency, purchased for themselves land of their principals, using the name of another to give color to the transaction, and resold the same at a higher price, the benefit of the resale inured to the principals, and they could sue at law for the profit received and retained by the agents.

6. TRIAL—VERDICT—DIRECTION—FORMALITY.

Where the court directs a verdict, the usual and better practice is for the jury to return a formal verdict in writing, but the absence of such a verdict is not fatal to the validity of the judgment.

7. PRINCIPAL AND AGENT—SALES BY AGENT—RIGHTS OF PRINCIPAL.

Defendants were plaintiffs' agents for the sale of land, and expressly agreed that, for the compensation which they were to receive, they would look after plaintiffs' interests until the sale was concluded and



the money fully paid. They entered into a contract of sale which unauthorizedly bound plaintiffs to execute a warranty deed, and the purchaser, in the contract, did not so obligate himself that plaintiffs could have held him to the purchase. Before the question of the character of the deed was settled, and before the purchaser signed any obligatory writing, the latter transferred his interest in the property to defendants, without having made any payment. This fact defendants concealed from plaintiffs, and immediately thereafter sold the property themselves at a greater price than the first purchaser was to pay. In subsequent negotiations with plaintiffs, they still spoke of the first purchaser as making the purchase. *Held*, that the sale finally made by defendants was made by them as plaintiffs' agents, and plaintiffs were entitled to the profits thereof.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This was an action brought by Robert B. Petty and Henry H. Negley, executors of the last will of Catharine R. Negley, deceased, against Charles E. Moore and William B. Chick, copartners as Moore & Chick, to recover certain moneys in the hands of defendants, received from the sale of a tract of land. The executors claimed that the land, when sold, belonged to the estate in their charge, and that the sale was made by defendants while acting as their agents. The defendants claimed that, while they once sold the land as agents of the executors, they duly accounted for the proceeds; that they thereafter bought the same from the purchaser, and resold it at a profit; and that the profit sought by the executors was their own. The petition, as first filed, proceeded upon the theory that the first sale by the defendants was a sham, and was really to themselves, though made colorably to another for the purpose of deceiving the executors and defrauding the estate; that, after accomplishing the deception, they sold the land to other parties at a substantial advance; and that consequently the estate was damaged in that amount. After the issues were joined, and when the cause came on for trial, the executors, with permission of the court, but against the objection of the defendants, amended their petition by alleging that the defendants, while acting as their agents, sold the land for the increased price, and received and still retained the same. No continuance or delay was requested by the defendants on account of the amendment. The cause was tried to a jury.

The record discloses the following facts:

Catharine R. Negley was a resident of Pittsburgh, Pa. Her will was duly probated in the orphans' court of Allegheny county, in that state. The plaintiffs, having been nominated therein as executors, qualified as such; and, in due course, letters testamentary were issued to them. The executors were invested by the will with full power to sell and convey the real property of the testatrix at public or private sale, and at such times and upon such terms as they might deem best, and to invest the proceeds. Included in the estate, which was considerable, was a tract of land in Cherokee county, Iowa. The defendants lived at Cherokee, Iowa; the executors, in Pennsylvania.

For several years prior to the transactions which resulted in the controversy the defendants had acted as agents of the executors in renting the Iowa land and paying the taxes. In August, 1901, the defendants wrote the executors that conditions were very unfavorable for the renting of the land in the future, and suggested the fixing of a selling price if the latter desired to sell. Then followed a course of correspondence covering a period of several months. The executors being willing to sell at a satisfactory figure, it was agreed that, if a sale was effected through defendants' efforts, they should, as agents, receive a commission of 2 per cent. of the selling price; the same "to include all ordinary transactions in relation to the future care of the matter such as collecting and forwarding the money." In this same connection the defendants had previously written the executors: "We would feel it incumbent upon us, if desirable to you, to still have charge of your interests in the premises until such time as the payments were all made."

The defendants wrote on November 14, 1901, that they had a customer who would pay \$17,000 for the property. The executors did not accept the proposition, but suggested the propriety of advertising in a local paper that the land was for sale. The defendants answered that the suggestion might be good if it was proposed to divide the land and peddle it in parcels, but they questioned the advisability of doing that. The executors rejected the offer of \$17,000, and named a higher figure, which they said they ought to obtain. To this the defendants replied that their customer, "after a careful examination of the land," declined to raise his first offer, and that they concurred in his views. They offered arguments in favor of their position, and said that the price desired by the executors was "out of the question" and "beyond the limit." It is worthy of note at this point that the customer who was said to have carefully examined the land is the man to whom the defendants claim to have made the sale two weeks later. He testified at the trial that he had never seen the land before purchasing, but had relied on defendants' statements concerning it. On December 12, 1901, the executors wrote that another party had written them, inquiring the price of the land. To this the defendants replied that they probably knew him, and that he was the man who in the preceding fall had offered them several thousand dollars less than the executors wanted. On December 16th the executors wrote that they had a definite offer from the other party; that they fixed the selling price at \$18,081, the purchaser to pay a certain tax; that they regretted that defendants did not advertise the property for sale, for, had they done so, a still better price could probably have been secured; that they had expected that the defendants would use all proper means to obtain the highest possible price, and at least obtain bids from the other parties whom defendants said they knew. They also said that, if they did not hear from defendants by wire on the 19th of December, the price mentioned would be withdrawn. On the 18th the defendants wired and wrote that they had sold the land at the price mentioned. At no time prior to the 21st of December did the defendants advise the executors of the name of the person with whom they were negotiating, and to whom they claimed to have sold. The tenor of their letters is marked by unfavorable comments on the value of the land. They knew or believed that a party residing in the same town, who had once offered them \$15,000 for the land, was then endeavoring to purchase from the executors, but they refrained from communicating with him. On the 18th of December a written contract of sale and purchase was prepared and signed by the defendants, as the agents of the executors, and by one Gray, as purchaser. The contract contained a requirement that the executors give the purchaser a good and sufficient warranty deed, except as to the tax already mentioned; that Gray pay \$100 upon the execution of the contract, the receipt of which was acknowledged; that \$2,900 be paid March 1, 1902; and that the remaining \$15,081 be represented by notes and mortgage. The contract and a draft for the \$100 were sent to the executors about a week afterwards. They returned the draft, and made various objections to the terms of the contract, among which was one to the requirement of a warranty deed. The sole evidence of the authority of defendants was in the correspondence, and it contained no warrant for a sale with covenants of warranty. The executors prepared and sent to the defendants a contract to be executed, but it was never executed by Gray, nor did he at any time bind himself in any enforceable way to accept such a conveyance as they were willing to give. The provisions of an Iowa statute affecting the sale of real property under foreign wills postponed the consummation of the transaction to about March 1, 1902. On February 21st, Gray executed two notes aggregating \$15,000, and a mortgage to secure the same. On the 26th the defendants wrote the executors, inclosing a draft for the cash payment, less their commission, also the notes, and the mortgage, which had been recorded, and said that they "had Mr. Gray pay an amount to make the mortgage an even \$15,000." They were retained by the executors.

On April 22, 1902, the defendants sent the executors a prepared deed "to be executed to Mr. R. H. Gray, the purchaser of this land"; and on the 26th of the same month the executors, having stricken out the clause of warranty, executed the same, and returned it to the defendants. In June, 1902,

the executors discovered that Gray had previously conveyed the land to the defendants, and that the latter had resold the same at an advance of more than \$5,000. The \$100 sent to the executors in December, 1901, by the defendants, and represented as being earnest money received from Gray to confirm the sale, was in fact furnished by the defendants themselves. Gray was a banker who lived at another town in Cherokee county, Iowa. He carried a balance in a bank in the town in which the defendants lived, and which was but a short distance from their office, where the contract of sale was said to have been prepared and signed. He did not draw a check upon his balance in that bank for the earnest money, but, on the contrary, the defendants, who had had previous dealings with him, advanced the money themselves, and charged Gray with the same upon their books. After the draft for the earnest money was returned by the executors, the defendants credited Gray therewith. When the cash payment of \$3,081, less commission, was remitted to the executors, on February 26, 1902, Gray had no interest whatever in the land. The money was wholly supplied by the defendants, although, as has been observed, they wrote that they "had Mr. Gray pay an amount to make the mortgage an even \$15,000." Gray executed the notes and mortgage for the deferred payments on February 21st.

The defendants say that some time between the 22d and the 26th, the date of the remittance, Gray came to them, and expressed regret that he had made the purchase, because of other financial engagements which he was required to meet. He said that he was willing to withdraw from the transaction without making any profit whatever. Consequently, according to the defendants, they took the purchase off of his hands, but they did not advise the executors thereof. About two months afterwards they prepared and forwarded to the executors a deed of conveyance to Gray, as the purchaser. It was conceded that, aside from the notes and mortgage which he executed, Gray never had a dollar invested in the transaction; that he made nothing and lost nothing.

It also appeared that, shortly before the commencement of the action in the court below, the executors wrote the defendants, charging them with bad faith, and with purchasing the land for themselves in the name of Gray. In reply, the defendants denied the charge that Gray was not the real purchaser, and referred the executors to certain court records for proof that Gray had contested the amount of the tax, which, as purchaser, he assumed, had succeeded in reducing it, and had finally paid the reduced amount. The truth was, however, that Gray did not pay the tax. It was paid months after the time the defendants claimed to have purchased the land from him, and after Gray himself ceased to claim any interest in it. At the same time the court records in the tax proceedings would doubtless have afforded some proof of their assertion, in that Gray was recognized therein as the owner of the land; but the testimony conclusively showed that from February to May, 1902, the defendants had no writing evidencing their alleged purchase from Gray, and from May to August, 1902, a deed from Gray to them was, according to the testimony of defendant Moore, kept from the records in order to avoid making new parties to the court proceedings. The letter of defendants regarding proof by the court records that Gray had paid the tax was therefore obviously misleading. One of the executors had seen the land several years before the transactions which have been related. The other had never seen it. Both of them relied largely upon the representations of the defendants concerning it.

About the first of the year 1902, in order to prepare the records for a proper conveyance of the title, an attested copy of the will of the testatrix and a transcript of the probate proceedings in the orphans' court of Allegheny county, Pa., were filed in the probate court of Cherokee county, Iowa, and the will was admitted to probate and record in the latter county as a foreign will. The order of the Iowa court contained a confirmation of the foreign appointment of the executors, and also a clause appointing them as such in that court. There was no bond given or formal qualification by them in Iowa. One of the defenses in the answer was that the court below was without jurisdiction to hear, try, or determine the cause, but the accompanying allegations showed that defendants evidently intended to chal-

lenge the capacity of the plaintiffs to maintain the action in Iowa. At the conclusion of the trial the plaintiffs interposed a motion for a verdict. The journal of the court recites that the motion was sustained, and that the jury returned a verdict in favor of the plaintiffs for \$5,207. The record does not disclose that any writing in the form of a verdict was signed by any one acting as foreman of the jury. Judgment having been entered for the amount of the verdict, the defendants prosecuted this proceeding in error.

E. H. Hubbard and A. R. Molyneux, for plaintiffs in error.

J. D. F. Smith and C. H. Lewis, for defendants in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The assignments of error present but four propositions which require consideration: Had plaintiffs, as foreign executors, authority to maintain the action in the state of Iowa? Did the Circuit Court commit error in permitting the plaintiffs to amend their petition on the eve of trial? Was the fact that no writing in the form of a verdict was signed by or on behalf of the jury fatal to the judgment? Did the Circuit Court err in directing a verdict for the plaintiffs upon the evidence adduced at the trial?

1. The will of the testatrix was duly probated in Allegheny county, Pa., and, the plaintiffs having qualified as executors, letters testamentary were there issued to them in due course. An attested copy of the will and a transcript of the probate proceedings were recorded in the county in Iowa in which the land was situated. By an order of the probate court in Iowa the same executors were appointed as such in that state, but they did not there qualify or give bond or receive letters testamentary. We will not pause to consider whether the language of the order in Iowa invested the executors with a domestic character, and whether the failure to qualify, give bond, and take out letters testamentary in that state can be urged in this proceeding. It may be assumed for the purposes of this cause that they were purely foreign executors; possessing, however, under an express provision of a statute of Iowa, the power to sell and convey the real property of the testatrix in that state. Proceeding with this assumption, did they have the right to maintain the action in Iowa for the recovery from their agents of the proceeds of a sale of land made under their authority? This question was presented by the defendants' answer, wherein it was alleged that the plaintiffs were appointed and qualified as executors only in the state of Pennsylvania, and that they had never been qualified or authorized to act as such under the laws of the state of Iowa. The general rule undoubtedly is that an executor or administrator in his representative capacity cannot maintain an action in the courts of any sovereignty other than that under whose laws he was appointed and qualified, without obtaining an ancillary grant of letters in the state where the action is brought, unless the right so to do is conferred upon him by the law of the forum. *Fenwick v.*

Sears' Administrators, 1 Cranch, 259, 2 L. Ed. 101; Dixon's Executors v. Ramsay's Executors, 2 Cranch, 319, 2 L. Ed. 453; Doe v. McFarland, 9 Cranch, 151, 3 L. Ed. 687; Kerr v. Moon, 9 Wheat. 565, 6 L. Ed. 161; Vaughan v. Northup, 15 Pet. 1, 5, 10 L. Ed. 639; Noonan v. Bradley, 9 Wall. 394, 19 L. Ed. 757; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112. The rule as to foreign guardians is the same. Morgan v. Potter, 157 U. S. 195, 15 Sup. Ct. 590, 39 L. Ed. 670. But whenever the cause of action declared upon by the foreign executor or administrator is one which involves an assertion of his own right, rather than one of the deceased, or which has accrued directly to him through his contract or transaction, and was not originally an asset of the estate in his charge, he may maintain an action in another state for the enforcement thereof, although express authority so to do may not be found in a statute of the forum. The principle underlying this modification of the general rule is that, when the cause of action accrues directly to the executor or administrator, it is assets in his hands for which he may sue in his personal capacity, and, if he sues as executor or administrator, the words so describing him will be regarded as merely descriptive, and be rejected as surplusage. See *Talmadge, Adm'r, v. Chapel*, 16 Mass. 71, in which it was held that, where a judgment had been recovered in New York by an administrator appointed in that state, he could bring suit upon the judgment in Massachusetts without taking out letters of administration there. This case was approved in *Biddle v. Wilkins*, 1 Pet. 686, 692, 7 L. Ed. 315. See, also, *Mowry v. Adams*, 14 Mass. 327; *Williams v. Moore*, 9 Pick. 432; *Kane v. Paul*, 14 Pet. 33, 42, 10 L. Ed. 311. The general rule is recognized and applied in Iowa (*McClure v. Bates*, 12 Iowa, 77), and also the qualification which has been stated (*Greasons v. Davis*, 9 Iowa, 219; *Chamberlain v. Wilson*, 45 Iowa, 149). In *Greasons v. Davis* the plaintiffs, foreign executors, brought an action in Iowa upon transcripts of judgments rendered in Pennsylvania. One of the defenses was that the plaintiffs were not qualified to sue when the action was commenced. It appeared that the plaintiffs' testator recovered the judgments in Pennsylvania, and, having died, the plaintiffs, as executors, were substituted on the record, which, under the practice in that state, put them in the position of judgment creditors, as though they had been the original plaintiffs in the actions. The trial court in Iowa was requested to instruct the jury that, if the plaintiffs were not appointed and qualified as executors under the laws of Iowa at the commencement of the action, they could not recover. A refusal of the instruction was sustained by the Supreme Court of Iowa, which said:

"If they had not been made parties in Pennsylvania, they could not sue without taking out letters here. \* \* \* Other reasons may require that they should still take out letters, in order to administer his estate here, but these reasons do not require it before suing in the present case."

The doctrine is more clearly illustrated in *Chamberlain v. Wilson*. Chamberlain, a citizen of Nebraska, died, holding a note executed by a resident of Iowa, and secured by mortgage upon real property in

the latter state. Letters of administration were issued in Nebraska to Van Horn, who, in his representative capacity, took possession of the note. He sent the note for collection to one Wilson, in Iowa, who collected a portion thereof from the maker, and had the money in his hands, ready to pay to the party entitled. A son of the deceased took out letters of administration in Iowa, demanded the money from Wilson, and sued him in that state upon his refusal to pay. The Nebraska administrator filed his petition as intervener, and claimed the money. It was held that, as the foreign administrator took actual possession of the note in question, embraced it in his inventory, and was charged with the principal and primary administration of the estate, he was entitled to the further control of it and its proceeds, which he did not lose by sending it to Iowa for collection. The court said:

"He may, in our opinion, maintain an action against Wilson for the proceeds of the note collected and in his possession, in his own name, without taking out new letters of administration. Probably, under the doctrine of *McClure v. Bates*, 12 Iowa, 77, he might not be enabled to maintain an action as administrator for the collection of the note. But the note came rightfully into his possession in virtue of the administration granted in Polk county, Nebraska. It was collected, and the proceeds were in the hands of Wilson, so that the right to maintain an action upon the note is not involved."

This doctrine is elsewhere generally recognized. In *Trecothick v. Austin*, 4 Mason, 16, Fed. Cas. No. 14,164, Mr. Justice Story said:

"But it is by no means clear that, if Trecothick's executors were now suing, they would be obliged in the present case to take out administration here before they could proceed. The demand against Ivers or the defendant [J. L. Austin] is not a demand which accrued in Trecothick's lifetime, or out of any contract with him. But it is a demand which accrued under agencies created by them, in their character as executors, after the death of Trecothick. They might, under such circumstances, have maintained a suit in their own names for an account against their agent, and need not have sued in their representative capacity. See *Cockerill v. Kynaston*, 4 Term R. 280; *Cowell v. Watts*, 6 East, 405; *Thompson v. Stent*, 1 Taunt. 322; *Toll, Ex'rs*, bk. 3, c. 10, p. 439. The agent would be estopped to deny their right to receive what he had collected in virtue of their authority. See *Nickolson v. Knowles*, 5 Madd. 47; 10 Vin. Abr. 'Estoppel,' M; 2 Comp. 11."

In *Lawrence v. Lawrence*, 3 Barb. Ch. (N. Y.) 71, Chancellor Walworth said:

"As a general rule, a foreign executor is not entitled to sue in our courts without having proved the will and taken out letters testamentary thereon in the proper probate court of this state. These rules, however, are only applicable to suits brought by executors for debts due to the testator, or where the foundation of the suit was based upon some transaction with the testator in his lifetime. They do not prevent a foreign executor from suing in our courts upon a contract made with himself as such executor."

To the same effect are *Fox v. Tay*, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; *State v. Kaime*, 4 Mo. App. 479; *Tyer v. Milling Co.*, 32 S. C. 598, 10 S. E. 1067; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; *Barton v. Higgins*, 4 Md. 539; *Rogers v. Hatch*, 8 Nev. 35; *Wayland v. Porterfield's Ex'r*, 58 Ky. 638; *Barrett v. Barrett*, 8 Me. 346; *Trotter v. White*, 18 Miss. (10 Smedes & M.) 607; *Johnston v. Wallis*, 41 Hun, 420; *Terrell v. Crane*,

55 Tex. 81; *Griswold v. Railroad Co.*, 9 Fed. 797, 798; *Goodyear v. Hullihan*, 2 Hughes, 492, Fed. Cas. No. 5,573.

In the case at bar the cause of action did not exist in the lifetime of the deceased. The proceeds of the sale sued for were never assets of her estate. The employment of defendants as agents to make the sale of the land was by the plaintiffs as executors. The right to recover the avails of any such sale accrued directly to the plaintiffs, and they were authorized to assert it in Iowa without procuring new letters in that state.

2. The allowance of the amendment of the petition was within the discretion of the trial court. The defendants did not suggest to the court that they were taken by surprise, and request additional time to meet the interpolated averment. It is claimed by them that the amendment changed the proceeding from an action at law to a suit in equity, but we are unable to concur in that view. If, as was charged, the defendants, whilst their agency subsisted, purchased for themselves the land of their principals, using the name of another for that purpose, and resold the same at a higher price, the benefit of the resale inured to the principals, and an action at law was maintainable for the profit which was received and retained.

3. Complaint is made that the trial court ignored the jury, sustained a motion for judgment, and rendered judgment thereon without the mediation of a verdict. The record, however, does not sustain this contention. The journal entry, which imports verity, recites that the plaintiffs moved the court to instruct the jury to return a verdict; that the motion was sustained by the court; that, under the instruction of the court, the jury returned a verdict; and upon that verdict the judgment was rendered. While the usual and the better practice, where the result is determined by the court as matter of law, is that a formal verdict in writing be returned by the jury, the absence thereof is not fatal to the validity of the proceedings. *Cahill v. Railway*, 74 Fed. 285, 20 C. C. A. 184.

4. Bearing in mind the rules that control a court in its duty to submit controverted questions of fact in an action at law to the jury, and in its duty, equally imperative, to direct a verdict when the state of the proofs requires it, we are of the opinion that the action of the Circuit Court was right. It was shown conclusively that the relation of principal and agent between the plaintiffs and the defendants did not cease with the preparation and signing of the contract of sale with Gray. The defendants had expressly agreed that, for the compensation which they were to receive, they would look after the interests of the plaintiffs until the business was concluded and the money fully paid. Moreover, the contract of sale which was signed by them as agents of the plaintiffs contained an unauthorized provision binding the latter to the execution of a warranty deed to Gray. In that condition it was unenforceable against the plaintiffs, nor did Gray at any time before the defendants took his place in the transaction so obligate himself that the plaintiffs could have held him to a purchase. The matter proceeded with the important condition respecting the character of the deed left un-

settled and undetermined by any obligatory writing signed by Gray, down to the time the notes, mortgage, and the cash payment were sent to the plaintiffs, and possibly to the time when, two months later, they struck from the proposed deed the clause of warranty, and executed and returned it to the defendants. But before either of these things were done, Gray, the grantee in the deed, had ceased to have or claim any interest whatever in the property. Before the notes and mortgage were sent to plaintiffs, and before the payment on the purchase price was made, and whilst the trust relation between the plaintiffs and defendants existed, Gray came to the latter, and expressed regret at having made the purchase, and a desire to withdraw therefrom. This was an important fact materially affecting the interests of the plaintiffs, and of which they were entitled to be fully and fairly advised by their agents. Whatever of benefit under the circumstances might accrue from the willingness of Gray to abandon his purchase or attempted purchase ought not to have been secretly reserved by the agents for their own advantage. They were bound to the utmost good faith, and to the subordination of their own interests to those of their principals. Facts then within the knowledge of the defendants evidenced at least a probability that a higher price could be secured for the land than Gray was to pay, and the defendants did pay as his successors. It will not do to draw lines too nicely to aid agents who have, during the existence of their relation of trust and confidence, assumed a position with reference to the business in their charge which is antagonistic to their principals. What we have said concerning the state of the negotiations when the defendants took the place of Gray in the purchase indicates a clear distinction between the case at bar and that of *Robertson v. Chapman*, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592, upon which reliance is placed. In that case the court said:

"The sale to O'Donohoe was so far consummated that neither party was at liberty to undo what had been done. O'Donohoe executed his notes for the deferred payments, and, his wife uniting with him, gave a mortgage to secure them. The notes and mortgage were delivered to and accepted by the plaintiff, who executed a deed to O'Donohoe, and placed it in the hands of Polk, to be delivered to O'Donohoe whenever a decree for the sale of the property was obtained, and upon the payment of the \$1,000 stipulated to be paid in cash. So that, at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. Nothing then stood in the way either of O'Donohoe's agreeing that Polk should take the property, or of Polk's becoming a purchaser from him. If the sale to O'Donohoe was an actual sale, in good faith, so far as Polk had any agency in effecting it—if the contract between the plaintiff and O'Donohoe had been so far executed at the time Polk took O'Donohoe's place in the purchase that it could not be rescinded by either party to it—then Polk's agency in selling the property did not prevent him from purchasing from O'Donohoe."

The foregoing being sufficient for the disposition of this contention of the defendants, we need not determine whether, aside from the nonexistence of a binding contract of sale when the rights of Gray were taken over by the defendants, the action of the Circuit



Court was or was not justified by other features of the case. The sale finally made by the defendants at the advanced price should therefore be held to have been made by them as agents, and for the benefit of their principals.

The judgment of the Circuit Court is affirmed.

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MUTUAL LIFE INS. CO. v. KEEN.

(Circuit Court of Appeals, Third Circuit. February 2, 1905.)

No. 37.

1. LIFE INSURANCE—ACTION ON POLICY—AFFIDAVIT OF DEFENSE.

The statement of claim in an action to recover life insurance set out a provisional policy issued by defendant to the decedent, insuring him for the term of 90 days, and which recited that he had made application for a permanent policy, and the receipt from him of the amount of one year's premium thereon; that the company should have the right to terminate the provisional policy at any time on notice and repayment of the premium received, but that if the application was accepted a permanent policy should be issued as soon as might be, and the amount received should be allowed in payment of the first premium thereon. The statement then alleged that the provisional policy had not been terminated by notice, nor had any part of the premium paid been returned, but that after the expiration of the 90 days the insured demanded a permanent policy or the return of the premium, and was told by defendant that his application had been accepted, and a permanent policy would be delivered in due course of mail, but that such policy had not been delivered at the time of the death of insured, which occurred shortly afterward. *Held*, that plaintiff's cause of action did not rest upon the provisional policy, which had expired by its terms, but solely upon a contract for permanent insurance, created either by the issuance of a policy or the acceptance of the application before the death of the applicant, which gave him a right to demand the policy, and that an affidavit of defense explicitly denying that such policy had been issued, or that the application had been accepted, or that defendant had ever so stated, went to the whole of plaintiff's claim, and was sufficient.

2. PLEADING—CONSTRUCTION OF AFFIDAVIT OF DEFENSE.

The office of an affidavit of defense, under the law of Pennsylvania, is to prevent a summary judgment, and it is not to be subjected to close technical examination. The law may not be so construed as in effect to deprive a defendant of the right to present disputed questions of fact or law to a court and jury for determination by the orderly and established judicial procedure.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 131 Fed. 559.

Charles P. Sherman and John G. Johnson, for plaintiff in error.  
Francis S. Laws, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, J. Suit was brought in the court below by the defendant in error, hereinafter called the plaintiff, against the plaintiff in error, hereinafter called the defendant, to recover upon an alleged contract of life insurance, in her favor, between her husband, John Este Keen, and the defendant company.

To the statement of claim filed by the plaintiff, affidavits of defense, original, amended and supplemental, were filed by the defendant, and thereafter, upon motion of the plaintiff, a rule for judgment for want of a sufficient affidavit of defense, was, after hearing and argument, made absolute, and judgment entered for the plaintiff for \$4,850, etc. The following facts, as alleged in the statement of claim and in the affidavits of defense, are disclosed by the record:

Prior to November 4, 1902, John Este Keen, a citizen of the United States, while residing in Constantinople, Turkey, made his application to the Mutual Life Insurance Company of New York, the defendant, for a policy of insurance upon his life, in the sum of £1,000 sterling, upon the 20-year endowment plan, in favor of his wife, the said plaintiff. On or about November 4, 1902, the said defendant, through its agent and general manager for the Levant, in Paris, issued to the said John Este Keen its provisional policy, insuring his life, for the benefit of his wife, the said plaintiff, for a period of 90 days, in the amount and upon the plan applied for, receiving therefor an amount equal to the annual premium for such insurance. The said provisional policy, made part of the statement of claim, is as follows:

"The Mutual Life Insurance Company of New York.

"Age 49 years.

Amount £1,000.

"20 Year Endowment; 20 Year Distribution.

"James W. Seymour, Jr., General Manager for the Levant, 17 Avenue De L'Opera, Paris.

"In consideration of the application for this provisional policy which is hereby made a part of the contract and of sixty-one pounds two shillings and four pence, the Mutual Life Insurance Company of New York does insure the life of John Este Keen for the sum of one thousand pounds sterling, in favor of his wife Hannah Mills Keen for the term of ninety days from date, to wit, until the 2d day of February, 1903, subject to the usual terms of said company's policies. It is expressly stipulated that if the officers of said company at New York shall not agree to continue the insurance during the said ninety days they may terminate said insurance at any time prior to the expiration of said ninety days by mailing a registered letter to the said J. E. Keen, informing him of their decision, and said insurance shall thereupon become null and void. In such a case this provisional policy shall become null and void, and shall be returned to the company at Paris, against reimbursement of the sum paid. If, on the other hand, the application for insurance is accepted by the officers of said company, at New York, a permanent policy shall be made out and delivered to the insured as soon as may be, and the amount herein acknowledged to have been received by the company in exchange for this provisional policy shall be allowed in payment of first premium on said insurance.

"In witness whereof, the said the Mutual Life Insurance Company of New York has caused this provisional policy to be signed in duplicate, by its President and Secretary, at its Home Office in the City of New York, and to be countersigned at Paris by James W. Seymour, Jr., its General Manager for the Levant, on this 4th day of November in the year 1902, and signed by the insured.

Richard A. McCurdy, President.

"[Seal] W. J. Easton, Secretary.

"Countersigned by James W. Seymour, Jr., General Manager for the Levant.

"John Este Keen, the Insured."

This provisional policy expired by its own limitation February 2, 1903, the officers of the defendant company not having exercised

their right to terminate said insurance at any time prior to the expiration of the said 90 days. The statement of claim contains the following averment:

"And the plaintiff avers upon information and belief that at no time during the said ninety days or afterwards did the defendant ever terminate the said policy, or mail a registered or other letter to the said insured, informing him of their decision so to do. That in the latter part of February, 1903, after the said ninety days had expired, the said insured, by his agent, made a demand upon the defendant at Constantinople, Turkey, for a permanent policy of insurance to be issued in pursuance of said provisional policy, or a return of the premium of \$295.82 which had been paid therefor. The defendant refused to return said premium, and advised the said insured that his application for a permanent policy had been accepted by the home office of the defendant in New York, U. S. A., and that a permanent policy would be delivered in due course of mail. The defendant has never returned or offered the return of the said premium, but still retains the same."

John Este Keen died March 26, 1903. The plaintiff avers that immediately thereafter, the defendant company was notified of the said death, and claim made for the amount alleged to be due "under said policy," and "that by reason of the premises, the said John Este Keen was, on the 26th day of March, 1903, insured in the defendant company in the sum of £1,000 sterling, \* \* \* payable to the plaintiff as the wife of said insured and as the beneficiary named in the policy of insurance, and which said sum the defendant has refused and still refuses to pay."

The material parts of the said affidavit of defense, amended and supplemental, filed by the defendant, are as follows:

"That \* \* \* defendant has a just, true, full and legal defense to the whole of the plaintiff's claim of the following nature and character, to wit:

"That no contract of insurance existed between the defendant and John Este Keen at the time of his death, to wit, March 26, 1903, and that defendant owes plaintiff nothing."

It then sets forth the provisional policy, above recited, as issued from the office of its general manager for the Levant, in Paris, November 4, 1902, and avers:

"That said provisional policy lapsed by its own terms February 2, 1903, on which date all defendant's liability under said policy ceased.

"That defendant did not exercise its right to terminate said insurance prior to the expiration of said ninety days, nor, on the other hand, was the application for insurance accepted by the officers of said company at New York, and no permanent policy was ever delivered to said John Este Keen, and no contract of insurance, other than the said ninety day provisional policy No. 100,110, which lapsed by its own terms February 2, 1903, as aforesaid, was ever entered into by defendant with said John Este Keen.

"That the plaintiff, in her statement of claim heretofore filed in this case, avers as follows: 'The defendant refused to return said premium, and advised the said insured that his application for a permanent policy had been accepted by the home office of the defendant in New York, U. S. A., and that a permanent policy would be delivered in due course of mail.'

"That it is not true either that the defendant refused to return said premium, or that the defendant advised the said insured that his application for a permanent policy had been accepted by the home office of the defendant in New York, U. S. A., or that a permanent policy would be delivered in due course of mail.

"That on the contrary, the defendant, acting through its officers at New York, deemed the information given to it by John Este Keen concerning

certain matters in his application for a permanent policy of insurance to be unsatisfactory, and refused to make any permanent insurance or to cause any permanent insurance policy to be delivered, until it, by its officers in New York, should be satisfied concerning the matters involved, which it deemed material and which were actually material to the transaction. It directed the director general for the Levant, at Paris, France, to deliver no permanent policy to said Keen until it, the defendant, by its officers at New York, should be satisfied concerning said material matters.

"That neither the defendant, nor its officers in New York, did accept the application of said John Este Keen for a permanent policy, and never agreed or authorized any one to express its agreement to the issuance of such permanent policy.

"That before the death of the said John Este Keen, it, the defendant, by its officers in New York, became satisfied that it had been deceived in said material matters, and forthwith, without delay, by cable and by mail, notified its said director general for the Levant, in Paris, not to deliver any permanent policy to said John Este Keen, and to return to said Keen the premium which he had paid upon the provisional policy which had been issued, and which had expired by its own limitation.

"That after the said John Este Keen had made his said application for insurance, a letter was addressed to him at Constantinople, Turkey, where he then resided, by the defendant's said director general for the Levant, at Paris, in which he, said Keen, was informed that before issuing any policy the company, defendant, would require from him a satisfactory statement to the effect that he had never applied to any other insurance company or association for a life policy which had been refused.

"That said Keen wrote a letter from Constantinople, addressed to said company's director general for the Levant, at Paris, dated February 12, 1903, in which he said: 'I beg to say that I have never made application for insurance to any other company, and have thus not been refused.'

"That said representation was false, though the fact that it was false was not known to said director general for the Levant.

"That the said application by said Keen for insurance, which was dated November 4, 1902, and which was acknowledged by him to be the basis of his provisional contract for insurance, contained false answers to certain questions put to him, which answers were warranted to be true. These answers concerned matters material to the contract, which were subsequently discovered by the defendant to have been false. They were believed by it at the time they were made to be true.

"Amongst these false answers in said application was an answer which untruthfully stated that he had never been declined as an applicant for insurance by any other company. As the defendant is informed, believes and expects to be able to prove, said Keen had applied antecedently to this representation to another insurance company for insurance, and had been by it declined.

"In said application, in answer to a question as to the name and address of the physician last consulted by the applicant, he replied: 'Dr. Patterson;' also that said physician had been consulted by the applicant one year antecedently to the application, and that the nature of the complaint concerning which said physician had been consulted was indigestion.

"In said application, in answer to a question requiring disclosure of full particulars of any other illness or injury he had had, giving the date, duration and remaining effects, if any, said applicant falsely answered: 'Never seriously ill;' whereas, as defendant is informed, believes and expects to be able to prove, the said Keen, in May, 1902, was operated upon for tubercular orchitis by a physician other than the said Dr. Patterson.

"All of which above-recited facts the company defendant believes to be true and expects to prove upon the trial of this cause."

In the opinion of the court below these affidavits did not, in any or all of the particulars as above recited, set forth a sufficient defense to the plaintiff's claim. To the judgment thereupon entered, for

want of a sufficient affidavit of defense, this writ of error has been taken.

We think the learned judge of the court below was in error in the view taken by him of these affidavits, and in the entry of said judgment. The fundamental error in this case is due to the construction given by the court below to the scope and effect of the provisional contract of insurance. The court in its opinion says:

"The provisional policy was issued for three months, which was to be merged into a permanent policy at the end thereof, unless the company found reasons during that time for terminating the insurance, when the provisional policy was to become null and void at the same time, upon the receipt of notice. No notice was given, and we think, therefore, at the end of the expiration of the provisional policy the insured had a right to assume from the language of his provisional policy, that his permanent policy took effect, unless otherwise notified. \* \* \* We think, therefore, for these reasons, that the decedent was insured at the time of his death, whether defendant had actually executed and delivered the policy or not. He was entitled to the policy under the contract; no money had been returned, nor had the insurance been terminated, in accordance with the provisions in the agreement, and its failure to carry out its part of the contract, by not executing the permanent policy of insurance, does not relieve it from liability."

This is, we think, a misconception of the meaning, force and effect of the provisional policy, and the stipulations contained therein. The defendant is a New York corporation, doing business in various foreign cities, through general agents and managers, among others in Constantinople, through its general manager in Paris. It is quite obvious that residents of such far away places, who are applicants for insurance, would, in ordinary course of business, have to submit to noninsurance through a considerable period while their applications were being transmitted to the home company for investigation and consideration. It therefore requires no explanation to understand how the device of a provisional policy, to remain in force during such period as will reasonably cover the delays involved in the transactions aforesaid, allows the company to conduct its foreign business in competition with foreign companies. The applicant has the benefit of immediate insurance, while his application is being considered, and the company assumes an unconsidered risk for a short period of time. By this arrangement, the home company may give to the proposed risk the mature investigation and consideration required, and accept or reject the same, according as its judgment may be affected by such investigation and consideration, in the latter case returning the premium received, or such part thereof as may not be applicable to the provisional policy.

This general purpose we read in the provisional policy, as recited in the statement of claim and affidavits of defense. It contains, first, a provision for immediate insurance "for the term of 90 days from date, to wit, until the second day of February, 1903"; second, a provision that the company may terminate such immediate insurance before the end of 90 days, at its own option, in which case the "provisional policy shall become null and void and shall be returned to the company at Paris against reimbursement of the sum paid"; third, a provision for the issuance of a permanent

policy, if the application for insurance is accepted by the officers of said company at New York. It is quite clear, then, that this provisional policy might have been terminated, either by the expiration of the 90 days, on February 2, 1903, or prior thereto if the company should choose not to continue the insurance, and should notify, by registered letter, the applicant to that effect. In the case at bar, the provisional policy was terminated by expiration of its term. It then remained for the insurance company to accept or not the application for insurance. In the former case, it would be due to the insured that a permanent policy be made out and delivered as soon as might be.

The case of the plaintiff then stands, as stated by herself, thus: The provisional policy had expired by its own limitation on February 2, 1903, the insured, her husband, not having died while it was in force. Her claim against the company must then rest upon, either the fact that a permanent policy had been issued prior to his death, or that his application had been accepted by the company, whether during the continuance of the provisional policy or after its termination, such acceptance imposing upon the company the obligation to make out and deliver the policy, and giving to the insured the right to demand and receive the same. That such construction was placed upon the stipulation of the provisional policy by the plaintiff, is plain from the following averment of her statement of claim. We again quote it:

"That in the latter part of February, 1903, after the said ninety days had expired, the said insured, by his agent, made a demand upon the defendant at Constantinople, Turkey, for a permanent policy of insurance to be issued in pursuance of said provisional policy, or a return of the premium of \$295.82 which had been paid therefor. The defendant refused to return said premium, and advised the said insured that his application for a permanent policy had been accepted by the home office of the defendant in New York, U. S. A., and that a permanent policy would be delivered in due course of mail. The defendant has never returned or offered the return of the said premium, but still retains the same."

Upon this averment of fact, the plaintiff rests the conclusion, that "by reason of the premises, the said John Este Keen was, on the 26th day of March, 1903, insured in the defendant company," etc. This is the essential averment of the plaintiff's case,—the substantive cause of action. If this is sufficiently denied by the defendant in its affidavit of defense, the plaintiff is not entitled to judgment, but must go to trial in due course before a court and jury. Let us see, then, how defendant in its affidavit, amended and supplemental, deals with this crucial statement of plaintiff's claim. The amended affidavit of defense says:

"That no contract of insurance existed between the defendant and John Este Keen at the time of his death, to wit, March 28, 1903, and that defendant owes plaintiff nothing. \* \* \* That said provisional policy lapsed by its own terms February 2, 1903, on which date all defendant's liability under said policy ceased. That defendant did not exercise its right to terminate said insurance prior to the expiration of said ninety days, nor, on the other hand, was the application for insurance accepted by the officers of said company at New York, and no permanent policy was ever delivered to said John Este Keen, and no contract of insurance, other than the said ninety day

provisional policy No. 100,110, which lapsed by its own terms February 2, 1903, as aforesaid, was ever entered into by defendant with said John Este Keen."

In the supplemental affidavit of defense the defendant, as already quoted, says:

"That the plaintiff, in her statement of claim heretofore filed in this case, avers as follows: 'The defendant refused to return said premium, and advised the said insured that his application for a permanent policy had been accepted by the home office of the defendant in New York, U. S. A., and that a permanent policy would be delivered in due course of mail.'

"That it is not true either that the defendant refused to return said premium, or that the defendant advised the said insured that his application for a permanent policy had been accepted by the home office of the defendant in New York, U. S. A., or that a permanent policy would be delivered in due course of mail.

"That on the contrary, the defendant, acting through its officers at New York, deemed the information given to it by John Este Keen concerning certain matters in his application for a permanent policy of insurance to be unsatisfactory, and refused to make any permanent insurance or to cause any permanent insurance policy to be delivered, until it, by its officers in New York, should be satisfied concerning the matters involved, which it deemed material and which were actually material to the transaction. It directed the director general for the Levant, at Paris, France, to deliver no permanent policy to said Keen until it, the defendant, by its officers at New York, should be satisfied concerning said material matters.

"That neither the defendant, nor its officers in New York, did accept the application of said John Este Keen for a permanent policy, and never agreed or authorized any one to express its agreement to the issuance of such permanent policy."

An affidavit of defense could not contain a fuller or more explicit denial of plaintiff's statement of claim and cause of action, than does the affidavit of the defendant in this case. The categorical statement is made by plaintiff, that the application of her husband was accepted by the company, and therefore, pursuant to the stipulation of the provisional policy, it was bound to issue as speedily as possible a permanent policy, the conclusion of law following, that by reason of the premises, a contract of insurance existed between the defendant company and the said John Este Keen at the time of his death. To this categorical statement there is a categorical denial, which requires neither amplification nor explanation. It goes to the whole cause of action, and puts the plaintiff upon proof of her case in the orderly process of a jury trial.

The affidavit of defense law of Pennsylvania may not be so construed as, in effect, to deprive a defendant of the right to present disputed questions of fact or law to a court and jury for determination by the orderly and established judicial procedure. Such a result might well amount to a deprivation of property without due process of law.

Mr. Justice Mitchell, in speaking for the Supreme Court of Pennsylvania in the recent case of *Andrews v. Blue Ridge Packing Co.*, 206 Pa. 370, 55 Atl. 1059, thus clearly defines the office of an affidavit of defense and the essential character of its required statements:

"An affidavit of defense should set forth fully and fairly, facts sufficient to show *prima facie*, a good defense, and if it fails to do so, either from omis-

sion of essential facts, or manifest evasiveness in the mode of statement, it will be insufficient to prevent judgment. But if not deficient in either of these respects, and on its face fairly setting forth a prima facie defense, it is not to be subjected to close technical examination as if it was a special plea demurred to. Its office is to prevent a summary judgment and for that purpose a showing of a defense, with certainty to a common intent, is sufficient."

It is manifest that a defense resting on a denial of the existence of the fact or facts upon which the plaintiff predicates his claim, does not require or permit the amplification necessary where affirmative defenses are set up, and in neither case is it necessary or proper to state the evidence in support of the defense so asserted. If the denial is full and complete, and goes to the whole of the plaintiff's claim, it is sufficient. A summary judgment, notwithstanding such a sworn defense, is not countenanced in reason or in law.

Without passing upon the question whether the learned judge of the court below should have attempted, upon a motion for summary judgment, to construe the stipulations of the provisional policy, or have left the same to be considered and passed upon at the trial, it seems to us clear that the construction actually placed upon said policy was not the correct one, and that he erred in saying that "a fair construction of the contract entitled the insured to assume that his insurance was accepted." Nor is the conclusion justified, that the provisional policy for three months was to be "merged in a permanent policy at the end of that period, unless the company found reasons during that time for terminating the insurance;" nor that because no notice was given during the three months to terminate the provisional policy at the expiration thereof, the insured had a right to assume from its language "that his permanent policy took effect, unless otherwise notified." As we have already stated, the plaintiff's statement of her claim is based upon a different theory, as to the meaning of the stipulation of the provisional policy to that thus advanced by the court below, and is consistent with our own interpretation thereof. As this is the vital point of the whole case, it is unnecessary to consider the other defenses to the plaintiff's action, arising out of the averment in the affidavits of defense, that false answers were made by the applicant in his application, upon the truth of which the permanent policy, as well as the provisional, was to be issued.

The judgment of the court below is set aside, and the case remanded to that court for further proceedings consistent with this opinion.

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In re SHOESMITH.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,096.

**1. BANKRUPTCY—INSOLVENCY—FRAUDULENT CONVEYANCE—PROCEEDS—CONCEALMENT.**

Where a bankrupt made a fraudulent conveyance of certain of his property, receiving \$4,500 in cash, which at the time of the filing of an involuntary bankruptcy petition against him he had retained for several months, and he did not inform the court where or how it was kept, but



declared that since the filing of the petition he had invested it in distant states, such sum should be treated as "concealed assets," and deducted from his available assets, for the purpose of determining his insolvency.

**2. SAME—SECURED NOTES.**

Where a farm subject to a mortgage to secure an alleged bankrupt's note was fraudulently conveyed to his brother by a quitclaim deed, the grantee secured a mere equity of redemption, and, not being personally liable for the mortgage debt, such debt was chargeable as a liability of the bankrupt, in determining his insolvency.

**3. SAME—COURTS—JURISDICTION—PETITION—AMENDMENT.**

Where a court of bankruptcy had jurisdiction of the parties and subject-matter and exclusive jurisdiction of the proceedings, the fact that the first involuntary petition filed was defective for want of equity did not deprive the court of jurisdiction to permit a sufficient amended petition to be filed more than four months after the last fraudulent transfer of property by the bankrupt, alleged as the act of bankruptcy.

Appeal from the District Court of the United States for the Northern District of Illinois.

In Bankruptcy.

Eugene Garnett, for appellant.

Elmer D. Brothers, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. Upon petition and answer in a petition in involuntary bankruptcy, charging insolvency and conveyances of property with intent to hinder, delay, and defraud creditors, the issue was referred for hearing. The referee reported that the conveyances were fraudulent as to creditors, that Shoesmith was insolvent, and recommended an adjudication of bankruptcy.

The financial condition of the alleged bankrupt was thus scheduled by the referee:

**Assets.**

1. Cash, part of proceeds of real estate sold.....	\$4,500 00
2. Stock in Iowa-Louisiana Land & Lot Company.....	1,000 00
3. Seat on Open Board of Trade.....	500 00
4. Grain and stock on farm.....	1,500 00
5. Tender in hands of W. N. Cronkrite.....	22 50
6. One-half rents of foreclosed property during redemption period .....	89 41
	<hr/>
	\$7,561 91
7. Deduct cash concealed.....	4,500 00
	<hr/>
	\$3,061 91

**Liabilities.**

1. Miscellaneous small debts sworn to by himself.....	\$ 629 85
2. Judgment of the Meyer Company.....	1,825 25
3. State Bank of Freeport on note signed by Shoesmith..	50 00
4. State Bank of Freeport on note indorsed by Shoesmith	4,700 00
5. Note secured by mortgage on farm.....	5,000 00
	<hr/>
	\$12,205 10

Leaving an insolvency of..... \$ 9,143 19

Upon exceptions to the report, the court found that Shoesmith had disposed of his property with intent to defraud his creditors as charged, but found that he was not insolvent at the date of filing the petition, and thereupon dismissed the petition.

The opinion of the court below, exhibited in the record, discloses that it disagreed with the referee with respect to his statement of assets and liabilities in two particulars: (1) In deducting from the assets item No. 7, "Cash concealed, \$4,500"; (2) in including in the liabilities item No. 5, "Note secured by mortgage on farm, \$5,000"—and, restating the account accordingly, finds Shoesmith to be solvent to the extent of \$356.81, taking, however, no notice of the exemptions allowed by the statutes of Illinois (Starr & C. Ann. St. 1896, vol. 2, p. 1887, c. 52, par. 13) of \$400, Shoesmith being a married man, entitled to such exemption. This appeal by the creditors from the decree dismissing the petition presents for consideration the question of the financial condition of Shoesmith.

It is to be observed that under the bankruptcy law of July 24, 1897, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], where an act of bankruptcy shall have been committed by a debtor, as specified in section 3a of the act (30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), the burden of proving solvency rests upon the alleged bankrupt. Section 3c, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3422]. It was therefore incumbent upon Shoesmith, the court below and the referee having found that he had disposed of his property with intent to hinder, delay, and defraud his creditors, to clearly show to the court that the aggregate of his property at a fair valuation was sufficient in amount to pay his debts, exclusive of any property which he had conveyed, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors. Section 1, subd. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]. A careful scrutiny of the testimony of Shoesmith exhibits an indisposition to disclose his real condition, but we need concern ourselves only with the two items in respect of which the court below disagreed with the referee. Possibly even this might be unnecessary, since upon the showing, as determined by the court, if we take into account the exemptions to which under the law Shoesmith was entitled, and which could not be appropriated to the payment of his debts, he would still be insolvent by a small amount. We are disposed, however, to waive that objection.

The first question to be considered has respect to the deduction by the referee from the assets stated of \$4,500, being item No. 7. This is the same item as No. 1, being the proceeds which Shoesmith stated he had on hand at the date of the filing of the petition, as part of the \$6,000 received from his brother upon the fraudulent conveyance to him of lands. The question is whether that sum was concealed with intent to hinder, delay, or defraud creditors. If it was, then, by the express terms of the act, it should not be considered in marshaling the assets of the estate to ascertain whether there is sufficient property to pay the debts. At the threshold of this inquiry we are confronted by the fact, found both by the court below and the referee, that the sum was derived from conveyances of property made with intent to hinder, delay, and defraud creditors. Indeed, the answer does not deny the fraudulent intent of the conveyances. It denies insolvency, and denies merely that the conveyance was an act of bankruptcy. It does not deny that the con-

veyance was fraudulent, but in legal effect only asserts that, because Shoesmith was solvent, the conceded fraudulent act was not an act of bankruptcy. Thus this money was received in pursuance of a scheme to hinder, delay, and defraud creditors, and with the purpose that it should not go to the payment of debts. It was received in cash several months prior to the filing of the petition, and at a time when a suit against him was about to be brought to trial, in which suit a judgment was rendered in favor of a creditor. It is conceded that he had \$4,500 of this money at the time of the filing of this petition. He had retained it for several months. He does not inform the court where or how it was kept, but declares that since the filing of the petition he had invested it in distant states. We think the money was concealed within the meaning of the statute, and, by force of that statute, should not be considered in ascertaining the amount of property available to pay debts. Here was a large sum of money received in the attempt and with the purpose to defraud his creditors at a time when a judgment against him was imminent. He should have applied this money to the payment of his debts. Common honesty demanded that. Instead of so doing, he kept it beyond the reach of creditors. That is concealment within the meaning of the statute. To conceal is "to hide, withdraw, remove, or shield from observation; cover or keep from sight." *Century Dictionary*. The word is thus used in like statutes. *Thomas v. State*, 92 Ala. 51, 9 South. 541; *O'Neil v. Glover*, 5 Gray, 144. "Concealment has to do with what concerns others." *Crabbe's Synonyms*. It implies an act done or procured to be done, which is intended to prevent or hinder. It covers something more, however, than a mere failure to disclose. *Bartholomew v. Warner*, 32 Conn. 98, 103, 85 Am. Dec. 251. The intent to hinder, delay, and defraud is proven, not denied. The inference is irresistible that the proceeds were kept beyond the reach of creditors with like intent, and so were concealed.

The other item with respect to which the court below differed with the referee is item No. 5 in the schedule of liabilities, "Note secured by mortgage on farm, \$5,000." This was a note of Shoesmith secured by a mortgage upon the real estate which he fraudulently conveyed to his brother by quitclaim deed. The purchaser bought a mere equity of redemption, and is not personally liable for the mortgage debt. *Powell v. Westmoreland*, 60 Ga. 572; *Elliott v. Sackett*, 108 U. S. 132, 140, 2 Sup. Ct. 375, 27 L. Ed. 678; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659. And such, also, is the law in the state of Illinois, where the land conveyed is situated. *Comstock v. Hitt*, 37 Ill. 542; *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081; *Hazle v. Bondy*, 173 Ill. 302, 50 N. E. 671; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975. It is true the mortgagee might pursue the security in the hands of the fraudulent grantee and subject it to the payment of the mortgage debt, but he is not obligated so to do. The note is the primary debt, the land the security; and Shoesmith, the primary debtor, could be pursued by the mortgagee without resort to the security, and could be compelled to pay the debt, if he

had property, independent of the security, sufficient for that purpose. If he paid the debt, he could not have recourse to the purchaser, or to the security, for reimbursement, in the absence of a binding assumption of the obligation by the purchaser, or of a valid agreement between vendor and vendee that the land should stand as an indemnity to the vendor. If the security were first pursued, he could be held responsible for any deficiency. It was a debt which should be included in the schedule of his liabilities.

Another question suggested at the argument has relation to the jurisdiction of the court below. It is contended that because the first petition filed by the creditor was defective, and a sufficient amended petition was filed more than four months after the last fraudulent transfer of the property, the court had no power to permit an amendment, and was therefore without jurisdiction to entertain the proceedings. The district court had jurisdiction of the parties. It had jurisdiction of the subject-matter. It has general and exclusive jurisdiction of bankruptcy proceedings. The objection goes to the want of equity exhibited by the petition, not to the want of power in the court. There was jurisdiction to determine the sufficiency of the petition, and it was complete to permit any amendment. The jurisdiction in such cases comes from the statute, and is not conferred by the accuracy and precision of the averments made in the petition. *Smith v. McKay*, 161 U. S. 355, 358, 16 Sup. Ct. 490, 40 L. Ed. 731; *Blythe v. Hinckley*, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783. And the amendment, when filed, relates to and takes effect as of the date of the filing of the original petition. *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866.

GROSSCUP, Circuit Judge (concurring). I concur, without reserve, in all of the foregoing opinion, except the portion that charges the five thousand dollars, embodied in the brother's mortgage, as a liability to be taken into account in determining the question of solvency without a counter credit on account of the value of the land mortgaged. I greatly doubt whether, in balancing assets and liabilities with a view solely of determining the question of solvency, the views expressed in the opinion are correct.

But a ruling on the status of this item does not affect the result, and need not, therefore, be further discussed.

The decree is reversed, and the cause remanded to the District Court with a direction to enter a decree adjudging Shoemith a bankrupt.

## EMMONS et al. v. NATIONAL MUT. BLDG. &amp; LOAN ASS'N OF NEW YORK et al.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 552.

**1. EQUITY PLEADING—MULTIFARIOUSNESS.**

A bill by a borrowing stockholder in a building and loan association against the association, which seeks to have the loan contract of complainant canceled for fraud and usury and on the ground that the association was not authorized to do business in the state, and also on behalf of himself and all other stockholders to have a receiver appointed to take charge of and manage the property and assets of the association in the state on allegations of mismanagement and misappropriation by its officers, is multifarious in substance as well as in form, the relief sought in the two capacities in which complainant sues being not only inconsistent, but antagonistic.

**2. SAME—DEMURDER.**

Where it is manifest on the face of a bill that it presents two causes of action, the defense of multifariousness may be taken by a general demurrer.

Appeal from the Circuit Court of the United States for the Southern District of West Virginia, at Huntington.

The bill in this cause was filed in the circuit court of Cabell county, W. Va., by J. H. Russell and D. W. Emmons, plaintiffs, suing on behalf of themselves and for the use and benefit of all other stockholders in the National Mutual Building & Loan Association of New York, a corporation of said state, conducting business and having estate in the state of West Virginia, and George J. Peet, trustee; and by appropriate proceedings the cause was duly removed into the United States Circuit Court for the Southern District of West Virginia. The bill is very elaborate, and its first, second, fourth, and fifth paragraphs set up the facts of the citizenship of the plaintiffs in the state of West Virginia, and of the defendant company in the state of New York, and of its doing business in said first-named state; of the subscription by the former for 50 shares of the stock of the latter; of the borrowing by them of the sum of \$5,000, and securing the same upon certain real estate in Cabell county, W. Va., to George J. Peet, trustee, on account of which they had made large payments, reducing their liability to the sum of \$952.56; and that said association asserted a claim against them on account of said loan of the sum of \$4,047.44, and was, through said Peet, trustee, proceeding by sale to subject their property to the payment of said demand. By the sixth, seventh, eighth, and ninth paragraphs of said bill complainants charge that they were induced to subscribe to said stock by the false representations of said association in reference to the organization of said company within the said state of West Virginia, the conduct of its business therein, and the period within which its said shares of stock would mature, which false statements formed the basis of their subscriptions, and were known to be false when made to them; that the said association was never duly organized under the laws of said state, or entitled as such to do business therein, and to charge dues, fines, premiums, and interest on its loans, as authorized by the laws of that state in reference to building fund companies, and that all of its said contracts in reference to loans of money in said state, and especially the contracts of the complainants, were usurious; that the directors and managers of said association recklessly conducted its affairs, and practically wrecked the same, improperly appropriated from the loan funds \$20,000 per year on account of their services, etc.; that they were misappropriating the loan fund for their own salaries, making it impossible for borrowers to pay off their loans under the original contracts; that the managers and directors of said association had violated and set aside various provisions of

its by-laws, had arbitrarily withdrawn the sum of \$294,000 from the assets of the association, and had refused to permit the stockholders to participate in the profits arising from the sum thus withdrawn; and that they were misappropriating the assets of said association for personal purposes. By the tenth, eleventh, and twelfth paragraphs it is charged that said association had abandoned its corporate business, keeping up only a quasi organization, by reason of the mismanagement on the part of its officers; that they were attempting to collect interest and premiums from its debtors aggregating 12 per cent. of the original loans made them; that there were some 20,000 shares of its stock held by persons throughout the United States with whom it was impossible to communicate and make parties to the suit; that it was necessary for the protection of the citizens of West Virginia, and to prevent the loss and exhaustion of the assets of said company, that said bill should be filed, and that the said association was insolvent. The complainants conclude with a prayer to said bill as follows: "These plaintiffs, being remediless save in a court of equity, where alone such matters are cognizant, would therefore pray that a receiver may be appointed to collect the dues, interest, premiums, and fines paid or to be paid to said association, and to take charge of and rent out the real estate owned by it in this state, and preserve the same pending the suit. Plaintiffs further pray that the said George J. Peet, trustee in the National Mutual Building & Loan Association, may be enjoined, restrained, and inhibited from making sale of the property which the said Peet, trustee, has advertised for sale on the 7th day of August, 1901, until a settlement and an accounting may be had between them. Plaintiffs further pray that the accounts between themselves and said association may be settled, and that they may be given credit for all the payments made by them; that said transaction may be stripped of its usury, and that all the payments made may go as credits on the principal sum borrowed; and that the trust deed given to secure said loan may be canceled and set aside upon the payment by them of such sum as is found to be due, and that their interest as stockholders in said association may be preserved and taken into the custody of this court, there to be administered according to law, and for such other general relief as in equity they are entitled; and they will ever pray." To this bill the association appeared, and filed its general demurrer, and the plaintiffs declining to amend their bill, the lower court sustained the demurrer, and dismissed the bill; the propriety of which action is now the subject of this appeal.

Z. T. Vinson, for appellants.

C. R. Wyatt, for appellees.

Before PRITCHARD, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

WADDILL, District Judge (after stating facts as above). The real question involved is whether or not the bill of the complainants is multifarious, and should have been dismissed. It will be observed that while many charges are preferred against the defendant company, the gist of the bill is, as shown by its prayer, that the true state of accounts between the complainants and the defendants may be ascertained, and their liability determined; that the transaction may be stripped of usury, and all sums paid by them be applied as credits on the principal sum borrowed; that the trust deed should be canceled and set aside; that said complainants' rights as stockholders may be preserved and enforced against the defendant; that the affairs of said association be placed in the hands of a receiver; and that pending suit such receiver should collect the dues, interest, premiums, and fines paid or to be paid to the association, and take charge of and rent out and preserve its property.

If the generally recognized doctrine that antagonistic causes of action cannot be set up in the same bill be accepted, then manifestly this bill cannot be maintained, as it is clear that while, perchance, the complainants may have rights in the double capacities set forth in the bill, such rights are palpably opposed one to the other, and depend for their determination upon entirely different considerations. The defense that the company would interpose to one branch of the relief sought by the complainants would be entirely different to that offered to the other. One of the causes presented by the bill involves the question whether the complainants are indebted to the defendant company; the other, whether the defendant company has any valid corporate existence at all—whether it was ever legally organized, and entitled to do business in the state of West Virginia, together with its method of doing business, and its right to continue to do business within said state. The effect of what the complainants seek to do in this case is, on the one hand, to have the defendant company declared an illegal corporation, doing business illegally without proper charter or by-laws, or with invalid by-laws; and as a consequence of which, and because of fraud in the inception of the contract with the complainants, to have their stock subscriptions treated as null and void, their debt as usurious, and the lien securing the same canceled. On the other hand, they ask to be treated as shareholders in such illegal corporation; to be made subject to its alleged invalid by-laws, and to be entitled to its benefits; with the right to have the association's officers account and to be held liable thereunder; and that the court will, through its receiver, proceed to administer the affairs of such corporation, to carry out the purposes of the corporation, and enforce the provisions of such by-laws. These positions are not only inconsistent, but plainly hostile. The complainants may be entitled to rights in each capacity, but they should not be allowed to pursue them in the same suit, unless the well-known doctrine of equity jurisprudence in reference to multifariousness is to be abandoned. "In order to enable a plaintiff to sue on behalf of himself and others who stand in the same relation with him to the subject of the suit, it is generally necessary that it should appear that the relief sought by him is beneficial to those whom he undertakes to represent. Where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit cannot be maintained; and a plaintiff cannot sue on behalf of himself and all the other members of a company, and also seek to establish a demand against the company." Daniell's Ch. Pr. (6th Ed.) p. 243. The value of this authority bearing upon questions of federal procedure in equity, not inconsistent with the rules of the Supreme Court of the United States, is well recognized; and the reason for the doctrine as thus laid down by the learned author is manifest. The relief sought by the complainants in behalf of themselves, relative to their own debt, is directly opposed to the interest of those in whose behalf the same complainants seek to sue as shareholders; every dollar of reduction in their indebtedness injuriously affecting the other shareholders' interests. Story's Eq. Pl. § 221; Hazard v. Dillon (C. C.) 34 Fed. 485. Just when and when not a bill may be said to be multifarious is a question not always free from doubt, and it has been well said by the Supreme Court of the

United States that "it is impracticable to lay down any rule of multifariousness as an abstract proposition; that each case must depend upon its own circumstances, and must necessarily be left where the authorities leave it—to the sound discretion of the court." *Oliver v. Piatt*, 3 How. 333, 411, 11 L. Ed. 622; *Barney v. Latham*, 103 U. S. 205, 215, 26 L. Ed. 514. While it may be difficult to specify a positive criterion as to a multifarious bill, the Supreme Court seems to have made it clear that such condition exists where the grounds of suit are different and each ground is sufficient within itself to sustain the bill. *Brown v. Guarantee Trust Co.*, 128 U. S. 412, 9 Sup. Ct. 127, 32 L. Ed. 468, and cases cited; *Security Savings Ass'n v. Buchanan*, 66 Fed. 799, 31 U. S. App. 244, 14 C. C. A. 97; *First National Bank v. Peavey (C. C.)* 75 Fed. 155. Applying this test to the present case, it is apparent that this bill is multifarious, since the complainants have the undoubted right by proper suit to have their liability settled as debtors of the defendant company, and it is equally clear that by another and entirely independent action they can have determined their rights as stockholders in the company; and that the two causes of action are confessedly different within themselves. The Supreme Court of West Virginia has very recently had under review the question involved here against this same defendant. *Day v. Building & Loan Association*, 53 W. Va. 550, 552, 44 S. E. 779. To that decision and the cases therein referred to special reference is made as containing an able exposition of the law on this subject. See, also, *Brown v. Bedford City Land Co.*, 91 Va. 31, 20 S. E. 968, where the subject is also fully and exhaustively considered by the Virginia Court of Appeals.

Counsel for the complainants seek to avoid the defense of multifariousness because the same was interposed by a general, and not a special, demurrer, citing *Bates on Fed. Prac.* § 203; and rely upon the doctrine that the demurrer should be overruled, if the allegations of the bill, taken together, entitle the complainants to some kind of relief, citing *La Croix v. May (C. C.)* 15 Fed. 236; *Mercantile Trust Co. v. R. I. Hospital Co. (C. C.)* 36 Fed. 863; *Merriam v. Holloway Pub. Co. (C. C.)* 43 Fed. 450; *Pacific Live Stock Co. v. Hanley (C. C.)* 98 Fed. 328. The authorities cited would not make necessary a special demurrer to raise the question of multifariousness to a bill like the present one. Here the defense is one of substance, rather than form, and appears on the face of the bill. It will not do to say that because a demurrer should be overruled where the bill sets up some cause of action against a defendant, relative to a given transaction, that for that reason a suit can be maintained which presents several separate and distinct causes of action against the same defendant. Multifariousness can be taken advantage of by demurrer, plea, or answer; and where it is manifest upon the face of the bill that two causes of action are presented the defense can be interposed by general, as well as by special, demurrer. *Oliver v. Platt*, 3 How. 333, 413, 11 L. Ed. 622; *Tyler v. Hand*, 7 How. 575, 12 L. Ed. 824; *Hefner v. Northwestern Ins. Co.*, 123 U. S. 747, 751, 8 Sup. Ct. 337, 31 L. Ed. 309; *Foster, Fed. Pr.* § 108; *Daniell's Ch. Prac.* (6th Am. Ed.) 557; *Taylor v. Holmes (C. C.)* 14 Fed. 498.



Complainants insist that they have the right especially to maintain their cause of action under section 58, c. 53, of the Code of West Virginia of 1899 and section 7 of chapter 96 of the same Code. The first section provides for the appointment of receivers, and the winding up of the affairs of corporations whose charters may have expired, or which may have dissolved before such expiration, at the instance either of creditors or stockholders; and the latter section for borrowers of money filing bills in equity to ascertain whether contracts or loans are tainted with usurious interest charges, and for the recovery of only the principal due under such undertakings. That the rights afforded by these sections can be secured and the full relief therein provided given by appropriate proceedings in the courts of the United States, where the amounts involved are sufficient, and the requisite citizenship of the parties exists, is manifest (*Gormley v. Clark*, 134 U. S. 338, 348, 10 Sup. Ct. 554, 33 L. Ed. 909; *Land Title & Trust Co. v. Asphalt Co.*, 127 Fed. 1, 62 C. C. A. 23; *Jacobs and others v. Mexican Sugar Co.* [C. C.] 130 Fed. 589); but this does not seem to affect the question of multifariousness under consideration. The relief afforded by the statute relative to usurious transactions has to be availed of by the borrower of the money or thing secured, and proceedings under the provision regarding the winding up of corporations have to be inaugurated by a creditor or stockholder of the corporation, and not by a debtor and stockholder of the corporation combined, as in this case. Whether a creditor and stockholder combined could blend their interests and grievances in a single suit, it is not necessary to determine here.

The decision of the lower court is plainly right upon principle, and abundantly supported by authority, and the same is affirmed.

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#### ROBINSON v. AMERICAN CAR & FOUNDRY CO.\*

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

**1. EQUITY PLEADING—RESPONSIVENESS OF ANSWER.**

A denial in the answer in a suit for infringement of a patent that the patentee was the first inventor of the improvement described in the patent named in the bill, specifying it by number, is sufficient to raise the issue of invention, although the title of the patent as stated in the answer may be technically inaccurate.

**2. SAME—REPLICATION.**

The replication to an answer in equity cannot be made to perform the office of exceptions.

**3. RES JUDICATA—DECREE DISMISSING BILL WITHOUT PREJUDICE.**

A suit dismissed without prejudice is not a bar to a second suit, nor conclusive of any issue joined in favor of the complainant.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

For opinion below, see 132 Fed. 165.

The bill was filed to enjoin the alleged infringement of a patent issued to the appellant for new and useful improvements in casting "composite and other wheels," dated November 23, 1897, and numbered 594,286. The bill

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\* Rehearing denied February 10, 1905.

asserts, "Which title was corrected November 30, 1897, by an amendment indorsed upon said letters, signed by the Assistant Secretary of the Interior, and countersigned by the Acting Commissioner of Patents," not stating, however, the title of the patent, nor in what respect that title was corrected. Otherwise the bill contains the usual allegations in such bills.

The answer denies that the complainant was the original and first inventor of the alleged improvement in casting "composite or other car wheels described in letters patent No. 594,286, dated November 23, 1897, as set forth in said bill of complaint"; denies the novelty of the invention; denies knowledge of the ownership of the patent by the complainant; denies the utility and value of the patent; denies public acquiescence in the validity of the patent and the rights of the complainant thereunder; denies "that it has at any time heretofore made, used, or sold the alleged invention and improvements set forth in said letters patent, or caused others so to do"; and denies intent to make, use or sell the alleged invention; denies that the alleged invention or improvements described in the letters patent contain the quality of invention, or require invention, or that the same are patentable, or that they exhibit anything more than the usual skill of mechanics employed in similar arts and industries. The answer then asserts that the alleged processes, combinations, molds, inventions, and improvements illustrated and described in the letters patent were, long prior to the supposed invention or discovery thereof by the complainant, described in 19 patents of the United States, which are set forth in the answer, and in a certain British patent also set forth. The answer further asserts prior public use of the supposed invention by many parties whose names and residences are stated, and in that connection asserts: "This defendant, further answering, says that since the summer of 1891 it has used the processes, combinations, and devices, and made the products in its works at Chicago, Illinois, of which infringement is charged against it by the complainant under his said letters patent sued on in this cause, and that the specific acts of infringement charged in this cause consisted in the same acts and doing the same things, and in none other, which it has practiced and done since the summer of 1891 at its works in Chicago, Illinois." The answer then further alleges that on July 12, 1898, the complainant filed his bill in the court below against the Wells & French Company and the Chicago City Railway Company, charging infringement of his said letters patent No. 594,286; that the defendants therein answered to that suit, denying infringement, in which cause evidence was taken, and upon the hearing the court below found the issue of noninfringement with the defendant, the Wells & French Company, and a decree was entered dismissing the bill of complaint; that the complainant appealed therefrom to the United States Circuit Court of Appeals for the Seventh Circuit, and that such decree was by said court, on the 29th of January, 1902, in all respects affirmed. The defendant further stated that it had succeeded to the rights of the Wells & French Company and to its plant, and is conducting and operating the same, with the same processes, molds, and methods of manufacturing car wheels that had been employed by the Wells & French Company, and which were found by the decree stated to be no infringement of letters patent No. 594,286, and that it is entitled to the benefit and effect of the decree of the court rendered in that suit, which decree is charged to have settled the question of infringement, and to have estopped the complainant from asserting or claiming infringement as to the processes, molds, and methods of manufacturing car wheels used by the Wells & French Company, and held to be no infringement of the complainant's patent.

The complainant thereupon filed exceptions to the answer, the exception to the defense of *res judicata* being that the decree actually entered in that suit was as follows: "It is ordered, adjudged, and decreed by the court that this cause be, and the same hereby is, dismissed, without prejudice, at the complainant's cost." This exception upon hearing was sustained, the court deeming itself at liberty to refer to the record of the prior action; and thereupon, by leave of the court, the defendant withdrew and struck out the defense of *res judicata*, and the complainant below filed his general replication to the answer, and which also suggested that the answer was inconsistent and insufficient with respect to the denial of infringement. On December 15,

1903, the cause was ordered set down for hearing on the pleadings, no proofs having been taken. On January 14, 1904, the hearing of the cause upon the pleadings was postponed at the request of the complainant, with leave to him to take proofs within 10 days. On January 23, 1904, the record shows that there was filed in the office of the clerk below a certified transcript of the case of Robinson v. The Chicago City Railway Company and the Wells & French Company, but by whom filed does not appear; and on the 25th of January the cause was heard by the court upon the pleadings, and on the 23d of February, 1904, a decree was entered dismissing the bill for want of equity, the court filing an opinion to the effect that there was nothing before the court but the pleadings, and, the answer being taken as true, there was nothing upon which the court could base a decree for the complainant. That decree the complainant brings here for review.

Arba W. Waterman and J. Gray Lucas, for appellant.  
Ephraim Banning, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). This cause was submitted and heard upon the pleadings, without evidence submitted by the complainant below to sustain the assertions of his bill. The sole question, therefore, for consideration is whether the answer contains admissions which would authorize a decree in his favor. It is insisted that the answer does not deny issuance of the patent, or that the complainant was the original and first inventor of the improvements mentioned therein, and concedes infringement. The bill states that the patent was issued for improvements in making "composite and other wheels." The answer denies that the complainant was the original and first inventor of the alleged improvement in casting "composite or other car wheels." Upon this is founded the objection that the answer does not controvert the novelty of the invention. We are without information of the exact title of the patent. According to the allegations of the bill this title was corrected subsequently to the issue, but in what respect is not stated. The objection is, however, purely technical, and of no moment. The bill states the number of the patent, and the answer denies that the complainant was the original and first inventor of the improvement specified in the letters patent so numbered; thus making certain the invention spoken to. It is a sufficient denial of the novelty of the alleged invention.

The answer denies that the defendant had at any time made use of or sold the alleged invention and improvements set forth in the letters patent mentioned. But it is insisted that this denial is qualified in the subsequent affirmative defense of prior use, by the allegation that since 1891—six years prior to the patent—defendant had used the processes, combination, and devices, and made the products in its works of which infringement is charged against it by the complainant under his letters patent, and that the specific acts of infringement charged consisted in the same acts and doing the same things, and none other, which it has practiced and done since 1891. No exception was preferred to the answer on this ground. There is interjected in the replication a suggestion of inconsistency in this respect. But the replication cannot perform the function of exceptions. A replication recognizes the sufficiency of the answer and

takes issue upon the facts charged. There is, however, no inconsistency in the two allegations. The first is a direct, positive denial of infringement; the second, that the acts of the defendant charged as infringing the patent have been done by it since 1891. It does not concede that these acts infringed the patent, but asserts, in legal effect, that if, as the complainant claims, they do so infringe it, then the performance of these acts dated from a period six years prior to the patent, sustaining the defense of a public use, and so establishing want of novelty in the invention. This objection is without merit. The case, then, being submitted upon the pleadings, upon the affirmations of the bill and the denials of the answer, which, so far as responsive to the bill, must be taken as true, there was no proof upon which a decree for the complainant could have passed.

The defendant had pleaded a prior suit between the complainant and the Wells & French Company and the Chicago City Railway Company, claiming advantage of the decree in that case as a privy. It is charged that the bill in that case was dismissed. The answer was excepted to upon the ground that it did not correctly set forth the decree in the other cause, and asserts that the cause was dismissed without prejudice. The court below deemed itself at liberty to go outside the pleading and to examine the former decree, and, finding it to be as stated by the exception, sustained the exception, and thereupon the defense of *res judicata* was withdrawn. It is now insisted by the complainant below, at whose instance that portion of the answer was stricken from the record, that we may inquire into that record, not pleaded, not contained in the record before us, and that we should hold that the record is *res judicata* between these parties so far as relates to the validity of the patent. This we cannot do. The record was neither pleaded nor put in evidence, and the cause was voluntarily submitted by the parties upon the pleadings. The clerk's minute does, indeed, state that there was filed in his office a copy of that previous record; but it was not put in evidence, and the mere filing of it in the clerk's office does not entitle it to be considered, nor is it brought here by the record for our consideration. But, if it could be considered, it would not avail the complainant. He asserts that that suit was dismissed at his cost, without prejudice, and that decree affirmed by this court (*Robinson v. Chicago City Ry. Co.*, 55 C. C. A. 254, 118 Fed. 438), and claims, by reason of certain expressions in the opinion of the court, that the decree of dismissal without prejudice is effective for him, so far as it dealt with the question of the validity of the patent, but ineffective so far as it dealt with the question of infringement. This is a novel application of the doctrine of *res judicata*. A bill dismissed without prejudice is not a bar to a subsequent suit. *County of Mobile v. Kimball*, 102 U. S. 691, 705, 26 L. Ed. 238. We are without information why the bill was dismissed without prejudice, but such a decree cannot, in the nature of things, conclude the parties. If we may examine our opinion upon the appeal in the case referred to, it will be found that while recognizing and assuming, without discussion of the prior art, the novelty of the complainant's invention, we dealt principally with the question whether the acts of the defendants to that suit constituted

infringement of the complainant's rights, and held that they did not. The admissions of the answer in the present case upon which the complainant relies are that the acts done by it are the same acts, and none other, which were charged as an infringement in that prior case. If, therefore, the decree in the prior suit is *res judicata* upon the question of the novelty of his invention, it is equally conclusive that the prior decree is *res judicata* against him that the acts of the defendant here complained of do not constitute infringement of his patented rights.

The decree is affirmed.

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MOTT et al. v. WISSLER MIN. CO.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 561.

**MANUFACTURING COMPANIES—SUPPLIES—LIENS—STATUTES—CONSTRUCTION.**

Code Va. 1887, § 2485 (Code 1904, p. 1246), provides that all persons furnishing supplies to a mining or manufacturing company necessary to the operation of the same shall have a prior lien on the personal property of the company other than that forming part of its plant to the extent of money due for such supplies, and a lien on all the estate, real and personal, of the company subject to any lien by deed of trust, mortgage, hypothecation, sale, or conveyance made or executed and duly admitted to record prior to the date the supplies were furnished; and section 2486 (page 1249) provides that no person shall be entitled to the lien so given unless he shall file and procure to be recorded a sworn statement of his claim within 90 days after maturity of the last item of his bill. *Held*, that the lien specified by section 2485 attached at the time the supplies were furnished, and not at the time the claim was filed under section 2486, so that an adjudication in bankruptcy against the debtor between the date of maturity of the last item of the account for supplies and the filing and recording of the claim did not destroy the claimant's right to priority in the distribution of the bankrupt's estate.

Appeal from the District Court of the United States for the Western District of Virginia, at Abingdon, in Bankruptcy.

John C. Blair, for appellants.

A. A. Phlegar and W. A. Glasgow, for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

BOYD, District Judge. The New River Mineral Company was a corporation under the laws of New York, engaged, among other things, in smelting and treating iron, and had its principal place of business at Ivanhoe, Wythe county, Va. During the months of October, November, and December, 1903, the Wissler Mining Company sold and delivered to the New River Company 1,171 tons of iron ore, worth \$3,042.23, as supplies for use in the latter's operations. The last item of the claim of the Wissler Company for the ore thus furnished became due January 20, 1904. After this Edwin Einstein, Jordan L. Mott, and Emanuel Einstein, of New York,

and Hines and Blair, of Wytheville, Va., creditors of the New River Mineral Company, filed an involuntary petition in bankruptcy against said company, and on the 6th day of February, 1904, the company (having made no opposition) was, by the court in bankruptcy for the Western District of Virginia, adjudged bankrupt. The debt for \$3,042.23 for supplies furnished the New River Company was duly proven against the bankrupt estate by the Wissler Company, and on the 2d day of March, 1904, a memorandum of the amount and consideration of the Wissler claim, accompanied by the affidavit of the vice president and general manager of the company, was duly filed with the clerk of the Circuit Court for Wythe county, and the same was by him on that day recorded in the record book and indexed as required by law. Thereupon, on the 4th day of March, 1904, the Wissler Company filed with the referee its proof of prior lien on the property of the bankrupt for the full amount due for supplies, as before stated, asserting that the said lien was existing, and that the debt due the Wissler Company should have priority in the distribution of the proceeds of the bankrupt's property. The petitioning creditors in bankruptcy, together with other unsecured creditors of the New River Company, objected to the preference thus sought by the Wissler Company, their grounds being, in substance, that the alleged lien did not exist; that the proceedings to obtain it had been commenced and consummated after the debtor company was adjudged bankrupt; and that the proceedings, together with the lien claimed, were void, and of no effect. The referee held that the lien of the Wissler Company was valid, and entitled the debt for supplies to priority. The objecting creditors excepted to this ruling. Upon the hearing of the exception before the District Court in bankruptcy, the action of the referee was sustained, and the case comes here by appeal on the part of the unsecured creditors, from this decision.

The Virginia statute (Code 1904, pp. 1246-1249) under which this controversy arises reads as follows:

"Sec. 2485. All conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics, or laborers, and all persons furnishing railroad iron, engines, cars, fuel, and all other supplies necessary to the operation of any railway, canal, or other transportation company, and all clerks, mechanics, and laborers who furnish their services or labor to any mining or manufacturing company, whether such railway, canal, or other transportation, or mining or manufacturing company be chartered under or by the laws of this state, or be chartered elsewhere and be doing business within the limits of this state, shall have a prior lien on the franchisees, gross earnings, and on all the real and personal property of said company which is used in operating the same, to the extent of the moneys due them by said company for such wages or supplies: and no mortgage, deed of trust, sale, hypothecation, or conveyance executed since the twenty-first day of March, eighteen hundred and seventy-seven, shall defeat or take precedence over said lien; and all persons furnishing supplies to a mining or manufacturing company necessary to the operation of the same shall have a prior lien upon the personal property of such company other than that forming part of its plant to the extent of the money due them for such supplies, and also a lien upon all the estate, real and personal, of such company, which said last lien, however, upon all such real and personal estate shall be subject and inferior to any lien by deed of trust, mortgage, hypothecation, sale, or conveyance made or executed and

duly admitted to record prior to the date at which said supplies are furnished: provided, however, that the lien secured by this provision to parties furnishing supplies shall be subsequent to that due to clerks, mechanics, and laborers for services furnished as aforesaid: and provided, that if any person entitled to a lien as well under section twenty-four hundred and seventy-five as under this section shall perfect his lien given by either section he shall not be entitled to the benefit of the other; and provided, also, that no right to or remedy upon a lien which has already accrued to any person shall be extended, abridged, or otherwise affected hereby.

"Sec. 2486. How perfected; how enforced.—No person shall be entitled to the lien given by the preceding section unless he shall, within ninety days after the last item of his bill becomes due and payable for which such supplies are furnished or service rendered, file in the clerk's office of the court of the county or corporation in which is located the chief office in this state of the company against which the claim is, or in the clerk's office of the chancery court of the city of Richmond when such office is in said city, a memorandum of the amount and consideration of his claim, verified by affidavit, which memorandum the said clerk shall forthwith record in the deed book, and index the same in the name of the said claimant and also in the name of the company against which the claim is. Any such lien may be enforced in a court of equity."

In this case the facts show, and it is also admitted by all the parties, that the New River Mineral Company was a manufacturing company; that the ores furnished to it by the Wissler Company were supplies necessary for the operation of the plant; and that the memorandum of the claim for these supplies was filed according to the statute, and properly recorded within 90 days after the last item of the account became due. The sole question, therefore, presented for consideration is whether the adjudication in bankruptcy intervening between the time when the last item of the account for supplies was due and the filing and recording of the claim had the effect to destroy the right of the Wissler Company to a priority in the distribution of the bankrupt's estate; and the proposition thus arising rests entirely upon the determination as to when the lien for supplies, provided by the Virginia statute, attaches—whether at the time the supplies are furnished, or not until the claim is filed and recorded.

So far as we have been able to find, the question here has not been passed upon by the Virginia courts, and we are therefore compelled to rely upon the language of the statute itself, and such principles relating to the subject as can be gathered from other sources. It is conceded to be a well-settled principle that, where a statute declares that a lien shall attach upon the performance of a certain act or the existence of a certain condition, there is no lien until the act has been performed or until the condition exists. The Virginia statute declares that:

"All persons furnishing supplies to a mining or manufacturing company, necessary to the operation of the same, shall have a prior lien upon the personal property of such company, other than that forming part of its plant, to the extent of the money due them for such supplies, and also a lien upon all the estate, real and personal, of such company, which said last lien, however, upon all such real and personal estate, shall be subject and inferior to any lien by deed of trust, mortgage, hypothecation, sale, or conveyance made or executed, and duly admitted to record prior to the date at which said supplies are furnished."

Upon this it seems clear that, when a person has furnished supplies to a manufacturing company, necessary for carrying on its operations, he has done the act necessary, under the statute, to create a lien; and we are borne out in this view by the next section of the law, which provides for the manner in which the lien is perfected and enforced, for that section expressly refers to the lien given by the preceding section. It will be observed that the second section does not provide that the person furnishing supplies to a manufacturing company shall have a lien when he shall have filed and recorded his claim, but that he may perfect and enforce the lien "given by the preceding section" by filing a memorandum, and so forth, with the clerk. It may be asked how it is possible to perfect a thing which has not been begun. Taking the two sections together, we are led to the conclusion that the perfecting of the lien, as contemplated by the second section, was intended to be taken in connection with its enforcement; not that the act of filing and recording, under the second section, created the lien, but that it put it in a condition to be perpetuated, and, if necessary, enforced by legal proceedings. The furnisher of the supplies would thus, by filing and recording, perfect his lien by doing all that was designed—by reaching the utmost point aimed at in the beginning; that is, after the right had accrued to him, and was existing, he secured it by doing the act required under the second section.

We are aided in arriving at this conclusion by what is said in a very forceful opinion relating to the same question. In *re West Norfolk Lumber Company* (D. C.) 112 Fed. 767. In this case the learned judge says:

"The language of the first section of this act [section 2485] is broad and comprehensive, and plainly contemplates the existence of the lien from the time the supplies are furnished. It gives a prior lien upon the personal property of such company other than that forming part of its plant, and also a lien upon the estate, real and personal, of such company, subordinating such latter lien, however, only to liens duly admitted to record prior to the date at which the supplies are furnished; in a word, against liens acquired by deeds of trust, mortgage, hypothecation, or in case of a sale or conveyance. The time of furnishing the supplies is the period as of which the materialman is given a right of lien. The right to claim the lien arises under this section, and may be enforced at any time after the supplies are furnished; but may be lost by failure to comply with some provisions of the act giving the right. The only requirement is that the lien shall be filed 'within ninety days after the last item of the bill becomes due and payable.' If the claim is filed within that time, the lien secured relates back to the time the supplies were furnished, subject to be defeated by prior or intervening supply liens."

We believe this construction of the Virginia statute to be in thorough accord with the general doctrine that "a statute creating a lien, being remedial in its nature, is to be liberally construed, so as to give full effect to the remedy in view of the beneficial purpose contemplated by it." *Amr. & Eng. Ency. of Law*, Vol. 19, page 24.

A case in entire harmony with the one above cited is that of *In re Dey*, 9 Blatchf. 285, Fed. Cas. No. 3,871, in which the court had under consideration a statute of New Jersey which provides, in substance, that every building shall be liable for the payment of any debt contracted for labor performed or materials furnished for the



erection and completion thereof, "which debt shall be a lien upon said building and the land whereon it stands." A subsequent section of the act provides that the creditor intending to claim a lien shall, in one year after the labor is performed or materials furnished, file in the office of the county clerk his claim; and the act provides further that, if such claim is not filed within such time, the building or land shall be free from all claims for the matters in such claim. It was contended in that case, as in the present, that the lien provided by the statute did not attach until the filing in the office of the county clerk; but said the court, referring to this position:

"This is giving to the provision requiring the claim to be filed a plain repugnance to the terms of the first section, which declares that the building shall be liable for payment, and the debt shall be a lien. In a large degree it defeats the purpose of the act, which was to furnish an instant security whilst the work was in progress on which the laborers and materialmen might rely." And, further: "The first section confers a right, whether it be what is therein called the 'liability' of the building, or the 'lien' on such building and the land whereon it stands, in the sense of a legal lien. In virtue of the work performed and materials furnished the creditor has secured the right within one year to file his claim, bring suit, and sell the property, divested of all estates or incumbrances by deed or mortgage. This right is vested by statute."

We also cite in support of our position *In re Georgia Handle Company*, 109 Fed. 632, 48 C. C. A. 571; *In re Emslie et al.*, 102 Fed. 292, 42 C. C. A. 350, and *In re Kerby-Dennis Co.*, 95 Fed. 116, 36 C. C. A. 677.

The lien given by the Virginia statute, and other statutes of like character, is based upon the ground that, to enable a manufacturing establishment to obtain material and supplies, and thereby continue operations, is not only of advantage to the establishment itself, but also to its creditors generally, who are interested in its success. It is easy to discern that the purpose of the Legislature in the enactment of the supply lien law was to establish a basis of confidence upon which the seller would be willing to extend credit to the manufacturing company, and thus enable the latter to obtain, from time to time, the supplies necessary to carry on its business. This confidence would be destroyed if, after the seller had delivered his goods to the manufacturing company, it were left in the power of the latter, by an act of bankruptcy, a confession of judgment, or other act, to divert its property so as to defeat the lien intended by the law. It will be observed, in reading the statute, that section 2485 provides, in substance, that the furnisher of supplies to a manufacturing company shall have a lien upon the personal property of such company, not forming a part of its plant, and also upon all the estate, real and personal, of such company, which said last lien shall be subject and inferior to any lien by deed of trust, mortgage, etc., executed and duly admitted to record prior to the date at which said supplies are furnished. In *Re West Norfolk Lumber Company*, heretofore cited, this provision of the statute is commented upon in support of the position that the lien for supplies attaches at the time they are furnished, but that such lien does not affect existing liens by deed of trust, mortgage, etc.; but the said section goes

further, and provides that "the lien secured by this provision to parties furnishing supplies shall be subsequent to that due to clerks, mechanics, and laborers, for services furnished as aforesaid." Here we see that the lien is referred to as the lien "secured by this provision," and is not made to depend upon anything further for its validity.

The Legislature, in making the law under consideration, no doubt had in mind the fact that generally the delivery of supplies to a manufacturing company is a continuing transaction; that is, the supplies are furnished from time to time, and in such quantities, as the operating necessities of the company require. It would render the act almost impracticable, therefore, if it required the furnisher of the supplies to record his lien whenever he made a single delivery or shipment. Take the present case. The claim of the Wissler Company is made up of items of 51 different shipments of ore, beginning on the 3d of October, 1903, and ending on the 10th of December of the same year. We cannot believe that in such cases it was the intention of the lawmakers to require the shipper, as soon as he had made a shipment, to hurry to the clerk's office and record his lien, and, if he failed to do so, to leave him unprotected. On the other hand, we are of the opinion that the language of the statute, and the reasons which may be assigned, consistent with its purposes, warrant us in coming to the conclusion that the lien provided attaches when the supplies are furnished, and is an existing lien from that time, to be perfected and enforced, however, in accordance with the further provisions of the act.

In the course of the oral argument there was some discussion as to the relative priorities of liens of different persons for supplies furnished to the same company, but that question is not involved in this case, and is therefore not before us.

The judgment of the court of bankruptcy is affirmed.

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### WONG DIN v. UNITED STATES.

(Circuit Court of Appeals, Ninth District. February 20, 1905.)

No. 1,097.

#### 1. CONSPIRACY—INDICTMENT.

Where an indictment alleged that defendants feloniously conspired with divers other persons, whose names were to the grand jurors unknown, to willfully, etc., aid and abet the landing of unknown Chinese persons in the United States from certain vessels, the names of which were to the grand jurors unknown, from ports or places in the empire of China to the grand jurors unknown, etc., and that, to effect the object of such conspiracy, defendant W. D., whose true name was to the grand jurors unknown, did bribe one B., deputy sheriff, in charge of certain Chinese persons whose names were unknown, who had been sentenced to deportation, to cause certain other Chinese persons, whose names were to the grand jurors unknown, to be substituted therefor, etc., was not defective for failure to allege the detailed facts stated to be unknown.

#### 2. SAME—TRIAL—EXAMINATION OF JURORS—DISCRETION.

In a prosecution for conspiracy, a severance having been granted as to defendant B., when the case was called for trial against the other de-

defendants, defendant D. obtained leave to plead guilty, whereupon defendant W. obtained leave to re-examine the jurors as to prejudice, by reason of D.'s change of plea, and one of the jurors, admitting prejudice, was excused. Thereafter, and before the 12 jurors had been selected, another defendant pleaded guilty, and defendant W. again requested leave to re-examine the jurors, which was denied. *Held*, that the denial of such application was not error; the court having cautioned the jury that the fact that defendant's codefendants had pleaded guilty could not be considered as against defendant W.

**2. SAME—Co-CONSPIRATORS—EVIDENCE.**

Where, in a prosecution for conspiracy, a severance was granted, the evidence of a co-conspirator is admissible for the government, in the absence of statute, and its credibility is for the jury.

**In Error to the District Court of the United States for the Northern District of California.**

The plaintiff in error, whose true name is alleged to be unknown, was jointly indicted with William F. Dasha, Thomas J. Dempsey, and Thomas T. Burnett for the crime of conspiracy, based upon section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3876]. The indictment, among other things, alleged that said defendants on August 8, 1903, at the city and county of San Francisco, Cal., "did then and there wickedly, corruptly, unlawfully, and feloniously conspire, combine, confederate and agree together with divers other persons whose true names are to the grand jurors aforesaid unknown, to commit an offense against the United States; that is to say, to then and there wilfully, unlawfully, and knowingly aid and abet the landing in the United States, to wit, at the port of San Francisco, within the State and Northern District of California, from certain vessels the names of which are to the grand jurors aforesaid unknown, from divers ports and places in the Empire of China, the names of which said ports and places are to the grand jurors aforesaid unknown, the voyages of which said vessels from said ports and places had then and there terminated at said port of San Francisco, in the State and District aforesaid, of certain Chinese persons, subjects of the Emperor of China, whose names are to the grand jurors aforesaid unknown, and which said Chinese persons were not, nor was either of them, members of the classes of Chinese persons who were then and there permitted by the laws of the United States to enter and remain within the United States; and which said Chinese persons were then and there unlawfully in the United States."

The overt act in furtherance of said conspiracy is alleged as follows: "And that to effect the object of the said conspiracy, the said Wong Din, whose true name is to the grand jurors aforesaid unknown, as aforesaid, heretofore, to wit, on the eighth day of August, in the year of our Lord one thousand nine hundred and three, \* \* \* did then and there unlawfully, wilfully, knowingly and feloniously pay and procure to be paid to the said Thomas T. Burnett, who was then and there a deputy sheriff of the city and county of San Francisco, State of California, assigned to duty at the county jail of the said city and county, in which said county jail certain Chinese persons, whose true names are to the grand jurors aforesaid unknown, were then and there confined, \* \* \* the sum of one thousand dollars \* \* \* for the purpose and with the intent on the part of him, the said Wong Din, \* \* \* of inducing the said Thomas T. Burnett and the said William F. Dasha and the said Thomas J. Dempsey to substitute, and cause and procure to be substituted, \* \* \* for and in the place and stead of five certain Chinese persons whose true names are to the grand jurors aforesaid unknown, who were then and there awaiting deportation as aforesaid, five certain Chinese persons other than and different from the Chinese persons who were then and there awaiting deportation to China as aforesaid, the true names of which said other and different Chinese persons are to the grand jurors aforesaid unknown."

A severance was granted as to defendant Thomas T. Burnett. The case came up for trial as against the other defendants on April 6, 1904, and,

after the impanelling of the jury, the defendant Dempsey asked for and obtained leave to withdraw his plea of not guilty, and to enter a plea of guilty. The plaintiff in error then asked and obtained leave to re-examine the jurors, in order to ascertain whether the change of plea by Dempsey would prejudice the jurors against him. One of the jurors, named Mohr, admitted that that fact so prejudiced him that he would be unable to give the plaintiff in error a fair and impartial trial, and this juror was then and there excused. The other 11 jurors each answered that the change of Dempsey's plea would not prejudice him against the defendant Wong Din. Thereafter, and before the 12 jurors had been selected, the defendant Dasha asked and obtained leave to change his plea of not guilty and enter a plea of guilty. This being done, the plaintiff in error asked leave to re-examine the 11 jurors as to whether or not the change of the plea by defendant Dasha would prejudice the case as against him. This request was refused, and an exception was taken to this refusal. The vacancy in the jury was then filled, and the trial proceeded, resulting in a verdict of guilty.

S. C. Wright, T. C. West, and Bert Schlesinger, for plaintiff in error.

Marshall B. Woodworth, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

It is claimed that the indictment does not state facts sufficient to constitute any offense against the laws of the United States. It will be noticed from the indictment that the names of the Chinese persons whom it is alleged the plaintiff in error and his codefendants entered into a conspiracy to release are unknown, that the vessel from which they were to be landed is unknown, that the names of the Chinamen awaiting deportation from the county jail are unknown, and that the names of the Chinese persons to be substituted for and in place of the five Chinese persons awaiting deportation are unknown. It is contended that for these reasons the indictment is wholly insufficient.

Are these details essential to constitute the crime charged? Are they of a character that reaches the substance of the crime? No one questions the correctness of the principles for which the plaintiff in error contends—that the accused in the indictment must be “informed of the nature and cause of the accusations” against him, and that for this purpose all of the material facts and circumstances embraced in the definition of the offense must be stated. No essential of the crime can be omitted. The object of an indictment is to furnish the accused with such a description of the charge as will enable him to make his defense, to enable him to avail himself of his conviction or acquittal for protection against another prosecution for the same cause, and to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction. These general principles have been frequently announced by the Supreme Court. *United States v. Simmons*, 96 U. S. 360-362, 24 L. Ed. 819; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698; *United States v. Hess*, 124 U. S. 483-486, 8 Sup. Ct. 571, 31 L. Ed. 516; *Pettibone v.*

United States, 148 U. S. 197, 202, 13 Sup. Ct. 542, 37 L. Ed. 419; Blitz v. United States, 153 U. S. 308, 315, 14 Sup. Ct. 924, 38 L. Ed. 725.

The gist of the crime of conspiracy, as alleged in the indictment, is the unlawful combination and agreement between the parties named as defendants therein. In *Pettibone v. United States*, supra, the court said:

"A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means; and the rule is accepted, as laid down by Chief Justice Shaw in *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, that, when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment, while, if the criminality of the offense consists in the agreement to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

The conspiracy in the present case was to accomplish an unlawful purpose, to wit, to aid and abet the landing in the United States of Chinese who were not, under the laws of the United States, entitled to land. The conspiracy was general in its nature. It applied to Chinese who were confined in the county jail, and was not limited to any particular person or persons, or to persons who came on any particular vessel, or from any certain port or place. These things, if unknown, could not be more clearly stated, and were not essential to make out the crime as alleged, and, as to the overt acts in carrying out the crime, were mere matters of evidence. We are of opinion that the indictment is sufficiently clear and certain upon all the essential points, and is sufficient to inform the plaintiff in error as to the nature of the accusation against him.

We are also of opinion that the court did not err in refusing to allow the plaintiff in error for the third time to re-examine the jurors. The 11 jurors on the second examination stated that the fact that one of the defendants on trial had changed his plea would not in any manner prejudice them against the plaintiff in error. The matter was within the discretion of the court. It is apparent from the record of the trial that the plaintiff was not prejudiced by this ruling. The jurors were properly cautioned in regard to this matter. The court charged the jury as follows:

"And I may say to you, gentlemen, that the fact that two of his codefendants have pleaded guilty to the charge contained in this indictment, in your hearing, cannot be taken as any evidence whatever against this defendant. You are to decide the case solely upon testimony to which you have listened, and base your verdict upon that alone, and not allow your minds to be in the least prejudiced by the fact that two of the defendants have pleaded guilty."

The testimony of Thomas T. Burnett, if competent, and believed by the jury to be true, was sufficient to justify the verdict of guilty found by the jury. But the plaintiff in error claims that the testimony of Burnett was wholly inadmissible; that "a conviction for conspiracy cannot be had on the uncorroborated testimony of the co-conspirators, nor can co-conspirators corroborate each other"—and cites *United*

States v. Logan (C. C.) 45 Fed. 873, in support of this proposition. That case is not sustained by the federal decisions.

In United States v. Sacia (D. C.) 2 Fed. 754, 758, Judge Nixon charged the jury that:

"The fact that a witness is a co-conspirator doubtless operates, and ought to operate, largely against the credibility of his testimony, but the jury is not bound to reject it on that account. Whilst it would be unsafe, in ordinary cases, to convict any one upon the uncorroborated testimony of accomplices in the crime, the rule of law undoubtedly is that they are competent witnesses, and it is your duty to consider their evidence. You are to weigh it and scrutinize it with great care. You are to test its truth by inquiring into the probable motive which prompted it. You are to look into the testimony of other witnesses for corroborating facts. Where it is supported in material respects you are bound to credit it, but where it is unsupported you are not to rely upon it, unless, after the exercise of extreme caution, it produces in your minds the most positive conviction of its truth."

See, also, to the same effect, United States v. Babcock, 3 Dill. 581, Fed. Cas. No. 14,487; United States v. Flemming (D. C.) 18 Fed. 907-916; United States v. Ybanez (C. C.) 53 Fed. 536, 540; United States v. Howell (D. C.) 56 Fed. 21-28; Wolfson v. United States, 101 Fed. 430-436, 41 C. C. A. 422.

In Benson v. United States, 146 U. S. 325-336, 13 Sup. Ct. 60, 36 L. Ed. 991, there is an extended discussion upon the point herein involved. There a severance was had between the case of Mary Rautzahn and that of Benson, on trial for murder. She, not having been tried, was called as a witness on behalf of the government against Benson, and it was claimed that Mary Rautzahn was not a competent witness against him. The court, among other things, said:

"The theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency, and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction. \* \* \* If there had been no severance, and the two defendants had been tried jointly, either would have been a competent witness for the defendants; and, though the testimony of the one bore against the other, it would none the less be competent. Commonwealth v. Brown, 130 Mass. 279. The statute, in terms, places no limitation on the scope of the testimony, for its language is, 'The person so charged shall at his own request, but not otherwise, be a competent witness.' His competency being thus established, the limits of examination are those which apply to all other witnesses. \* \* \* If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a codefendant not on trial be adjudged incompetent? The conviction or acquittal of the former does not determine the guilt or innocence of the latter, and the judgment for or against the former will be no evidence on the subsequent trial of the latter. \* \* \* We think the testimony of Mrs. Rautzahn was competent, and there was no error in its admission."

In 12 Cyc. 453, there is a reference to many state authorities which sustain the principles that, "in the absence of a statute, the credibility of an accomplice is for the jury," and that "no common-law rule forbids a conviction upon the uncorroborated testimony of an accomplice, if

his evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt."

See, also, Underhill on Criminal Evidence, § 73; Hughes on Criminal Law, § 3172.

The judgment of the District Court is affirmed.

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BUCKHANNON & N. R. CO. v. DAVIS.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 553.

1. **FEDERAL COURTS—RECEIVERS—LEAVE TO SUE—CONDITIONS.**

Where a petition was filed in a federal court for permission to sue its receiver of a railroad company to condemn a grade crossing over the railroad's right of way, the court had power, in granting such permission, to reserve the question as to the forum in which the suit should be brought, and, if necessary, to modify or revoke any order which it might have improvidently granted.

[Ed. Note.—Action by and against receivers of federal courts, see note to *J. I. Case Flow Works v. Finks*, 26 O. C. A. 49.]

2. **SAME—EMINENT DOMAIN—FEDERAL COURTS—JURISDICTION.**

Where a federal court had taken jurisdiction of the property of a railroad company in process of liquidation, and had appointed a receiver therefor, an order requiring that a suit against the receiver to condemn a crossing over such railroad's right of way should be brought in the federal court did not constitute an interference with the state in the exercise of its rights of eminent domain.

3. **SAME—STATUTES.**

Act Cong. March 3, 1897, c. 373, § 3, 24 Stat. 554, and Act Aug. 13, 1898, c. 866, § 3, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582], declaring that every receiver of any property, appointed by any court of the United States, may be sued in respect to any act or transaction of his in carrying on the business connected with such property, without previous leave of the court in which such receiver was appointed, etc., did not authorize the bringing of a suit to condemn a crossing over the right of way of a railroad company in the hands of a receiver appointed by a federal court without leave thereof.

4. **SAME—ACTS OF RECEIVER.**

Refusal of the receiver to agree on a crossing at a point and in a manner insisted upon by the petitioner, which the receiver considered as detrimental to the property in his custody as receiver, did not constitute "an act or transaction" by the receiver within such act.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia.

For opinion below, see 131 Fed. 115.

W. S. Meredith (Reese Blizzard, on the brief), for appellant.

John W. Davis (John Bassel and Ira E. Robinson, on the brief), for appellee.

Before PRITCHARD, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

PRITCHARD, Circuit Judge. The bill of Coster et al., trustees, was filed March 13, 1899, its purpose being the foreclosure of the underlying mortgage of the Parkersburg Branch Railroad Com-

pany, dated July 1, 1879. In accordance with the prayer of said bill, John W. Davis was appointed receiver of all the property of said railroad company, and he duly qualified as such officer. Pending the proceedings in that case the Buckhannon & Northern Railroad Company, on the 27th day of October, 1903, filed its petition therein, asking permission to institute and prosecute in the circuit court of Taylor county, W. Va., certain condemnation proceedings against the said receiver, the object of which was to secure a crossing for the Buckhannon & Northern Railroad Company over the railroad and right of way of the Parkersburg Branch Railroad Company at a point within the corporate limits of the city of Grafton, in Taylor county, W. Va. It was set out in the petition that the Buckhannon & Northern Railroad is a corporation organized under the laws of the state of West Virginia for the purpose of constructing and operating a railroad for public use from the town of Buckhannon, in Upshur county, to Fairmont, in Marion county, W. Va., and thence on to the boundary line between the states of West Virginia and Pennsylvania; and that in constructing its railroad it is necessary for the petitioner to cross, at grade, the right of way and roadbed of the Parkersburg Branch Railroad at the point desired to be condemned for that purpose, and that such crossing was necessary in connection with the construction of petitioner's railroad; that said petitioner and the Parkersburg Branch Railroad Company could not agree upon the amount of compensation to be paid for such crossing, nor upon the point at which it was to be made, nor the manner of making the same. The court, after considering such application, granted permission to the Buckhannon & Northern Railroad Company to institute and maintain a suit against John W. Davis, receiver of the Parkersburg Branch Railroad Company, relative to such crossing, the order then entered containing these words: "The court at this time not passing upon the forum in which said suit or proceeding is to be instituted." On the 4th day of November, 1903, the receiver moved the court to strike from the record the order entered therein on the 27th day of October, 1903, giving such permission to institute proceedings to condemn, and the court, on considering such motion, set the hearing of the same for November 17, 1903. Notice of the fact that the court had so set the hearing of such motion was served on the Buckhannon & Northern Railroad Company on the 6th day of November, 1903. On November 9, 1903, the Buckhannon & Northern Railroad Company served notice on the receiver that it would, on November 19, 1903, make application by petition to the circuit court of Taylor county, W. Va., to appoint commissioners to ascertain a just compensation to the owners, and to secure such orders as might be necessary to condemn the right of way before mentioned. This notice was served without any request having been made to the court to dispose of the question of the forum, reserved when leave to sue was granted. The receiver, on November 17, 1903, filed a report of his proceedings as such officer, and, the cause coming on to be further heard, it was ordered that the hearing on the motion to set aside the order giving per-



mission to sue be had on December 2, 1903, and that in the meantime the Buckhannon & Northern Railroad Company be restrained from prosecuting its said action in the circuit court of Taylor county, W. Va., until the further order of the court. After a consideration of the questions presented by the record, the court amended the order of January 27, 1903, which gave the Buckhannon & Northern Railroad Company the right to institute proceedings against the receiver, by restricting the parties to the right to institute such proceeding in the Circuit Court of the United States in the cause of Coster et al. v. The Parkersburg Branch Railroad Company, 131 Fed. 115, and perpetually enjoining the Buckhannon & Northern Railroad Company from further prosecuting its suit for condemnation in the circuit court of Taylor county, W. Va.

It is contended by appellant that the court did not have power to revoke, annul, or modify its order of October 27, 1903, which granted permission to sue the receiver, and reserved the question as to the forum in which suit should be brought. The court undoubtedly had the right to attach any reasonable condition to the order which granted permission to sue the receiver, and, if necessary, to modify or revoke any order which it might have improvidently granted.

It is also contended by appellant that the state of West Virginia, in the exercise of its sovereign right of eminent domain, cannot in any way be interfered with by the courts of the United States. We do not understand such to be the law. In the case of *Searl v. School District No. 2*, 124 U. S. 199, 8 Sup. Ct. 461, 31 L. Ed. 415, Justice Matthews, in discussing this question, said:

"Such a proceeding, according to the decision of this court in *Kohl v. United States*, 91 U. S. 367 [23 L. Ed. 449], is a suit at law, within the meaning of the Constitution of the United States and the acts of Congress conferring jurisdiction upon the courts of the United States. In *Boom Co. v. Patterson*, 98 U. S. 403, 406 [25 L. Ed. 206], speaking of a judicial proceeding to appropriate private property to a public use and to fix compensation therefor, it was said: 'If that inquiry take the form of a proceeding before the courts, between parties, the owners of the land on one side, and the company, seeking the appropriation, on the other, there is a controversy which is subject to the ordinary incidents of a civil suit;' and among such incidents it was held in that case was the right, on the ground of citizenship, to remove it from a state to a federal tribunal for hearing and determination. The same point was ruled in the *Pacific Railroad Removal Cases*, 115 U. S. 1, 18 [5 Sup. Ct. 1113, 29 L. Ed. 319]. In *Gaines v. Fuentes*, 92 U. S. 10 [23 L. Ed. 524], it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation, and is presented by pleadings for judicial determination."

In the case *supra* the federal court did not have jurisdiction in the first instance, but obtained it by virtue of the removal of the case from the state to the federal court. In this case the court has already assumed jurisdiction and control over the property which is sought to be condemned for public use, and, inasmuch as it had jurisdiction over the parties and subject-matter of the controversy at the time of the application to sue the receiver, it was competent for the court to put in motion the machinery provided by

the statutes of West Virginia for the purpose of adjusting the rights between the parties.

It has often been held in cases wherein federal courts assume jurisdiction of a suit pending between citizens of different states that the court is empowered to proceed in accordance with the rules of procedure which obtain in the state where the controversy arises. In this case it is clear that the court has the right on a proper showing to authorize the condemnation of the property in question, in accordance with the provisions of the statutes of West Virginia; and in doing so the court does not interfere with the state in the exercise of any right authorized by its statutes, but is simply enforcing the laws of West Virginia in a case where the court has obtained jurisdiction over the parties and the subject-matter involved in the controversy. However, the principal and most important question which the court is called upon to decide is whether the facts in this case entitle the petitioner to institute suit against the receiver without permission of the court. The real contention presented for our consideration is as to the proper construction of section 3 of Act March 3, 1887, c. 373, 24 Stat. 554, and Act Aug. 13, 1888, c. 866, 25 Stat. 486 [U. S. Comp. St. 1901, p. 582], which reads as follows:

"That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect to any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed; so far as the same shall be necessary to the ends of justice."

This act provides that suits may be brought against receivers in certain instances therein specified without leave of the court. It was clearly the intention of Congress to restrict the cases wherein suits are to be brought without permission of the court to acts and transactions of the receiver in carrying on the business intrusted to his care, and the statute in question cannot be construed to mean that suits may be brought against a receiver to establish any right to the property which may be placed in his custody without the permission of the court. The property being at all times under the control of the court of administration, it would be absurd to permit the institution of suits in another forum to recover such property or diminish its value.

If the contention of appellant as to the meaning of the statute be correct, such construction would render the court powerless to protect the property placed in its custody for preservation. It cannot be said that this is a suit which does not affect the value of the property; neither can it be contended that it is not brought for the purpose of recovering a portion of the property now in the hands of the receiver. The suit is proposed to be instituted for the purpose of acquiring an easement, which is, to say the least of it, a qualified estate; it is such an estate as may be assigned and transferred for a valuable consideration, and it is a right which, if established, would deprive the Parkersburg Branch Railroad

Company of the enjoyment of certain rights and interest in the property thus acquired, and would tend to diminish the value of the property remaining in the hands of the receiver. The property being in the hands of the court of administration, such court is entitled in the first instance to pass upon the question whether the receiver shall part with any portion of it, and as to whether the compensation for the taking of the same is adequate; otherwise the policy of the law in relation to the appointment of receivers would be defeated.

The case of *Gableman v. Peoria, Decatur & Evansville R. Co.*, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220, is relied on by appellant to sustain the contention that the petitioner is entitled to bring this suit without leave of the court. That was a case wherein a party was injured by the failure of the defendant company in the hands of the receiver to properly operate gates at a railroad crossing. In that case the plaintiff clearly had the right to institute suit against the receiver without leave of the court, because the act complained of was performed while he was, as such receiver, operating the property, which brought it clearly within the provisions of the act of 1887-88.

The contention that the refusal of the receiver to agree upon a crossing at a point and in a matter insisted upon by the appellant, which the receiver considered as detrimental to the property in his custody as receiver, can be construed as an act or transaction by the receiver as contemplated by the act of 1887-88, is untenable. His refusal to accede to the demands of appellant was not "an act or transaction of his in carrying on the business connected with such property in his custody," but was simply a refusal on his part to permit another to acquire title to a portion of the property placed in his custody without first obtaining leave of the court.

Under the circumstances the action of the learned judge who tried this case was eminently proper, and therefore we find no error. The adoption of any other policy in such cases would, in most instances, result in confusion, and would be productive of a conflict of jurisdiction in the administration of property committed to the custody of the court.

The orders of the Circuit Court refusing to authorize the receiver to be sued in another forum, and perpetually restraining the Buckhannon & Northern Railroad Company from instituting suit against the receiver in the circuit court of Taylor County, W. Va., are affirmed.

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In re MUELLER.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1905.)

No. 1,369.

**1. BANKRUPTCY—APPELLATE JURISDICTION—MODE OF REVIEW.**

Judgments or orders of a District or Circuit Court entered in controversies arising in bankruptcy proceedings, as distinguished from those entered in bankruptcy proceedings proper, are reviewable by the Circuit Courts of Appeals only by appeal or writ of error under their general ap-

pellate jurisdiction, as provided in Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. **SAME.**

Judgments or orders of a District Court in bankruptcy proceedings proper, relating to the administration of the estate, if appealable under the terms of Bankr. Act, July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], cannot be reviewed on petition to revise in matter of law under section 24b, the two provisions being exclusive of each other.

3. **SAME—ORDER ALLOWING CLAIM.**

A creditor holding a note given by a bankrupt firm, signed as surety by a member of the firm, also bankrupt, having proved the debt against the firm estate, also filed it as an individual debt against the estate of the surety. *Held*, that the only question determined by an order allowing such claim was that it was a provable debt against the individual estate of the partner, and that such order was reviewable only by appeal under Bankr. Act, July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], the amount allowed being over \$500.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Kentucky, in Bankruptcy.

Alfred Selligman, for petitioner.

O. A. Wehle, for respondent.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a petition filed by A. E. Mueller, trustee in bankruptcy of the partnership styled L. De Witt & Sons, and of the individuals composing same, to review an order of the District Court allowing a certain claim in favor of the German Insurance Bank of Louisville, Ky., against the individual estate of Mary A. De Witt, one of the members of the bankrupt firm. The matter comes on now to be heard upon a motion to dismiss the petition for review upon the ground that the order or judgment sought to be reviewed was a judgment allowing a debt or claim of \$500 or over, and therefore not subject to be reviewed under the provisions of section 24b of the bankrupt act, but reviewable only by an appeal under section 25a, Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]. In *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116, it is said:

"The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estate of bankrupts is recognized in sections 23, 24 and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction."

There is no reason to suppose that one may elect whether he will bring up the order or judgment which he wishes to have reversed by appeal or by a petition for review. These remedies are exclusive of each other. That which may come here by appeal cannot come here for review; otherwise the distinction which the act recognizes will be ignored. Neither is there any reason for supposing that an order or judgment may be appealed when questions of fact are to

be considered and reviewed upon petition if only a question of law is involved. The distinction between cases appealable and cases reviewable lies deeper, and turns upon the character of case or question. Cases which are appealable are of two classes:

1. There is the broad appellate jurisdiction conferred by section 6 of the Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], by appeal or writ of error, from the final decisions of the District Court "in all cases other than those provided for in the preceding section of this act." That the decree or judgment is one arising in a controversy relating to the settlement of the bankrupt's estate does not make it any the less appealable or reviewable by writ of error. Upon the contrary, section 24a provides as follows:

"The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases." U. S. Comp. St. 1901, p. 3431.

That neither the fifth nor sixth section of the act of 1891 (26 Stat. 827, 828 [U. S. Comp. St. 1901, pp. 549, 550]) was changed by the bankrupt act was expressly decided in *Bardes v. Hawarden Bank*, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 262 and *Elliott v. Toeppner*, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200. By "controversies arising in bankruptcy proceedings" is meant those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors. An illustration of such a controversy is found in *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, wherein title to certain chattels in the hands of the trustee was asserted under an intervening petition. Another is found in *Dolle v. Cassell* (decided by this court January, 1905) 135 Fed. 52, wherein a vendor under a conditional sale of chattels sought to recover the articles under an unrecorded agreement for the retention of title until payment of the purchase price. Still another is found in the case entitled *In re First National Bank of Canton, Ohio* (decided by this court at its January session) 135 Fed. 62, in which a creditor of the bankrupt sought to enforce a mortgage lien upon a stock of merchandise belonging to the bankrupt, which stock had come to the possession of the bankrupt's trustee. The distinction between a "controversy arising in bankruptcy" and "proceedings in bankruptcy" is very sharply drawn by Judge Baker, speaking for the Seventh Circuit Court of Appeals, in the case of *In re Friend et al.*, 134 Fed. 778. The learned judge there said:

"That section 23 establishes a clear distinction between 'proceedings in bankruptcy' and 'controversies at law and in equity arising in the course of bankruptcy proceedings'; the former, broadly speaking, covering questions between the alleged bankrupt and his creditors as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales,

exemptions, allowances, and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate; and the latter, broadly speaking, involving questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants on the other, concerning property in the possession of the trustee or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly the administrative orders and judgments, but only the question of the extent of the estate. That the same distinction is maintained in section 24a on the one hand, and sections 24b and 25a on the other."

2. But this general appellate jurisdiction conferred by 24a does not extend to certain specified proceedings. Thus section 25a provides for "appeals, as in equity cases," if taken within 10 days: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; (3) from a judgment allowing or rejecting a debt or claim of \$500 or over. The time within which a writ of error may be taken out or an appeal prayed from a judgment or decree of the District Court in "a controversy arising in bankruptcy," such as is referred to in section 24a, is the time prescribed by the eleventh section of the judiciary act of 1891 (26 Stat. 829 [U. S. Comp. St. 1901, p. 552]), namely, six months. But no appeal can be taken in one of the cases specifically mentioned in this section unless taken within ten days. This short limitation was doubtless imposed because of the peculiar nature of the judgments mentioned, and the evil results of delay upon the rights of other parties whose rights would be affected. But, whatever the reason, there is no way in which a judgment of the kind described by section 25a can be reviewed but by an appeal, and an appeal sued out within ten days. But when the judgment is upon the verdict of a jury, under section 19 of the bankrupt law (30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]) it cannot be revised under an appeal as in an equity case, but only by writ of error. *Elliott v. Toeppner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200. The doubt as to what kinds of cases are appealable under the provisions of this section turns upon the meaning to be attached to the words "a debt or claim." That "claim," as used here, means a "debt," is settled by *Holden v. Stratton*, 191 U. S. 115, 118, 24 Sup. Ct. 45, 48 L. Ed. 116, where it was said by Chief Justice Fuller that, "while the word 'claim' is used in its signification of the demand or assertion of a right in subdivision 11 of section 2, in respect of all claims of bankrupts to their exemptions, it is also used in many parts of the act, and, as we think, in section 25, as referring to debts \* \* \* presented for proof against estates in bankruptcy." But where the appeal is from a judgment allowing or disallowing a debt, any question of lien or priority of the debt, if allowed, may be considered upon the appeal as an incident of the debt. *Cunningham v. German Ins. Bank*, 103 Fed. 932, 43 C. C. A. 377; *Courier-Journal Co. v. Schafer-Brewing Co.*, 101 Fed. 699, 41 C. C. A. 614; *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179. If, however, the debt or claim is not disputed, and the only question sought to be reviewed is one of the rank or priority of the claim by reason of its character or some lien in its favor against property of the bankrupt, it has been held by the Circuit

Court of Appeals for the Seventh Circuit that, so far as the order or decree depended upon a question of law, it could be reviewed upon a petition for review. In *re Rouse Hazard Co.*, 91 Fed. 96, 33 C. C. A. 356; In *re Richards*, 96 Fed. 935, 37 C. C. A. 634. This ruling we followed in *Courier-Journal Co. v. Meyer Brewing Co.*, 101 Fed. 699, 41 C. C. A. 614. In *Burleigh v. Foreman*, 125 Fed. 217, 60 C. C. A. 109, the First Circuit Court of Appeals held that, where a question arose as to whether certain assets belonged to the estate of a bankrupt copartnership or to the individual estate of one of the partners, an issue thus raised between the creditors of the two estates constituted one of those distinct and separable issues "arising in bankruptcy proceedings" appealable under the broad appellate jurisdiction of the Courts of Appeal under the judiciary act of 1891, and reaffirmed under section 24a of the bankrupt act. In *Buckingham v. First Nat. Bank of Chicago*, 131 Fed. 192, a like question came before us on appeal, and was entertained without objection; the only question in this case last mentioned being the question of whether there were in fact two estates.

3. There remains only the revisory jurisdiction under section 24b, where it is provided that "the several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction." The consensus of opinion and reason seems to be that this revisory jurisdiction does not include any orders or decrees which are appealable, the provisions for appeal and for petition of review being mutually exclusive. Loveland on Bankruptcy (2d Ed.) p. 809; *Brandenburg Bankruptcy* (2d Ed.) 375; In *re Good*, 99 Fed. 389, 39 C. C. A. 581; In *re Ives*, 113 Fed. 911, 51 C. C. A. 541. The distinction between "controversies arising in bankruptcy proceedings" under 24a and the "proceedings" in bankruptcy referred to in 24b, has already been observed. The "proceedings" reviewable are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under 24a. In *re Friend, Moss and Morris* (Seventh Circuit Court of Appeals, Oct., 1904) 134 Fed. 778; *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179; *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986.

4. Applying these principles to the case in hand, it is clear that, if the judgment sought to be reviewed is a judgment allowing a claim, the motion to dismiss must be granted. From the petition and its exhibits it appears that an involuntary petition in bankruptcy was filed against the firm of L. De Witt & Sons, composed of Lafayette De Witt, Clarence De Witt, J. H. De Witt, and Mary A. De Witt, and that the firm and the individuals composing it were adjudged bankrupts. Mary A. De Witt is the wife of Lafayette

De Witt. Mary A. De Witt has an individual estate, which estate has passed to and is in the possession of her trustee in bankruptcy, who is also trustee for the bankrupt firm of which she is a member. The estate of the bankrupt firm is insufficient to pay the firm debts. But the petition avers that the estate of Mary A. De Witt is sufficient "to pay all the claims proved against it" if the claim of the German Insurance Bank be excluded. The petition then avers that the said German Insurance Bank was the holder of five promissory notes signed by the firm of L. De Witt & Sons and by Mary A. De Witt and one Wilhelmina Rueve; that the said bank filed and proved their claims against the estate of L. De Witt & Sons and received a small dividend thereon; that afterwards the said bank filed a proof of claim against the individual estate of Mary A. De Witt based upon the same indebtedness. This proof of debt alleged that the said Mary A. De Witt, by her individual signature upon said notes, had become individually liable for the said indebtedness. The said proof of claim is made an exhibit to the petition for review, and in said proof it is, among other things, alleged:

"That the said Mary A. De Witt, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of \$5,425; that the consideration of said debt is as follows: (1) A promissory note dated September 23, 1903, executed and delivered by said Mary A. De Witt, bankrupt, to said creditor, by which she, the firm of L. De Witt & Sons, also bankrupts, and one Wilhelmina Rueve, jointly and severally promised and agreed to pay," etc.

Then follows a like allegation in regard to four other notes signed by the firm and by said Mary A. De Witt and Wilhelmina Rueve. It is in the petition also averred that the referee "allowed said claim as a claim against the individual estate of Mary A. De Witt." Certain of the creditors excepted to the allowance of this claim, and moved a reconsideration and a disallowance. This motion was overruled, whereupon a petition was filed by the trustee for a review of the referee's order, and the matter carried before the District Judge sitting in bankruptcy, who affirmed the referee's order upon the ground that the bank "was entitled to make the proof of its debt against the individual assets of Mary A. De Witt." From the foregoing it appears that there are two distinct estates—the estate of the copartnership and the individual estate of Mary A. De Witt, a member of the copartnership. It is obvious that, unless the German Insurance Bank has a debt or claim which it can prove against the individual estate of Mrs. De Witt, it cannot, although a creditor of the copartnership, and therefore a creditor of Mrs. De Witt, receive any dividend from her estate until the individual debts are paid. The present bankrupt law expressly provides that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts, and that only the surplus of each estate shall be added to the other. The right of the bank to participate in the distribution of Mrs. De Witt's individual estate depended, therefore, upon the



question as to whether it had a claim provable against that estate. This was the real and only controversy before the referee and before the District Judge upon the review. The order sought to be reviewed is therefore neither more nor less than an order allowing the debt as a claim against Mrs. De Witt's individual estate. If that order stands, that claim will necessarily participate in the distribution of her estate.

For the purpose of taking this case without the category of cases appealable under section 25a, as an appeal from a judgment allowing or disallowing a debt or claim, it has been urged that the real question is one of marshaling—a question as to whether the debt or claim of the bank shall receive dividends from both estates, while other creditors of the partnership will be confined to the partnership fund and the surplus of Mrs. De Witt's individual estate after her individual debts are paid. But this begs the question. That there is an individual estate and a partnership estate is not disputed. If the bank is a creditor of both estates, it can prove against both. *Buckingham v. First National Bank of Chicago*, decided by this court, and reported in 131 Fed. 192. The real contention was as to whether Mrs. De Witt was competent, as a married woman, to become a surety for the firm of which she was a member, under section 2127, Ky. St. 1903, and whether her individual signature was a suretyship within the terms of that statute, or a mere contract giving the bank the right to go upon her individual estate for a debt which, in any event, was her own debt, and not the debt of another. But the single question lying at the root of the whole question of whether the bank should share in both estates depended upon whether it had a provable debt against both estates or funds. There is no question of distribution or double dividends, except as it results from the allowance of the claim of the bank as a claim against the individual estate of Mary A. De Witt. Whether that allowance was right or wrong is the only question. That question should have been brought here by appeal under section 25a, taken within 10 days from the order of the District Judge confirming the allowance of the claim. Petitioner waited until the time for such an appeal had long passed, and then filed his petition for review.

The motion to dismiss must be allowed.

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### KENOVA LOAN & TRUST CO. v. GRAHAM.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 556.

#### 1. BANKRUPTCY—PETITION FOR REVIEW—QUESTIONS REVIEWABLE.

On a petition for review of an order of a District Court in bankruptcy, as distinguished from an appeal therefrom, questions of law only can be considered.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

**2. SAME—PREFERENCES.**

Whether the lien claimed by a creditor of a bankrupt under a trust deed constituted a valid preference under the bankrupt law was a question dependent on the correct determination of the facts relating to the particular transaction, so that a determination thereof adverse to the claimant by the referee and District Court could not be reviewed on a petition for review.

**3. SAME—LIMITATIONS.**

Where a creditor of a bankrupt claimed a lien on certain of the bankrupt's assets under a trust deed, which the referee and the District Court held to be an invalid preference, the claimant, on prosecuting a petition for review to the Circuit Court of Appeals, did not occupy the position of a purchaser for value of the property, or an adverse claimant thereto, within Bankr. Act July 1, 1898, c. 541, § 24, 30 Stat. 553 [U. S. Comp. St. 1901, p. 8431], authorizing appeals within six months, but was rather within section 25a, prescribing a ten-day limitation therefor.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of West Virginia.

F. B. Enslow, for petitioner.

Wallace & Fitzpatrick, for respondent.

Before PRITCHARD, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

WADDILL, District Judge. This is a petition to review the action of the United States District Court for the Southern District of West Virginia, taken on the 30th day of May, 1904, disallowing the claim of the petitioner, the Kenova Loan & Trust Company, against the estate of the bankrupt, because the same was a preference within the meaning of the bankruptcy act. The bankrupt, O. M. Page, was a contractor for the construction of five miles of grading on the Naugatuck Branch of the Norfolk & Western Railroad, in the state of West Virginia. In November, 1902, he began dealing with the Kenova Loan & Trust Company, securing from them money from time to time, with which to carry on his contract, giving them assignments of the funds to become due to him from the railroad for construction work in which he was then engaged; and the trust company collected his monthly estimates from the railroad company, less 15 per cent. retained by the railroad, and applied the same to the indebtedness of the said Page. Page first secured a small amount from the trust company, until on the 27th of June, 1903, he owed as much as \$3,000. On the 24th of July, 1903, the trust company, in addition to the assignments of the monthly estimates aforesaid, took a trust deed from Page upon a large amount of personal property used in the execution of his contract, consisting of mules, horses, carts, scrapers, drags, etc., to secure a note for \$3,000 that day executed; and it thereupon credited him with that amount, less a discount of \$20, and charged him up with a previous note then remaining unpaid. Subsequently, on the 22d day of August, 1903, the trust company received the amount of the July estimate from the railroad, amounting to \$3,687.97, and charged Page with a note of \$804.50, and two checks, leaving a balance in its hands of \$2,528.67.

Neither the last-named amount nor any part of the July payment was applied to the payment of this note, but instead the bank loaned Page the further sum of \$1,000, less discount thereon, and on the 28th day of August, 1903, placed the two amounts in its hands to his credit, which he drew, and left for parts unknown, without paying his hands or other obligations in connection with his contract, for which it was understood he was drawing the money. After the departure of Page he was duly adjudged an involuntary bankrupt, and the property conveyed under the trust deed as aforesaid was sold in the bankruptcy proceeding, bringing the sum of \$1,176.20, which is in the hands of the bankrupt's trustee, two of the mules having been previously sold by consent for \$180, and the money turned over to the trust company.

The question at issue is whether these two amounts are to be applied to the general indebtedness of the bankrupt or paid the Kenova Loan & Trust Company by reason of the lien of its trust deed of the 24th of July, 1903, on account of the \$3,000 therein secured. Appropriate proceedings were had in the lower court to present these questions, a petition having been filed by John T. Graham, appointed receiver in the cause, and subsequently elected the bankrupt's trustee, to enjoin the sale of the personal property under the trust deed; and the referee awarded a rule against the trust company to show cause why the \$180 in its hands should not be paid over to the trustee, to which rule and the petition the trust company duly made answer. Evidence bearing on the questions at issue was taken and passed upon by the referee, who was of opinion that the trust deed was invalid, because it was executed to a trustee who was a stockholder in the trust company, and acknowledged before a notary who was a stockholder and director and president of the trust company, and that the recordation of the same did not constitute even constructive notice to subsequent lien creditors and purchasers of the fact of its recordation under the registry laws of West Virginia; but, assuming the deed to have been properly admitted to record, that the same was invalid under the facts before him, because it created a preference within the meaning of the bankrupt law, and therefore, both as to the \$180 and the \$1,176.20, the bank was not entitled to a preference, and should refund to the bankrupt's trustee the \$180 in its hands. Upon application to review the action of the referee the lower court was of the opinion that the referee was in error as to the recordation of the trust deed, and overruled his decision on that point, but sustained him as to the question of preference; the learned judge of that court saying:

"Upon the second proposition, however, I come to the conclusion, upon the facts stated in the record, that the referee was right in holding that this deed was a preference within the meaning and intent of the bankruptcy act. I am forced to the conclusion that no new consideration passed upon the execution of the deed of trust, but that the transaction was in fact but the renewal of a former note, and was so treated by all the parties; and, further, that the debt secured by it should, under the agreements and understandings of the parties, have been canceled and extinguished on the 22d of August, 1903, upon the receipt by the trust company of the August payment from the N. & W. Ry. Co."

Upon presentation of the petition for review in this court the bankrupt's trustee moved to dismiss the same on the following grounds: First, that a petition for review does not authorize review of questions of fact; second, that it is shown by the petition that the amount in controversy between the petitioner and John T. Graham, trustee, is \$1,356, and review does not lie when the amount is in excess of \$500; third, the said petition cannot be treated as in the nature of an appeal, because the time for such procedure has expired. The case is now before the court as well upon its merits as upon the motion to dismiss for the reasons stated.

The pleadings in this case clearly present for the consideration of the court a petition for review of the action of the lower court, as distinguished from an appeal therefrom; and on such proceeding questions of law, and not of fact, can be considered and passed upon by this court. Section 24b, Bankr. Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]; *Brandenburg*, § 598; *Loveland* (2d Ed.) § 312; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Cunningham v. German Ins. Bank*, 103 Fed. 932, 43 C. C. A. 377; *Courier Journal Job Printing Co. v. Brewing Co.*, 101 Fed. 699, 41 C. C. A. 614; *In re Purvine*, 96 Fed. 192, 37 C. C. A. 446; *In re Union Trust Co.*, 122 Fed. 937, 59 C. C. A. 461.

The question of whether or not the lien claimed by the trust company constituted a valid preference under the bankrupt law was one dependent upon the correct determination of the facts in relation to the particular transaction; and that fact both the referee and the lower court having determined adversely to the trust company, this court, treating this as a petition for review, could not disturb, and, treating it as an appeal, should only do so where those tribunals appear plainly to have been wrong in the conclusions reached by them. Under the facts of this case it may be said that there was room for difference of opinion as to just what was the true transaction between the parties; but certainly no such doubt as would justify this court in departing from the well-established rule of accepting the decision of the lower courts, particularly where they both coincide as to what are the facts. This being the view taken by the court upon the question of preference, it is unnecessary for us to pass upon the one discussed at the bar as to whether a petition for review would lie where the amount involved exceeded \$500. Nor is it necessary to pass upon whether or not this petition for review should not be treated as, in effect, an appeal; since, if so treated, it would not have been taken within the time prescribed by the statute—that is to say, within 10 days from the time of the decision appealed from. Counsel for the petitioner seeks to take this petition, however, out of the 10-days limitation prescribed by section 25a of the bankrupt act, and insists that it does not occupy the position of one who appeals from an order disallowing a claim referred to therein; but that it is in point of fact a purchaser for value of the property conveyed under the trust deed to secure its debt, and occupies the relation of adverse claimant to such property, and that as to it,

under section 24 of the bankruptcy act, the limitation of 6 months, as distinguished from 10 days, applies. Suffice to say as to these contentions, the court does not concur with the petitioner in either of them, and they cannot avail to afford relief herein.

The order of the District Court is affirmed.

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In re HOWARD.

(Circuit Court of Appeals, Ninth Circuit. February 20, 1905.)

No. 1,095.

**1. APPEAL—REVERSAL—RESTITUTION—DECREE—RES JUDICATA.**

The trustee of a bankrupt recovered judgment for \$6,492.37, as the value of certain fruit shipped by him as the factor of the original shippers, in an action in which the assignee of the original shippers, also claiming the fund, was substituted as defendant. The judgment directed payment to the trustee or his attorney, and the latter, receiving from the depository \$6,502.22, paid to the trustee \$5,274.26, retaining the balance for services and disbursements. On appeal this judgment was reversed, and judgment directed for the assignee of the original shippers, whereupon a decree was rendered in the lower court, to which both the trustee and his attorney were parties, directing restitution to such assignee of the sum of \$6,492.37. *Held*, that such decree, unappealed from, was *res judicata* between the parties as to the trustee's liability, so that he was not thereafter entitled to a modification thereof on his being unable to obtain restitution of the amount retained by the attorney, so as only to require the trustee to repay the amount received.

**2. SAME—SUMMARY JURISDICTION.**

It was competent for the court of bankruptcy, on such record, to enter an order, in the exercise of its summary jurisdiction, requiring the trustee to pay the assignee the amount determined to be due him by the decree of restitution.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of California, in Bankruptcy.

For opinion below, see 130 Fed. 1004.

Joseph R. Patton and William A. Coulton, for petitioner.

Tirey L. Ford, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. Charles B. Bills, as trustee in bankruptcy of the estate of Edward B. Howard, trading as Howard & Co., bankrupt, commenced an action in the Circuit Court of the United States for the Eastern District of New York on the 16th day of January, 1900, against Sylvester G. Whiton, as executor of the estate of Charles H. Skidmore, deceased. The action was commenced by the trustee by the sanction and authority of the referee in bankruptcy of the District Court for the Northern District of California in and for the county of Santa Clara, in this state, for the purpose of recovering from Whiton, as such executor, certain moneys which were the proceeds of sales of six car loads of dried fruit theretofore consigned to the firm of Turle & Skidmore by Edward

B. Howard, prior to being adjudicated a bankrupt, as a factor of the original shippers. The proceeds of these shipments were then in the hands of Whiton as executor of the estate of Skidmore; the said Skidmore being the general, and the said Turle being the limited, partner of said firm of Turle & Skidmore. In this action Louis C. Schliep, as assignee of the original shippers, was on the 6th day of December, 1901, substituted as a defendant in place of Whiton, executor. Thereafter, and on August 28, 1902, a decree was entered in said action in which it was adjudged that the sum of \$6,502.22 on deposit in the Washington Trust Company, with interest thereon at the rate of 3 per cent. per annum from December 7, 1901, belonged to the plaintiff Charles B. Bills, as trustee in bankruptcy of the estate of Edward B. Howard, bankrupt, with the exception of \$150.63, with interest thereon at the rate of 3 per cent. per annum from the date of the original deposit with the trust company, which last sum, it was adjudged, belonged to the defendant Schliep. In pursuance of this decree it was ordered that the Washington Trust Company, upon presentation of a certified copy of the decree and order, should pay to the plaintiff Bills, or to his attorney, Philo B. Safford, the said sum of \$6,502.22, with interest as specified in the decree, and to Louis C. Schliep, or his attorney, the sum of \$150.63, with interest as specified in the decree. On August 29, 1902, the day after the entry of this decree, the trust company paid over to Safford, as attorney for the trustee, the sum of \$6,492.37, and thereupon Safford transmitted to said trustee the sum of \$5,274.26, retaining the sum of \$1,218.11; claiming \$1,075 thereof as a payment on account of legal services rendered by him in said action, and \$143.11 for disbursements made by him therein. Upon the receipt of said sum of \$5,274.26 by the trustee, he caused it to be deposited in the Bank of San José, the depository designated by the District Court of the United States for the Northern District of California as the bank in which all moneys received by the said trustee in the matter of said bankruptcy should be deposited. After the entry of the decree in favor of the trustee in the Circuit Court, the defendant Schliep appealed the case to the Circuit Court of Appeals for the Second Circuit, and on December 6, 1903, that court reversed the decree of the Circuit Court; holding, upon the evidence in the case, that the San José shippers, in the sale of their fruit, had dealt with Howard as the mere agent of Turle & Skidmore. 127 Fed. 103, 62 C. C. A. 103. The Court of Appeals accordingly directed the Circuit Court to order the funds to be paid over to the defendant Schliep, as the assignee of the shippers, and a mandate was issued to the Circuit Court accordingly. On February 11, 1904, a final decree was entered in the Circuit Court in favor of the defendant Louis C. Schliep, pursuant to the mandate of the Circuit Court of Appeals. In this decree it was further ordered that Schliep should recover his costs in the Circuit Court of Appeals and in the Circuit Court, taxed at \$681.30. Thereafter, and on April 1, 1904, the Circuit Court, upon motion for restitution, was advised by the affidavit of Louis C. Schliep of the payment by the Washington Trust Company of the sum of \$6,492.37 on August 29, 1902, to Philo B. Safford, as attorney for the trustee; that the attorney had transmitted

\$5,274.26 to the trustee, and had applied \$1,218.11, the remainder thereof, in payment of professional services rendered and expenses incurred by him as attorney for the trustee in the action; that demand had been made upon the trustee and upon his attorney for restitution of the said sum of \$6,492.37, with interest thereon, and payment had been refused. After a hearing upon said motion, the court entered a decree adjudging that the trustee forthwith make restitution to Louis C. Schliep of the said sum of \$6,492.37, with interest thereon from the 29th day of August, 1902, at the rate of 3 per cent. per annum, and that the defendant Schliep have execution therefor.

On the 18th day of April, 1904, Louis C. Schliep filed a petition in the District Court of the United States for the Northern District of California, alleging the entering of the final decree in his favor by the Circuit Court of the United States for the Second District, directing that the Washington Trust Company pay over to him or his order the sum of \$6,502.22, with interest thereon at the rate of 3 per cent. per annum from the 7th day of December, 1901, and further directing that Schliep recover from Bills, trustee, the sum of \$681.30, being the cost of the appeal in the Circuit Court of Appeals and the final decree in the Circuit Court. The petition also alleged that due demand had been made upon the Washington Trust Company for the sum of \$6,502.22 and interest thereon, and that payment had been refused on the ground that the Trust Company had paid over to Safford the sum of \$6,492.37, being the entire amount of said fund and interest, excepting only the sum of \$150.63 and interest, still held by it for account of Schliep. It was also alleged that demand had been made on Safford for the said sum of \$6,492.37, and payment refused; that application had been made in the Circuit Court for the Eastern District of New York for restitution; and that a decree had been granted therein on the 1st day of April, 1904, an exemplified copy of which decree was attached to the petition, and made a part thereof. The petition prayed that the District Court enter an order directing payment to the petitioner of the sum of \$6,492.37, with interest thereon from the 29th day of August, 1902, at the rate of 3 per cent. per annum, and further to make payment to him of the sum of \$681.30, being the total of the costs directed to be paid by the final decree of the United States Circuit Court for the Second Circuit. To this petition an answer was filed by the trustee, Charles B. Bills, alleging, among other things, the matter hereinbefore referred to, and alleging further that immediately upon the receipt of the sum of \$5,274.26 from his attorney, Safford, he repudiated the appropriation of any portion of said sum so paid by the Washington Trust Company to Safford on account of the attorney's fees for services rendered by said Safford to said trustee in said action, and demanded that Safford forthwith transmit the said sum so retained by him out of such payment, in order that the whole of said fund so received under said decree might be preserved intact until the final termination of said action, but that Safford then and there refused, and has always refused, to transmit to said trustee the amount so retained by him out of said payment, and has ever since refused, and now refuses, to restore the same, or any portion thereof, to the petitioner, Schliep, or to the said trustee. It was further alleged that no order or decree had at any time

been made by the judge of the District Court, or by its referee in bankruptcy for the county of Santa Clara, fixing or determining the amount of the value of the services of said Safford as attorney for said trustee, and that no order or decree, or petition therefor, had ever been made or filed in said court, or by said referee in bankruptcy, authorizing or sanctioning or approving the said acts of Safford in thus appropriating and taking any portion of the funds so paid to him by said Washington Trust Company. It was also alleged that the trustee had not at any time since the 17th day of September, 1902, had sufficient money or funds belonging to the estate of said bankrupt wherewith to institute any action or proceedings, or to take any steps to compel the said Safford to restore to him, the said trustee, or to the Washington Trust Company, the funds, or any portion thereof, so taken and appropriated by Safford for attorney's fee in said action, and for that reason the said trustee had been unable to take any action or proceedings whereby said money so taken could be restored to the Washington Trust Company, or come into the hands of said trustee, or be paid to said petitioner. It is further alleged that the trustee had always been willing and ready and able to pay to such person as the court might determine was entitled thereto the said sum of \$5,274.26.

Upon this petition and answer the District Court, following the decree of restitution entered in the New York Circuit Court, entered an order directing the trustee to forthwith pay to Louis C. Schliep the sum of \$6,492.37, with interest thereon from August 29, 1902, at the rate of 3 per cent. per annum, and denied the application of Schliep for an order requiring the trustee to pay to the petitioner the sum of \$681.30, costs of suit in accordance with the judgment of the New York Circuit Court, but without prejudice to the right of the petitioner to enforce said judgment by action or execution. The petition of the trustee to review this order is for the purpose of so modifying the order that it shall require and direct him to pay over to said Louis C. Schliep the sum of \$5,274.26, without interest, being the amount received by him from his attorney, Safford, and for the costs on this review.

The trustee in his answer does not deny the entry of the decree of restitution in the New York Circuit Court. The decree appears from the record to have been regularly entered after a hearing in which the trustee was represented by his attorney, Safford, who was himself a party to the proceedings. This decree, not having been appealed from, has become final, as between the parties, and the questions there determined are *res adjudicata*. Upon the pleadings in the District Court, it was competent for that court, in the exercise of its summary jurisdiction as a court of bankruptcy, to enter an order requiring the trustee to pay the petitioner the amount determined to be due him by the decree of restitution.

The item of costs amounting to \$681.30 which the petitioner claims by reason of the judgment of the Circuit Court of Appeals, and the decree of the Circuit Court entered in pursuance of that judgment, was not made a part of the decree of restitution, and was not ordered paid by the District Court, but the denial of the order was without prejudice of the right of the petitioner to enforce judgment for the same by action or execution. The decree of restitution was directed to a specific fund



which came into the hands of the trustee, either actually or in judgment of law, and which he was required to restore to the petitioner. To enforce this decree, the summary proceedings in the District Court were an appropriate remedy; but not so with respect to the judgment for costs, for the payment of which no funds had come into the hands of the trustee. We think this claim of the petitioner was properly omitted from the order of the District Court.

The order of the District Court is affirmed.

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**FRED MACEY CO., Limited, v. MACEY.**

(Circuit Court of Appeals, Sixth Circuit. February 23, 1905.)

No. 1,366.

**1. FEDERAL COURTS—JURISDICTION—APPEAL.**

On appeal to the Circuit Court of Appeals in an action removed from the state court it is the duty of the Court of Appeals to determine whether the record exhibits a case properly removable, regardless of whether any objection was taken to the jurisdiction of the federal court either in the court below or on appeal.

[Ed. Note.—Review of jurisdiction of circuit courts, see note to *Excelsior Wooden-Pipe Co. v. Pacific Bridge Co.*, 48 C. C. A. 351.]

**2. SAME—DIVERSITY OF CITIZENSHIP—REMOVAL PETITION—DESIGNATION OF COMPLAINANT.**

Where a suit in equity was removed to the federal court on the ground of diversity of citizenship, an allegation that plaintiff was and is "a citizen of the state of Michigan," plaintiff elsewhere being styled a "partnership association organized and existing under the laws of the state of Michigan," in the absence of some further averment concerning the citizenship of the members of the association, was insufficient to establish that plaintiff was a citizen of the state of Michigan for the purposes of federal jurisdiction, unless plaintiff was a corporation of that state.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

**3. SAME—PARTNERSHIPS—STATE LAWS—CORPORATIONS.**

Const. Mich. art. 15, § 11, provides that "the term 'corporations' as used in the preceding sections of the article, shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships." 2 Comp. Laws Mich. pp. 1883, 1888, as amended by Pub. Acts 1903, pp. 398-404, provide for the organization of "limited partnerships," and also for partnership associations in which the capital subscribed is alone responsible for the debt of the association, but they are not declared by the statute to be corporations, though some of the powers of a corporation are conferred on them. *Held*, that such an association was not a corporation so as to become a citizen of the state in which it had its domicile for the purposes of federal jurisdiction, independent of the individuals composing it.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 860, 861.]

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Albert Crane, for appellant.

A. C. Denison, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill in equity filed in a circuit court of the state of Michigan for the county of Kent. The complainant is described therein as "a limited partnership association organized and existing under the laws of the state of Michigan, and having its principal office and place of business at Grand Rapids, in said county of Kent and state of Michigan." The only defendant is Frank Macey, who is described in the bill "as a resident of the city of Grand Rapids aforesaid." This defendant seasonably filed his petition for the removal of the suit into the Circuit Court of the United States for the Western District of Michigan. The ground for removal, if any exists, is diversity of citizenship. The petition upon this subject alleges that he (the petitioner), "at the time of the commencement of the suit was, and still is, an alien, and a subject of the King of Great Britain and Ireland." The averments concerning the citizenship of the plaintiff were as follows:

"(3) That the controversy in this suit is between a citizen of the state of Michigan and a citizen of a foreign state.

"(4) That the complainant, at the time of the commencement of this suit was, and still is, a partnership association organized and existing under and by virtue of the laws of the state of Michigan, with the location of its business at the city of Grand Rapids, in the state of Michigan.

"(5) That the Fred Macey Company, Limited, within the meaning of section 11 of article 15 of the Constitution of the state of Michigan, and the organic act of the association, at the time of the commencement of this suit had, and now has, the powers and privileges of a corporation, not possessed by individuals or partnerships, and within the meaning of such constitutional provision and such organic act at the commencement of this suit was, and now is, a corporation."

Upon the filing of this petition, and the removal bond required by law, an order was entered in the state court allowing a removal, and the transcript of the record was duly filed in the court below. Thereupon the defendant filed a demurrer upon the ground that there was a plain and adequate remedy at law. This ground of demurrer was sustained and the bill dismissed. From this decree the plaintiff has appealed.

But preliminary to any consideration of the questions arising upon the decree of the court below there arises upon the face of the record the question of the jurisdiction of the court from which the appeal has been taken. This is a question which this court, as well as every court of the United States, must ask and answer for itself. The fact that no objection was made in the court below and that no objection has been made here cannot relieve the court from the duty of saying whether the record exhibits a case properly removable from the state court into the court below. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 453, 20 Sup. Ct. 690, 44 L. Ed. 842, and cases therein cited. The right of removal depends solely upon the existence of diverse citizenship. The defendant's petition for removal very plainly and explicitly avers his own alienage, and, if the plaintiff below is a corporation of the state of Michigan, within the rule that a suit by or against a corporation in a

court of the United States is conclusively presumed, for jurisdictional purposes, to be one by or against citizens of the state creating the corporation, then the requisite diversity of citizenship exists and the case was properly removed. The averment of the sixth paragraph that the complainant was and is "a citizen of the state of Michigan" is insufficient unless it is a corporation of the state of Michigan. Such an allegation in respect of a plaintiff elsewhere styled a "partnership association organized and existing under the laws of the state of Michigan," unless such organization be a corporation within the jurisdictional rule, has "no sensible meaning attached to it," in the absence of some further averment concerning the citizenship of the members of the association. *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. Ed. 451; *Chapman v. Barney*, 129 U. S. 677, 682, 9 Sup. Ct. 426, 32 L. Ed. 800; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 454, 20 Sup. Ct. 690, 44 L. Ed. 842; *Thomas v. Board of Trustees*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. —.

But it is urged that the fifth paragraph of the petition for removal, set out above, avers the complainant "was and now is a corporation," and that this is an averment of fact which must be accepted. But this language is explained, and, taken in connection with its context, is nothing more or less than a conclusion of law made by the pleader. Reading all of the relevant parts of the petition together, we find it clearly enough stated that the complainant is "a partnership association" organized and existing under and by virtue of the laws of the state of Michigan. The averment then comes only to this: that under the laws of Michigan the complainant association is a corporation. But it is the duty of this court to take judicial notice of the statute law of Michigan under which such associations are organized, and determine whether the circuit court was entitled to take jurisdiction of this case upon the ground that the association, under those laws, was a corporation within the meaning of the rule for jurisdiction as defined in *Great Southern Fire Proof Hotel Co. v. Jones*, cited above. In the case just cited the court, after referring to the rule that, for the purpose and within the meaning of the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different states, a corporation was to be deemed a citizen of the state creating it, said:

"No such rule, however, has been applied to partnership associations, although such associations may have some of the characteristics of a corporation. When the question relates to the jurisdiction of a Circuit Court of the United States as resting on the diverse citizenship of the parties, we must look, in the case of a suit by or against a partnership association, to the citizenship of the several persons composing such association."

Unless, therefore, such associations, under the law of Michigan, are substantially different from similar organizations under the law of Pennsylvania, they are not corporations within the rule for jurisdiction, and this case must be governed by the case of the *Great Southern Fire Proof Hotel Co. v. Jones*, cited above, wherein the opinion of this court in respect of such associations in *Andrews*

*Bros. & Co. v. Youngstown Coke Co.*, 58 U. S. App. 444, and 86 Fed. 585, 30 C. C. A. 293, is overruled. The law of Michigan provides for "limited partnerships," and also for "partnership associations" in which "the capital subscribed is alone responsible for the debts of the association." 2 Comp. Laws Mich. pp. 1883, 1888. But an examination of the act last referred to and its amendments, Pub. Acts 1903, pp. 398-404, No. 244, exhibits a striking likeness between associations created under the Michigan law to those organized under the Pennsylvania law. *Andrews Bros. & Co. v. Youngstown Coke Co.*, 58 U. S. App. 444, 86 Fed. 585, 30 C. C. A. 293. That they are not declared by the statute to be corporations is a striking and significant fact. Neither can it be denied that some of the powers of a corporation are conferred. The Constitution of Michigan, by section 11 of article 15, provides that "the term corporations as used in the preceding sections of this article, shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships." The Constitution of Pennsylvania contained a like provision, but the Supreme Court of the United States regarded the fact as not affecting the question further than to place such associations under the restrictions imposed by that article upon corporations. *Great Sou. Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 456, 20 Sup. Ct. 690, 44 L. Ed. 842. The judicial decisions of Michigan have been examined which bear upon this question. *Rouse-Hazard Co. v. Cycle Co.*, 111 Mich. 251, 69 N. W. 511, 38 L. R. A. 794; *Staver & Abbott Mfg. Co. v. Blake*, 111 Mich. 283, 69 N. W. 508, 38 L. R. A. 798. Neither case presented any question calling for a settlement of the question of the corporate character of such associations. In the case first cited the case involved the question as to whether a member might, with the consent of other members, pay up his subscription by giving his promissory notes, and whether his stock was thereby paid up when the notes had been sold for money and the proceeds applied to association purposes. In that case the court said:

"That as to the question whether the law of limited partnerships applies to the defendant, or the law of corporations, the answer is that the case must be controlled by the law applicable to corporations."

In the other case cited above the court applied the rule of estoppel to those who had dealt with the association as an association applicable to persons dealing with corporations as such; the court saying:

"We see no reason why the doctrine of estoppel should not be applied in the one case as well as to the other. There is no difference in principle between the two. Each is a legal entity, whose sole warrant for existence is found in, and whose powers and liabilities were fixed by, statute. The doctrine of estoppel in this case need not, however, be based upon the determination of the question as to whether the Grand Rapids Storage Co., Ltd., was a corporation."

Thus there has never been any decision of the state of Michigan which determines that these associations are corporations. Indeed, the Michigan cases do not even characterize them as "quasi corpo-

rations," as did the Pennsylvania courts. We see no ground upon which we can reasonably distinguish this association from those under view in the case of *The Great Southern Fire Proof Hotel Co. v. Jones*, so often cited above. There being no allegation as to the citizenship of the members of this association either in the original bill or in the petition for removal, there is no presumption as to their citizenship arising from the fact of organization under the law of Michigan.

After the question of the jurisdiction of the circuit court had been made by the court, counsel filed a stipulation by which it was agreed that the original bill should be so amended as to aver that each and every member of the complainant association at the time of the filing of the bill was, and now is, a citizen of a state of the United States. When the matter is one amendable in the court below, and the parties agree to the amendment being made in this court, it is within the power of the court to allow such amendment without sending the case back to have the amendment made. In *Fletcher v. Peck*, 6 Cranch, 87, 127, 3 L. Ed. 162, and *Kennedy v. Georgia State Bank*, 8 How. 586, 611, 12 L. Ed. 1209, amendments by consent were allowed, the matter being amendable in the court below. In *Udell v. Steamship Ohio*, 17 How. 18, 15 L. Ed. 42, the amendment of a libel was refused. *Gates v. Goodloe*, 101 U. S. 612, 25 L. Ed. 895, and *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, presented questions concerning the substitution of one plaintiff in error for another. In *United States v. Hopewell*, 51 Fed. 798, 2 C. C. A. 510, there was presented the question as to the circumstance under which an appellate court may allow an amendment. The opinion was by Justice Gray, for the First Circuit Court of Appeals. That great judge said:

"When any question is made as to the allowance of such an amendment, the usual and proper practice is to remand the case to the Circuit Court to deal with that question. But when, as in this case, the parties agree to the amendment, and to facts which justify and require it, the amendment may be made in the appellate court."

But the proposed amendment in the case before us is not one which could be made in the Circuit Court, and cannot, therefore, be made here, although the parties consent. If neither the petition for removal nor any part of the record, on its face, showed a removal case, the case was not in law removed. The state court did not lose jurisdiction nor did the United States court acquire it. If the court below acquired no jurisdiction because of this vital defect, it has no authority to allow an amendment, but should remand the case to the state court from which it was unlawfully removed. *Crehore v. O. & M. Ry. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249; *Powers v. C. & O. Ry. Co.*, 169 U. S. 92, 101, 18 Sup. Ct. 264, 42 L. Ed. 673. We have been referred to *Kansas City Ry. Co. v. Pranty* (C. C. A.) 133 Fed. 13, where an amendment was allowed by the Circuit Court of Appeals for the Fifth Circuit in a case which had been removed upon an insufficient averment of citizenship. We think that court did not notice the distinction between a case originating in the Cir-

cuit Court and one removed from a state court, or an amendment in a removed case where the essential facts to justify a removal were stated in the petition to remove, the amendment pertaining only to details. *Carson v. Dunham*, 121 U. S. 421, 427, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Martin v. B. & O. Ry. Co.*, 151 U. S. 673, 690, 14 Sup. Ct. 533, 38 L. Ed. 311.

The result is that we must refuse the application to amend. The judgment of dismissal upon the questions made by the demurrer must be reversed, and the court below directed to enter an order remanding the case to the state court.

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FREDERICKS v. JAMES REES & SONS CO.

THE NORTHERN.

(Circuit Court of Appeals, Third Circuit. January 16, 1905.)

No. 46.

1. MARITIME LIENS—LIENS GIVEN BY STATE STATUTE—JURISDICTION IN ADMIRALTY TO ENFORCE.

A lien to be enforced by proceeding in rem, given by a statute of a state for repairs or supplies furnished to a vessel in her home port, is in the nature of a maritime lien, and may be enforced in admiralty in the District Courts of the United States, and the jurisdiction of such courts is exclusive.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 191-205; vol. 34, Cent. Dig. Maritime Liens, § 21.

Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.]

2. SAME—PENNSYLVANIA STATUTE—DREDGE BOAT.

Pennsylvania Act 1858 (P. L. 363), which gives a lien for repairs or supplies furnished on "all ships, steamboats or vessels navigating the rivers Allegheny, Monongahela or Ohio in this state," embraces only such vessels as are engaged in the business of trade or commerce on such rivers, and does not apply to a dredge boat without motive power, and used only for supporting and moving from place to place dredging apparatus.

Appeal from the District Court of the United States for the Western District of Pennsylvania, in Admiralty.

L. C. Barton, for appellant.

Albert York Smith, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the District Court of the United States for the Western District of Pennsylvania, sitting in admiralty. In June, 1903, a libel was filed by the appellees in said court, against the dredge boat or vessel called the *Northern*, in a cause of contract alleged to be civil and maritime. The libel set forth that sometime in the month of June, 1901, and at divers other times set forth in the bill of particulars, the libelants furnished stores, supplies, materials and fuel, and work and labor, for the repairing, equipping and navigating said vessel; that said stores and work and labor were furnished and performed upon the order of the ship's hus-

band, and upon the credit of said vessel and owners at the port of Pittsburgh. To enforce the lien alleged to rest upon the said boat by reason of the premises, the libelant prayed for process in due form, according to the course of admiralty and maritime jurisdiction administered by said court. The said dredge boat was, in due course, arrested and afterwards released upon the usual stipulation of the claimant and his surety. After hearing, on libel, answer and proofs, judgment was entered by the court in favor of the libelant and against the said claimant and his surety. The libel states that the value of the repairs and supplies furnished by libelant was and is by the maritime law and by the laws of the state of Pennsylvania, a lien upon said vessel, etc. It is properly assumed, however, by the libelant in argument, and by the court below, that no lien exists in this case by the general maritime law, and that the jurisdiction of the District Court, in admiralty, must depend upon a maritime lien created by the law of the state of Pennsylvania.

In the administration of admiralty and maritime law by the United States courts, it has long been well settled that, for repairs or supplies in the home port of the vessel, no lien exists or can be enforced in admiralty under the general law. It is equally well settled that, where the statute of a state gives a lien to be enforced by a process in rem, for repairs or supplies to a vessel in her home port, this lien being similar to a lien arising against a vessel in a foreign port, under the general maritime law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the District Courts of the United States, and that the jurisdiction of such courts, sitting in admiralty, is exclusive. Anomalous as it may seem, the states may create liens which they cannot enforce, but which may be recognized by the courts of the United States sitting in admiralty. *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609; *The Planter*, 7 Pet. 324, 8 L. Ed. 700; *The St. Lawrence*, 1 Black, 522, 17 L. Ed. 180; *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654.

It is claimed by the libelant in this case, that the lien for the supplies furnished the dredge boat Northern, as claimed in the libel, existed by virtue of a statute of the state of Pennsylvania, passed in 1858 (P. L. 363). It was therein enacted:

"That all ships, steamboats or vessels navigating the rivers Allegheny, Monongahela or Ohio, in this state, shall be liable and subject to a lien in the following cases: \* \* \* II. For all debts contracted by the owner or owners, agent, consignee, master, clerk or clerks, of such ships, steam or other boats or vessels, \* \* \* for and on account of work and labor done and materials furnished \* \* \* in the building, repairing, fitting, furnishing or equipping such ships, steam or other boats or vessels."

Assuming that the dredge boat Northern was a ship, boat, or vessel, within the meaning of the general admiralty and maritime law, she was in her home port, and no lien for the value of said supplies existed under the general maritime law. The statute of the state of Pennsylvania, just referred to, did, however, unquestionably create a lien against certain ships, boats, or vessels, for the value of supplies furnished in their home ports, which, being a maritime lien, is enforceable

exclusively in the admiralty courts of the United States. It is obvious, however, that the maritime lien thus enforceable must be strictly the one created by the state statute, and subject to just such limitations as are imposed thereby. The statute is special and local, and the ships, steamboats, or vessels subjected to a lien are only those "navigating" the said rivers. It would seem clear that the dredge boat here libeled did not navigate the rivers named, or any others. It was a structure floating upon the water, supporting and entirely occupied by apparatus and machinery for digging out the bottom of a river, dock, or harbor. It was not in any respect constructed for holding or carrying freight or passengers. It is true, it floated upon the water, but was only intended to be moved the short distances necessary in the work of dredging, or when towed from one scene of operation to another. It certainly was not engaged in navigating the rivers mentioned. No ordinary or proper meaning, that could be attached to the word "navigating," is applicable to any movement required of such a structure. Nor is this dredge boat entirely apart from the question, whether it is the subject of a maritime lien, fairly within the category made by the act, of a ship, steamboat or vessel, much less of one "navigating"; i. e. engaged in the business of navigating the named rivers. If it were necessary, the word "vessels," in the act, as being the one most widely descriptive, must be limited in its meaning by its collocation with the words "ships" and "steamboats," according to the well-settled rule of *eiusdem generis*. The ships, steamboats, or vessels referred to, are clearly those intended for the purpose of or actually engaged in the business of navigating the named rivers; that is, in the business of moving on the waters thereof from place to place, whether for the purpose of carrying persons or commodities, or both. This obvious meaning of the words used in the act, excludes a dredge boat, neither intended nor used for the business of moving persons or commodities from place to place on the waters of said rivers. Whatever extension of meaning may be given the words "ship, steamboat or vessel," used alone, the word "navigating" imports a clearly defined limitation which cannot be disregarded, and dredge boats, floating pile drivers, and floating elevators are excluded from the purview of the act, though scows and barges, intended to be towed from place to place for the carriage of passengers or commodities, would be included.

In the case of *The City of Pittsburgh* (D. C.) 45 Fed. 699, it was well decided by Judge Reed, of this same District Court, in construing this statute of Pennsylvania, that an old steamboat, from which the boilers, wheels, engines and machinery had been removed, and which was then used as a pleasure barge, having no independent means of propulsion, but intended to be towed by a towboat, in the transportation of excursion parties on these rivers, was a vessel navigating the same, within the language of the act, and as such subject to a lien for materials furnished and work done in fitting and repairing her. In deciding that this barge was included among the vessels upon which a lien is given by the act, for work and materials used in repair, the learned judge refers to two Pennsylvania cases, viz., *The Fashion*, 3 Grant, Cas. 40, and *Parkinson v. Manny*, 2 Grant, Cas. 521. In the former, it was held that a canal boat was a "vessel," within the meaning of the



act, and in the latter, that a coal boat was not such a "ship or vessel" as to be within the meaning of the act of 1836 (P. L. 617),—an act similar in its purpose to the act of 1858, which provided that:

"Ships and vessels of all kinds, built, repaired, or fitted within the commonwealth, shall be subject to a lien for all debts contracted by the masters or owners thereof, for work done or materials found or provided in the building, repairing, fitting, furnishing or equipping of the same."

The court in this case said:

"That vessels of a permanent and substantial character, such as make repeated voyages, either at sea or upon our rivers and canals, are contemplated by the act, and not such as are merely temporary."

The remaining question, whether the barge was such a "vessel," under the maritime law, as a court of admiralty will take jurisdiction of, for the enforcement and collection of the lien created by the state statute, was, of course, decided in the affirmative; but in the case at bar, as well as in that case, the determination of this question is unavailing, unless the words of the statute apply to the particular vessel before the court. Therefore, even if we could agree with the reasoning of the learned judge in the case of *The Pioneer* (D. C.) 30 Fed. 206, that a dredge boat was a "vessel," within the meaning of the general maritime law, and as such subject to a maritime lien for supplies, it would not follow that such a boat was within the class referred to by the Pennsylvania act here in question. So, in the case of *The Alabama* (C. C.) 22 Fed. 450, referred to by the learned judge of the court below in his opinion in the case of the steam dredge boat *Eastern*, No. 2, the question was not as to what kind of boats or floating structures were included in the description of a state statute creating a lien upon them, but whether, under the general maritime law, a dredge boat and scows, taken together as one craft, constituted a "vessel," to which a maritime lien would attach.

We do not, however, consider the question, whether such boats as the *Northern* in this case, are to be held "vessels," and subjects of maritime lien under the general admiralty law as settled, notwithstanding the decisions in the case of *The Pioneer*, supra, and of *The Hezekiah Baldwin*, 8 Ben. 556, Fed. Cas. No. 6,449, where a floating elevator was held to be a vessel and a subject of maritime lien. In the case of *Cope v. Dry-Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501, where the question was whether a floating dry dock could be subjected to a proceeding in rem for a salvage service, Mr. Justice Bradley, delivering the opinion of the court, says:

"It is true that the terms 'ships' and 'vessels' are used in a very broad sense, to include all navigable structures intended for transportation."

Then citing a case decided by the Court of Appeal in England, which held that the word "ship" would include a hopper barge used for receiving mud from a dredging machine, and carrying it out to deep water, he adds:

"Perhaps this case goes as far as any case has gone in extending the meaning of the term 'ship' or 'vessel.' Still, the hopper barge was a navigable structure, used for the purpose of transportation."

The District Court for the Eastern District of Michigan, in the case of *The General Cass*, reported by District Judge Brown (now Mr. Justice Brown of the Supreme Court), *Brown's Admiralty*, 334, held that the admiralty jurisdiction extended to lighters employed in carrying lumber out to vessels lying in deep water. In an interesting discussion of the question of jurisdiction depending upon the character of the vessel, the court says:

"The true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged. \* \* \* If the business or employment of vessels appertain to travel, or trade and commerce, on public navigable water, it is sufficient, and the jurisdiction attaches."

However this may be, as a question of admiralty jurisdiction, we are clear that the Pennsylvania statute referred to applies only to vessels engaged in the business or employment of trade or commerce on the rivers named therein. The view here taken of the question of jurisdiction under the Pennsylvania statute, renders it unnecessary to consider the other defense, as to whether the suit was commenced within the time prescribed by law.

Therefore, for the reasons stated, the decree of the court below is reversed.

## 2,000 TONS OF COAL *ex* THE MICHIGAN.

JONES v. W. K. NIVER COAL CO.

(Circuit Court of Appeals, First Circuit. January 20, 1905.)

No. 558.

### 1. ADMIRALTY—DELAY—DEMURRAGE.

The charterer having arranged for a discharge at a particular wharf, the vessel's agent, on arrival, thought the berth unsuitable, and arranged for discharge at another dock, which was occupied, so that the vessel was delayed two days. *Held* that, in the absence of other evidence, the charterer was not liable for such delay which was caused by the shipowner and his agents.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 570, 576, 587.]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

### 2. SAME—DELAY IN UNLOADING.

Where the stevedoring in discharging a vessel was done by an employé of the ship's agent, the charterer was not responsible for his delays.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 570, 576, 587.]

### 3. SAME—EVIDENCE.

On a libel for demurrage, evidence *held* insufficient to establish that failure to furnish sufficient lighters to discharge cargo on both sides of the vessel was due to the fault of the charterer.

### 4. SAME—CUSTOMHOUSE PERMIT.

Where the discharge of a vessel was stopped during five hours for want of a customhouse permit, which had been mislaid by a customs officer, and the permit was procured by the charterer very soon after

the discharge was stopped for want thereof, and it did not appear that the stevedore was ready to proceed when the permit arrived, the charterer was not liable for such delay.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 570, 576, 585, 587.]

Appeal from the District Court of the United States for the District of Massachusetts.

The following is the opinion of Lowell, District Judge, in the court below:

The charter party in this case provided:

"(8) The cargo to be taken from alongside by consignee at port of discharge, free of expense and risk to the steamer as fast as steamer can deliver, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate; if longer detained, consignees to pay steamer demurrage at the rate of fourpence per net register ton per running day (or pro rata for part thereof), time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count, unless the steamer is already on demurrage. Steamer to effect discharge of the cargo, and providing only steam, steam winches, winchmen, gins and falls."

The steamer arrived at Boston on November 7th, and reported November 8th. The charterer had arranged for discharge at the West India Fibre Company's wharf, but Mr. Hall, the vessel's agent, thought the berth unsuitable, and arranged for discharge at the Commonwealth Dock instead. The berth there was occupied, and so the Lake Michigan was not berthed until November 10th. She began to discharge November 11th. In the absence of further evidence, I find that the delay prior to the beginning of the discharge was caused by the shipowner and his agents, rather than by the charterer.

The stevedoring was done by Donahue, who was employed and paid by Hall. The meaning of the charter party is not altogether clear, and libellant's counsel denied that Donahue was the libellant's agent, but he did not argue in support of his denial, and the agency appears to me established. For delays caused by Donahue, therefore, the charterer is not responsible. The libellant's principal complaint was a want of lighters, or, rather, delay in supplying them. Libellant's counsel urged that the steamer should have been breasted out from the wharf, so that lighters could have been placed inside as well as outside, and discharge could have been had from both sides at once. Donahue testified that the captain would not breast out the steamer when asked to do so, and the captain testified that he would have moved his ship, had he been asked. Failure to breast out, then, resulted from the inaction or refusal of Donahue or of the captain. Both were the libellant's agents, and the charterer is not responsible for their misconduct, if misconduct there was. The libel makes the full rate of discharge 1,200 tons a day, and this rate was surpassed on one day, and nearly equalled on two others, by a discharge of coal from one side only. Donahue testified: "There were two lighters all the time—all I could work." "I think we done better than any of them [other steamers] at the time." "I had barges there all the time." "We had two barges there all the time, which was all we could work." "The only barges I had there fitted the hatches all right—all I could work. There was no trouble with fitting the hatches." "If I could have worked on the inside as well as on the outside, it would have been all right." "I complained to him [the captain] because I couldn't work my men as I ought to. I told him we ought to breast off. He seemed to be in a hurry, and gave me no show to get my barges placed properly."

It is true that these statements of Donahue were contradicted by other witnesses, and some of them are not quite accurate. At times there was only one lighter alongside. Whether the delay in bringing up fresh lighters was unduly great and, if so, who was to blame for the delay, is not plain. We have two agents of the libellant, each charging the fault upon the other,

and each asserting that, if the other had done his duty, the cargo would have been discharged at a proper rate. Under these circumstances, I do not find sufficient evidence to hold the charterer at fault. The barge Tobyhanna, which was ready in the stream, was not put in because Donahue said he could not use her. Captain Morgan testified that only two lighters could have been used without breasting out, and two lighters were alongside nearly, though not quite, all the time.

On November 15th discharge was stopped during five hours for want of a customhouse permit. It seems that this permit was mislaid by a customs officer. In general, it is the duty of the consignee to procure a permit for the discharge, and it does not follow that he is excused in all cases because one customs officer omits to deliver the permit to another. In this case the delay appears to have been caused by some officer's carelessness, and the permit was procured by the charterer very soon after the discharge had been stopped for want of it. On the whole, without further evidence, I do not think the charterer's liability for the delay has been made out. It does not appear that the steredore was ready to proceed when the permit arrived, and the testimony of Mr. Purdon suggests that he was not.

Libel dismissed with costs.

Stephen R. Jones (Carver & Blodgett, on the brief), for appellant.

Benjamin L. M. Tower (Tower, Talbot & Hiler, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. This is an appeal from the District Court for the District of Massachusetts dismissing a libel claiming demurrage. The only issues involved are pure questions of fact. As to these issues the proofs are of such an indefinite character that we are unable to reach a conclusion which we could pronounce more satisfactory than that reached by the District Court. Therefore we must abide by its determination.

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

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In re ANDRE.

(Circuit Court of Appeals, Second Circuit. January 18, 1905.)

No. 93.

1. BANKRUPTCY—COURTS—PROPERTY OF BANKRUPT—ADVERSE CLAIMS.

Bankr. Act July 1, 1898, c. 541, § 2, cl. 3, 30 Stat. 545 [U. S. Comp. St. 1901, p. 8421], authorizes courts of bankruptcy to appoint receivers on application of parties in interest, where absolutely necessary for the preservation of bankrupts' estates; section 23, as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 413], confers jurisdiction on such courts, without the consent of the defendant, in suits to recover property, where the bankrupt has within a specified time made a preferential or fraudulent transfer of any of his property; and section 69 (30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) provides that a judge on proof that an alleged involuntary bankrupt has neglected or is about to so neglect his property that it has thereby deteriorated or is deteriorating, etc., shall issue a warrant to the marshal to seize and hold the same subject to further orders. *Held*, that such sections authorize courts in bankruptcy to interfere with property alleged to belong to an involuntary bankrupt only in cases where the property of the

bankrupt is in possession of a party not an adverse claimant, and do not authorize an order requiring a sheriff claiming property of an alleged bankrupt adversely under an attachment issued out of the state court to surrender the same.

**2. SAME.**

The court of bankruptcy, under such sections, had jurisdiction to entertain the proceedings to ascertain whether the claimant was in fact an adverse claimant, or whether he held the property as bailee of the bankrupt.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

James W. Gerard, for petitioner.

William Lesser, for respondent.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a petition to review an order of the District Court in bankruptcy requiring the sheriff of the county of New York to surrender property in his custody seized and held by him under a warrant of attachment issued by one of the state courts in an action brought by a creditor against the alleged bankrupt. The attachment was levied May 6, 1904. May 9, 1904, creditors of the alleged bankrupt filed a petition to have him adjudicated a bankrupt. Shortly thereafter the court, upon the application of the petitioning creditors, required the sheriff to show cause why he should not turn over the property seized by him to a receiver who had in the meantime been appointed in the bankruptcy proceedings. The sheriff appeared, insisted that the application should be made to the state court, and alleged that he had a lien upon the property for poundage. Thereupon the court made the order now under review.

The question whether the sheriff was entitled to the poundage claimed is subordinate to the more important one whether the court should have made the order by which before there had been any adjudication in bankruptcy the sheriff was required to assume the responsibility of releasing his levy upon the property. The attachment was process which the sheriff was bound to enforce for the benefit of the plaintiff in the action, and, though it would be dissolved in the event of an adjudication of bankruptcy, it was his right and his duty to retain the property until the attachment should be dissolved, and even then until by competent authority he should be required to surrender it. Representing the party who had obtained the attachment, and as an officer whose duty it was to hold and dispose of the property in obedience to the process, he was in possession under a title paramount and adverse to that of the alleged bankrupt; and he asserted his adverse title, upon the application to require him to surrender the property, by insisting that the application should be made to the court that had issued the process, and by setting up his own lien for poundage.

The authority for the jurisdiction which was exercised by the court below is found in those provisions of the bankrupt act which empower courts of bankruptcy, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of the property of the bank-

rupt, to authorize a receiver or a marshal to take charge of it until a trustee is appointed. Section 2, cl. 3, § 69, of Act July 1, 1898, c. 541, 30 Stat. 545, 565 [U. S. Comp. St. 1901, pp. 3421, 3450]. These provisions do not in terms authorize the bankruptcy courts to take possession of property not belonging to the bankrupt, or property to which an adverse title is asserted by third persons. Prior to the decision in *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, it was supposed by some of the federal courts that, pursuant to the provisions of section 23 of the act (30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), the bankruptcy courts had jurisdiction of all suits brought by trustees respecting property claimed to belong to the bankrupt's estate which was being administered by the trustee, and which the bankrupt had transferred in contravention of the act; and many of the courts which had adopted this construction of the section sanctioned the exercise by the bankruptcy courts of the power under sections 2 and 69 to take such property into its custody for the preservation of the estate pending the appointment of the trustee, notwithstanding it was in the possession of some third person claiming an adverse title to it. The *Bardes* Case decided that it was the intention of Congress manifested by section 23, "that controversies not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy, which assert a title to money or property as assets of the bankrupt, against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant.'" If Congress did not intend these controversies to be adjudicated by the bankruptcy courts, it cannot be reasonably supposed that Congress intended to permit the bankruptcy courts to adjudicate controversies respecting the title to the bankrupt's property with adverse claimants before the appointment of a trustee, against the consent of the adverse claimant; and it would follow that the reasonable construction of the power conferred by section 2 and section 69 should be that it extends only to taking custody of property belonging to the bankrupt, or which is in his possession, or that of a third person as his bailee or agent, and not to property in the possession of an adverse claimant. This power must, of course, confer jurisdiction upon the bankruptcy court to ascertain whether the property is in the possession of the bankrupt, or his bailee or agent, or whether it is in the possession of an adverse claimant, and consequently to institute and entertain an appropriate proceeding for that purpose; and this proceeding must necessarily be a summary one, because, as no trustee has been appointed, there is no person to represent the estate as a party to a formal suit. Section 23 of the bankrupt act, as amended February 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 413], confers jurisdiction upon the District Courts, without the consent of the defendant, in suits for the recovery of property, where the bankrupt has within a specified time made a preferential or fraudulent transfer of any of his property. Subdivision "b" of section 60, and subdivision "e" of section 67, of Act July 1, 1898, c. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]. This amendment, however, cannot affect the original meaning of sections 2 and 69, 30 Stat. 545, 565 [U. S. Comp. St. 1901, pp. 3421, 3450], and the

construction of these sections must remain as it was before. We conclude that it is only in cases in which the property of the bankrupt is in the possession of a party not an adverse claimant that the courts of bankruptcy have authority, under those sections, to interfere with it, unless the adverse claimant chooses to consent, but that these courts have jurisdiction to entertain proceedings to ascertain whether there is an adverse claimant, and that the mere refusal of a person in possession to surrender the property does not constitute him an adverse claimant. These conclusions are justified by the following authorities: *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183.

The sheriff having asserted an adverse claim, the application should have been denied, and without passing upon the merits of his claim for poundage.

It is accordingly so ordered, with costs of this review.

LACOMBE, Circuit Judge. I concur in the opinion reversing the order of the District Judge. The trustee relies mainly on a prior decision of this court in *Re Kenney*, 105 Fed. 897, 45 C. C. A. 113, which was affirmed by the Supreme Court under the title *Clarke v. Larremore*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555. The argument in the *Kenney* Case before this court was without briefs, and the precise point raised here is not discussed in the opinion. It was taken by certiorari to the Supreme Court, but in none of the four briefs there filed (two by each side) is there any discussion as to the jurisdiction of a bankruptcy court to make a summary order directing the transfer of property in the possession of a person holding an adverse claim.

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STRAND et ux. v. GRIFFITH et al.

(Circuit Court of Appeals, Ninth Circuit. February 20, 1905.)

No. 1,078.

**CIRCUIT COURT OF APPEALS—JURISDICTION AND POWERS—REMAND OF CAUSE WITHOUT HEARING.**

A Circuit Court of Appeals is without power to dismiss an appeal on motion of the appellant and remand the case to the court below with directions to permit the amendment of a pleading on a showing that facts were inadvertently omitted therefrom, which was not known to appellant until after the appeal was taken.

[Ed. Note.—Jurisdiction of Circuit Court of Appeals, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Em. Co. v. Gallegos*, 32 C. C. A. 475.]

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Greene & Griffiths, for appellants.

Kerr & McCord, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

**MORROW, Circuit Judge.** This is a suit in equity, brought in the Circuit Court for the District of Washington, to obtain the annulment of a decree of the superior court of Washington, duly affirmed by the Supreme Court of that state, to vacate and set aside a foreclosure sale of certain real estate, and for a decree vesting the title to said real estate in the complainants. A demurrer to the bill was sustained for want of equity, and the case then brought to this court upon appeal. The appellants now move this court for leave to amend the amended bill of complaint in said cause, and for that purpose ask that their appeal be dismissed, and the cause be remanded to the lower court, with directions to said court to allow the requested amendments to be made, and such further proceedings as may be had in said cause. The motion is made upon the ground of excusable inadvertence and mistake on the part of appellants and their principal attorney in omitting certain items of amendment, and is based upon the affidavits of said attorney and the appellant Hans B. Strand, alleging that it was not discovered until June 20, 1904, that the facts embraced in the proposed amendment had been omitted from the amended complaint.

The amended bill charged the defendants with conspiring to cheat and defraud the complainants in inducing them to purchase of defendants a stock of merchandise represented to be suitable for a dry goods store, but which was in fact worthless, and in obtaining from complainants promissory notes in part payment of said merchandise, secured by mortgage on valuable real estate, which mortgage was afterwards foreclosed by the defendants, and the said real estate sold to satisfy the same, a deficiency judgment being entered against complainants for the amount unsatisfied. The details of the fraud charged are stated with particularity in the amended bill: The desire of the complainants to engage in the retail dry goods business; the visit of the complainant Hans B. Strand to the city of Minneapolis in that connection; the false representations there made to him by the defendants Buck, Campbell, and Skinner with regard to a stock of dry goods then stored in the warehouse of the defendant Griffith in said city, through which said complainant was induced to enter into an agreement to buy said goods without having inspected them; the various artifices resorted to by the defendants to prevent the complainant from thoroughly inspecting the goods, and the tricks by which the confidence of the complainant was gained; the execution by him of promissory notes to the defendant Skinner in reliance upon said fraudulent representations, and a deed of conveyance of real estate by the two complainants to the defendant Skinner; the representations by the defendant Griffith that he had a lien upon the goods amounting to \$3,500, which must be satisfied before they could leave his warehouse; the later representation by Griffith that he had become the sole owner and holder of the promissory notes given by the complainant to Skinner; the execution by the complainants of a chattel mortgage upon the goods to the defendant Griffith and a mortgage upon certain real estate, also, before the goods were shipped to the complainants in Washington; the finding of the stock of goods to be worthless, and practically a total loss; the demand by the complainants of the defendants to make good the damages sustained by reason thereof; their refusal to do so; the inability of complainants



to pay the notes or satisfy the mortgages by reason of not realizing upon the goods; the consequent foreclosure of said mortgages, sale of the property thereunder, and entering of a deficiency judgment against complainants for amount unsatisfied; the transfer by said Griffith of his pretended interest and rights in said property to other parties, made defendants to this action. The defendants Griffith, Buck, Campbell, and Skinner are jointly charged with a conspiracy to cheat and defraud the complainants. The amendments now sought to be made to the bill are allegations to the effect that it was not known to the complainants until November, 1898, and after the foreclosure proceedings were finally determined by a judgment of the Supreme Court of the state of Washington, that the defendant Griffith had any fraudulent relation to the complainants, and allegations showing that the foreclosure proceedings mentioned were finally terminated by decision and judgment of the Supreme Court of the state of Washington on the 5th day of October, 1898.

The amended complaint was filed in the court below on September 9, 1903. A demurrer to this amended complaint was filed on September 12, 1903, and on November 6, 1903, the court sustained the demurrer, and on December 9, 1903, the bill was dismissed. The notice of appeal and allowance of appeal to this court is dated April 1, 1904. It appears, therefore, that the facts embraced in the proposed amendment were known to the appellant in November, 1898, but were omitted from the amended complaint in September, 1903, and this omission was not discovered until June 20, 1904. We are of the opinion that we have no authority to grant this motion. In *Roemer v. Simon*, 91 U. S. 149, 23 L. Ed. 267, the appellant presented to the Supreme Court a petition and affidavit, stating, in substance, that new and material evidence previously unknown to him had been discovered since the appeal. Upon this petition the appellant moved for leave to give notice for a rule requiring the appellee to show cause why the court should not remit the record to the court below for a rehearing of the cause. In denying the motion the court said:

"It is clear that after an appeal in equity to this court we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from; and that upon the hearing of the cause. No new evidence can be received here. Rev. St. § 698 [U. S. Comp. St. 1901, p. 568]. The court below cannot grant a rehearing after the term at which the final decree was rendered. Eq. Rule 88. It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed."

This statement of the limitation on appellate jurisdiction is applicable to Circuit Courts of Appeals and to a motion to dismiss the case on the appellant's motion with directions to the lower court to allow an amendment to the bill of complaint.

Motion denied.

In re HAFF.

(Circuit Court of Appeals, Second Circuit. January 4, 1905.)

No. 80.

1. **BANKRUPTCY—RECEIVERS—APPOINTMENT BEFORE ADJUDICATION—BONDS.**

Bankr. Act July 1, 1898, c. 541, § 3, subd. e, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], provides that whenever a petition is filed to have another adjudged a bankrupt, and an application is made to take charge of and hold his property prior to the adjudication, the petitioner shall file a bond for the payment, in case the petition is dismissed, to the respondent of all costs, expenses, and damages occasioned by the seizure; and section 69 (30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) declares that a judge, on satisfactory proof that the bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, etc., may issue a warrant for the seizure of his property by the marshal, but that before such warrant is issued the petitioner shall give bond, conditioned to indemnify the bankrupt for such damages as he shall sustain in the event the seizure shall prove to have been wrongfully obtained. *Held*, that where an order appointing a receiver for an alleged bankrupt before adjudication required the petitioner to give a bond, but failed to fix the time when the bond should be filed, and did not require such filing before the receiver was directed to take possession of the property, it was erroneous.

2. **SAME—VACATION.**

Where an alleged bankrupt applied to vacate an order appointing a receiver of his property before adjudication, on the ground that the petitioner had not filed the bond required by Bankr. Act July 1, 1898, c. 541, §§ 3 (e), 69, 30 Stat. 547, 565 [U. S. Comp. St. 1901, pp. 3423, 3450], the fact that at the time the motion to vacate was filed another creditor had filed a petition for an adjudication against the bankrupt, and had applied for a receiver and filed a bond conditioned that if his petition were dismissed he would pay expenses and damages occasioned by the seizure and detention of the bankrupt's property thereunder, did not authorize the denial of the motion to vacate such order.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

Martin Conboy, for petitioner.

Leo Levy, for respondent.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a petition by the alleged bankrupt in review of an order of the District Court in bankruptcy refusing to vacate the appointment of a receiver of his property. February 2, 1904, one Linane, a creditor of Haff, filed a petition that Haff be adjudged a bankrupt, and at the same time made an ex parte application to the court for the appointment of a receiver of his property; and thereupon the court appointed one McKen such receiver, and ordered Haff and all other persons having property of his under their control forthwith to turn it over to the receiver upon the filing by the receiver of a bond approved by the court for the faithful discharge of his duties. The order contained this further provision: "It is further ordered that the petitioning creditor herein file a bond in the sum of one thousand dollars under

section 3e of the bankruptcy act" (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]). The receiver thus appointed, without waiting for the filing of the bond by the petitioning creditor, took possession of the property of Haff. April 30th, no bond in the meantime having been filed by Linane, Haff moved the court to vacate the appointment of McKeen as receiver. It is the order denying this motion which Haff seeks to review.

Section 3, subd. e, Bankr. Act, provides as follows:

"Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond \* \* \* in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt."

Section 69, Bankr. Act (30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), is as follows:

"A judge may, upon satisfactory proof, by affidavit, that bankrupt against whom an involuntary petition has been filed and is pending, \* \* \* issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained."

It is the obvious purpose of these two sections to require indemnity to be given to an alleged bankrupt before his property shall be seized or taken from his possession in behalf of the petitioning creditor or creditors before there has been an adjudication of bankruptcy. Without such indemnity a person not a bankrupt, or who has committed no act of bankruptcy, would not be adequately protected. Upon a dismissal of the petition for his adjudication he could in an extreme case probably maintain an action for malicious prosecution, and recover in such action incidentally such damages as he may have sustained by the loss of the use of his property pending its restitution to him by the receiver or marshal. It would also be open to him to apply to the court and obtain an order directing a restitution of the property to him. It is the purpose of the two provisions to spare him the expense and trouble of seeking either of these remedies, by requiring the party or parties who seek to dispossess him of his property in advance of an adjudication to furnish him with a security adequate for his complete protection. The two sections are cognate, and evidence clearly the meaning of Congress to protect the alleged bankrupt from expense or injury in consequence of the seizure of his property when it may subsequently appear that the proceedings against him were unwarranted, and in this behalf require that security be given by the adverse party at the time when an order is made appointing a receiver or a warrant is issued to the marshal. The spirit of the requirement, and probably its substance, would be satisfied if the order appoint-

ing a receiver should in terms provide that he should not take custody of the property until the filing and approval of the bond.

The order under review fixed no time within which the bond should be filed, and did not require it to be filed before the receiver should take possession of the property. Because of its failure to make provision in either of these particulars we think it was erroneous.

The denial of the motion to vacate this receivership seems to have been influenced by the circumstance that at the time the motion was made another creditor had filed a petition to have Haff adjudicated a bankrupt, and then applied to have a receiver of his property appointed, and had filed a bond upon that application which had been approved by the court. The condition of that bond was that in the event of the petition of that creditor being dismissed he would pay to Haff or his legal representatives all costs, expenses, and damages occasioned by the seizure, taking, and detention of the property. That bond could not afford any security to Haff for the previous seizure and detention of his property by the receiver McKeen.

We conclude that the order appointing McKeen as receiver should have been vacated by the court below upon the application of Haff.

The order refusing this relief is reversed, with costs of this review to be paid by the petitioning creditor.

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#### THE MARCUS HOOK.

(Circuit Court of Appeals, Second Circuit. December 7, 1904.)

#### **SALVAGE—AMOUNT OF AWARD—SERVICES RENDERED INSIDE DELAWARE BREAKWATER.**

A salvage award of \$600 to two tugs for timely and meritorious services rendered in towing to a place of safety a barge worth, with her cargo, above \$30,000, which had been anchored inside the Old Delaware Breakwater, but was dragging her anchor and drifting toward the cape in a hurricane, held too small, and increased to \$1,200, in view of the evidence, which showed that the service was attended with considerable danger to the rescuing tug, owing to the high seas, and that probably the barge would have gone ashore but for the assistance given by the tugs.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, §§ 80-83.

Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 128 Fed. 813.

Henry G. Ward, for appellant.

James Forrester, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The testimony herein supports the finding of the District Judge "that the barge would eventually have gone

ashore on the cape if nothing had interfered to prevent." The only question in the case is whether the District Judge was justified in his conclusions that "the service was of a low order, and it did not amount to much more than towage," and "the danger to the barge was not as great as the libellant seeks to make out," because the *Ivanhoe*, the tug which had towed the barge to the breakwater, and was lying at anchor from a quarter to a half mile away, while "slow in getting her anchor up, \* \* \* doubtless would have overtaken the barge before she actually touched the ground, which was half to three-fourths of a mile distant when the *Juno* [the rescuing tug] arrested the drift, and the barge was still at some distance from the shore when the *Ivanhoe* started to her aid."

The master of the rescuing tug testified that the master of the barge said to him: "If you hadn't caught us, we would have gone to the beach. I thank you very much, gentlemen, for the kind service you rendered." The master of libellant's tug *Somers N. Smith*, which also went to the assistance of the barge, testified as follows: "Q. Did you have any talk with the man in charge of the *Marcus Hook*? A. Yes, sir. Q. State what you said? A. I asked him if he wanted any assistance. He said yes; he would be on the point of that cape if he didn't take assistance." The mate of the *Juno* said: "I think the barge would have gone on the beach before the *Ivanhoe* could have got to it." No witnesses were called by claimant to contradict this testimony, and there is nothing to support the finding that the *Ivanhoe* would doubtless have overtaken the barge, except such inferences as may be drawn from the testimony of libellant's witnesses as to the conditions prevailing on the morning in question. The uncontradicted testimony as to these conditions was as follows: During the early morning of the day in question a hurricane of unusual force prevailed in the neighborhood of the breakwater. The superintendent of the Maritime Exchange, who has been stationed at the breakwater for some eight years, stated that it was the hardest and severest storm he had ever experienced. The wind was blowing at first northeast, with a velocity of about 84 miles, and later shifted to the westward, with a velocity of about 60 miles, an hour. At 8 o'clock in the morning the sea was running high, and several vessels in that locality were lost or suffered serious damage. At or about 4 o'clock in the morning of said day, said barge, by reason of the violence of the storm, began to drag her anchor, and at first drifted toward the shore, and later, when the wind shifted to the westward, at about half past 7, began to drift more rapidly toward the point of Cape Henlopen. In the opinion of the various disinterested witnesses employed at the Maritime Exchange Station and light-house on the breakwater, the barge would have gone on the beach inside the point of the cape unless timely assistance had been rendered. When in this condition she hoisted her ensign union down, and the steamtug *Juno*, which was drifting around with her anchor up, responded to the signal, got a hawser on to her, and tugged her, with her anchor down, into a place of safety. This service was difficult and dangerous, and was rendered at a risk of collision, by

reason of the severity of the storm and the height of the sea, which made it very difficult to keep the head of the tug into the wind. The *Ivanhoe* remained at anchor until after the *Juno* had undertaken to rescue the barge, and did not reach the barge until the *Juno* had been towing her for about half an hour, and had brought her from a position of positive danger to one of safety. The great preponderance of testimony was to the effect that the barge was not more than a quarter of a mile from a point where she would have grounded when the *Juno* took her in tow.

If the District Judge had seen and heard the witnesses, we might feel reluctant to disturb his finding and award, even though we might not have agreed with him therein. But as all the testimony was by deposition, and the foregoing statements are uncontradicted, we are forced to conclude from an examination of the whole record that the barge would probably have gone ashore except for the services of the *Juno*. As these services were attended with risk of damage to the *Juno*, for reasons stated above, and as the barge and cargo rescued were worth over \$30,000, and the rescuing tug was worth \$8,000, we think the award made by the District Court was insufficient, and should be doubled, in order to sufficiently reward the salvors for their meritorious services.

The decree of the District Court is modified, with costs, and the cause is remanded to said court with instructions to enter a decree in conformity with this opinion.

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THE HUGHES BROTHERS AND BANGS, NO. 49.

(Circuit Court of Appeals, Second Circuit. November 21, 1904.)

No. 43.

**SALVAGE—RESCUE OF PROPERTY—TOWAGE.**

For towing a scow picked up while merely drifting about the harbor in the morning in a moderate wind, when the tide was beginning to flood, and when a tug had been sent for it by its owners, compensation will be allowed on the basis of a very low order of salvage, and not on the basis of rescue of property at sea in imminent peril of loss or deterioration.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, §§ 80-83.

Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal by claimant from a decree awarding as salvage the sum of \$2,500 against its scow *Hughes Brothers and Bangs* for services rendered by libelants in towing said scow from a point about 150 feet northeast of the lighthouse on Dry Romer Shoal to Long Dock, Staten Island.

W. S. Montgomery, for appellant.

James Forrester, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

**PER CURIAM.** We are unable to concur in the opinion of the District Judge that the scow was in extreme danger at the time when the services in question were rendered. She had been drifting about in the Lower Bay on a winter morning, when there was only a moderate wind and the tide was the beginning of flood or slack water at the last of the ebb. The claimant knew that the scow had gone adrift, and a tug sent by it to pick her up met her in the Narrows in tow of libelants' tug. The evidence fails to show the draught of the scow, or that she would have been likely to suffer injury, if she had continued to drift about until her tug arrived. It is not satisfactorily shown that the scow would probably have been damaged if she had grounded on Dry Romer with the weather conditions prevailing on that morning. She was inside the harbor, and she was not derelict. Her night watchman testifies that in response to the offer of the tug to take him in tow he only asked to be towed inside the lighthouse.

This, then, was not a case of "rescue of property at sea in imminent peril of loss or deterioration." Cohen's Admiralty Law, 37. It was, however, an arduous service, because of the very exceptional amount of ice in the bay and the bitter cold weather. Two hawsers were broken on the tug, and the mate, Sullivan, had his hands frozen and one of them sprained, and was confined in consequence to the hospital for five days. We think the towage, if it can be considered a salvage service at all, was of a very low order, that the salvors are only entitled to a low grade of salvage allowance, and that \$150 an hour for the time occupied would give them ample compensation. It appears that the libelants' tug encountered the scow at between 4 and 5 o'clock in the morning, and reached Long Dock, Staten Island, with her at about 11:30 o'clock, for which \$1,000 may be allowed, \$100 of which should be paid to the injured mate.

The decree of the District Court is modified, with costs, and the cause is remanded to that court, with instructions to enter a decree in conformity with this opinion.

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THE GANOGA.

(Circuit Court of Appeals, Second Circuit. January 12, 1905.)

Nos. 108, 109.

**TOWAGE—LIABILITY OF TUG FOR LOSS OF TOW.**

A decree adjudging a tug liable for the loss of a tow affirmed, although the evidence was inconclusive, on the ground that the trial court heard and saw the witnesses, and that there was evidence to support its finding that the tug was imprudent in starting out in the condition of the weather, with a tow made up of such vessels as the one in question.

Appeal from the District Court of the United States for the Southern District of New York.

These are appeals from decrees of the District Court, Southern District of New York, holding the steam tug Ganoga in fault for the loss of the canal boat J. T. Hawkes, which she had in tow. The

Hawkes filled and sank while rounding the Battery, the tow being bound from Jersey City to places in the East river. The opinion of the District Court is reported in 130 Fed. 399.

Henry G. Ward, for appellant.  
Herbert Green, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. We find it very difficult to dispose of these appeals. Negligence is charged (1) In making up said tow improperly; (2) in starting out in the face of weather conditions apparently endangering the safety of the tow; (3) in keeping on when it was apparent that safety was endangered; (4) in not landing the canal boat as the master requested and prudence required. The District Judge found against the tug on every one of these charges. The evidence, however, is more than usually inconsequential and unpersuasive, and upon the question whether the libellant has sustained the burden of proof the case is so close that different tribunals might well reach different conclusions. As to one—perhaps two—of the charges the proof is so unsatisfactory that we should be inclined to reverse, but as to the others there is evidence to support the charges. The District Judge heard the witnesses, and observed how their testimony was given—an important advantage in this case, where seemingly some of them gave somewhat different accounts at different times. Upon the whole, we do not see how we can reverse on the main charge of fault. We are not satisfied that any of the other methods of making up the tow which have been suggested would have been any safer for the tow as a whole. They would have made it less risky for the Hawes, but more risky for some other boat. But if the boats were such an incongruous assortment that they couldn't be put together more satisfactorily than they were, it might fairly be held imprudent to take them out in weather which, though rough, would not be dangerous for a more homogeneous tow.

Upon the whole, in view of the fact that there is some evidence to support a finding of fault, and that the District Judge saw and heard all the witnesses, we have concluded to affirm, with interest and costs.

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ROBERTS v. BENNETT.

(Circuit Court of Appeals, Second Circuit. November 18, 1904.)

No. 95.

**BILLS OF EXCEPTIONS—SETTLEMENT—TIME—ILLNESS OF JUDGE.**

It is an "extraordinary circumstance," excusing failure to have a bill of exceptions allowed and signed during the term at which judgment was rendered, though no extension of time was granted, where the trial judge was unable, because of illness, to settle the bill.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, §§ 49, 72½.]



In Error to the Circuit Court of the United States for the Northern District of New York.

Motion to Dismiss or Affirm Writ of Error.

E. H. Risley, for the motion.

Louis Marshall, opposed.

Before WALLACE and TOWNSEND, Circuit Judges.

PER CURIAM. Although the bill of exceptions was not allowed and signed during the term in which the judgment was rendered, and no extension of time beyond the term had been given by the court or the consent of the parties, we think the delay was excused by the illness of the judge before whom the action was tried, and his consequent inability to settle the bill, and that the "extraordinary circumstances" withdraw the case from the operation of the general rule. *Koewing v. Wilder*, 126 Fed. 472, 61 C. C. A. 312.

The motion to set aside the bill of exceptions is denied.

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CLEMENT v. WILSON.

(Circuit Court of Appeals, Second Circuit. January 18, 1905.)

No. 84.

**ERROR—REVIEWABLE ORDERS—GRANTING NEW TRIAL.**

It is the settled law in the federal courts that an order setting aside a verdict and granting a new trial cannot be reviewed on a writ of error, (1) because the granting or refusal of a new trial rests in the sound discretion of the trial court; and (2) because such an order is not a final judgment or order, and cannot be reviewed.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 378, 477, 741; vol. 3, Cent. Dig. Appeal and Error, §§ 3800-3876.

Finality of judgments and decrees for purpose of review, see notes to *Brush Electric Co. v. Electric Imp. Co. of San Jose*, 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.]

In Error to the Circuit Court of the United States for the District of Vermont.

For opinion below, see 126 Fed. 808.

M. H. Cardozo, for plaintiff in error.

Max L. Powell, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below brought to review an order setting aside a verdict in favor of the defendant and directing a new trial. The verdict was set aside because the court was of the opinion that it had not been rendered by an impartial jury. There are two reasons why this writ of error cannot be entertained: (1) It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to

which the motion is addressed, and the result cannot be made the subject of a review upon a writ of error. *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898. (2) This court can only review final decisions, and the order of the court below in granting a new trial has no element of finality. No judgment is final which does not terminate the litigation between parties. Upon this ground a judgment of reversal, granting a new trial, cannot be reviewed. *Baker v. White*, 92 U. S. 176, 23 L. Ed. 480; *Tracy v. Holcombe*, 24 How. 426, 16 L. Ed. 742; *St. Clair County v. Lovingsston*, 18 Wall. 628, 21 L. Ed. 813.

The writ of error is dismissed.

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**STANDARD SANITARY MFG. CO. v. ARROTT (two cases).**

(Circuit Court of Appeals, Third Circuit. February 28, 1905.)

Nos. 60, 61.

**1. ESTOPPEL—NECESSITY OF PLEADING—WAIVER OF OBJECTION.**

Where, in a suit in equity, testimony of facts which it is claimed raise an estoppel against one party is introduced without objection, and contentious testimony disputing such facts is produced on the other side, the contention for an estoppel may be made at the hearing without having been pleaded.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 299-303.]

**2. SAME—MATTERS IN PAIS—PROOF.**

Where an equitable estoppel is relied upon, the facts upon which it is based must be proved with particularity and precision, and nothing can be supplied by inference or intendment.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 308.]

**3. SAME—ACTS CREATING.**

In the absence of expressly proved fraud, there can be no estoppel based on the acts or conduct of the party sought to be estopped, where they are as consistent with honest purpose and with absence of negligence as with their opposites.

**4. PATENTS—EQUITABLE TITLE—EVIDENCE TO SUPPORT.**

Evidence considered, and held insufficient to sustain a claim to the equitable ownership of a patent as against the patentee, either on the ground of contract or estoppel.

**5. SAME—LICENSE—IMPLIED CONTRACT.**

No implied contract of license to use a patented device, arising from the circumstances under which the patent was taken out and the relations of the parties, can be set up in the face of a proved express contract of license.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 131 Fed. 457.

Walter Lyon and John R. Bennett, for appellant.

M. A. Christy, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. These are appeals from the decrees of the Circuit Court for the Western District of Pennsylvania, in cross-suits in equity. The first was by a bill filed by the appellee, James W. Arrott, Jr., complainant below, against the appellant, Standard Sanitary Manufacturing Company, defendant below, for the infringement of letters patent No. 633,941, entitled "An improvement in dredgers for pulverulent material," an appliance for sifting powdered substances. To this suit, the company made answer, setting up two defenses, to wit: (1) Alleged prior knowledge and use of the invention by a person other than the patentee; (2) an alleged contract by Arrott to convey the patent to the company, and consequently an equitable title in the company thereto. Shortly after filing its answer in the original suit, the appellant company filed a cross-bill, setting up its alleged equitable title to the patent and praying a decree for the specific performance by Arrott of his contract to make conveyance thereof. The appellee, Arrott, in his answer to the cross-bill, denied the material allegations, and specifically the existence of any title in complainant, and the making of the contract alleged. The cases were heard together in the Circuit Court, upon the pleadings and proofs. The court below decided that the alleged prior knowledge and use had not been sufficiently proved, and upon the question of equitable title found against the company appellant and in favor of Arrott, the appellee. In consequence of these findings, a decree was entered in the cross-suit for specific performance, dismissing the bill therein, and in the original suit by the appellee, for infringement, a decree was entered granting the injunction prayed for, and referring the case to a master for an accounting. The invalidity of the patent, on the ground of the alleged anticipation, has not been urged before us, so that the only assignments of error with which we are concerned, are those which relate to the equitable title alleged by the appellant in its answer to the infringement suit, and in its bill of complaint praying for a specific performance of an alleged contract to convey the patent.

The appellant, the Standard Sanitary Manufacturing Company, was a corporation created for the purpose of taking over the plant, good will, fixtures and property (including the patents) of several companies, among them the Standard Manufacturing Company (sometimes called the old company), all engaged in the same or similar business. This it did December 31, 1899. The stock of the old or Standard Manufacturing Company, was nearly all owned by James W. Arrott, Sr., father of the appellee, and Francis J. Torrance. James W. Arrott, Jr., the appellee, owned 200 shares, or one-eightieth of the capital stock, and his brother, C. F. Arrott, was also a small stockholder.

We think the learned judge of the court below, in the following extract from his opinion, has fairly summarized the pleadings in both suits, so far as they relate to the alleged equitable title:

"2. In respect to the alleged equitable title of the Standard Sanitary Manufacturing Company to the said patent, the averments of that company contained in its answer to the original bill, and in its cross-bill against James W. Arrott, Jr., are in substance these, namely: That Arrott was a stockholder and director of the old Standard Manufacturing Company, and that while thus interested in that company and employed as its superintendent at its Allegheny City factory, and under his contract was to use his best

endeavors to advance the interests thereof and improve and perfect appliances to be used in its business, the improvement constituting the subject-matter of letters patent No. 633,941 was made and reduced to practice and afterwards used in the business of said company, and the expenses incurred in procuring the patent were paid by that company; that said patent was taken and held by James W. Arrott, Jr., in trust for said company, and was used by the said company until the beginning of the year 1900 with the consent of the said Arrott, it being the equitable owner of the improvement and patent; that on December 30, 1899, certain property of the Standard Manufacturing Company, including its plant in Allegheny City, and all its patents, whether held in its own name or in the names of others, were sold to the Standard Sanitary Manufacturing Company; that on the 26th of January, 1900, James W. Arrott, Jr., entered into a contract with the Standard Sanitary Manufacturing Company, by which he was employed as general superintendent of the factory in Allegheny City at an increase in salary, and by which he confirmed to the Standard Sanitary Manufacturing Company the right to patent No. 633,941, and he thereby agreed to assign to that company the said letters patent; that Arrott continued from the date of this contract, January 26, 1900, until about May 19, 1901, as general superintendent of the Allegheny City factory, from which position he resigned on the date last mentioned, and that the right of the Standard Sanitary Manufacturing Company to said letters patent and the use of the improvement was never denied by James W. Arrott, Jr., until after his resignation of said position.

"In his answer to the cross-bill of the Standard Sanitary Manufacturing Company, James W. Arrott, Jr., denies that under his contract with the old Standard Manufacturing Company, he was under any obligation to make inventions for that company, or to transfer to it or hold for its use and benefit any letters patent he might obtain, and denies that that company ever became or was the owner in law or equity of letters patent No. 633,941; he avers the fact to be that the use of said improvement was originally commenced by the Standard Manufacturing Company with his knowledge and consent in the expectation and contemplation of a satisfactory agreement between that company and himself with relation thereto, and that thereafter, to wit, on October 23, 1899, that company through its board of directors expressly recognized his title to said improvement and letters patent, and it was then and there agreed between himself and the company that the company should pay to him for the privilege of using the improvement at its factory a royalty or compensation which should be satisfactory to him, and that thereafter that company used the improvement under and subject to that agreement; he admits that on January 26, 1900, he entered into a contract with the Standard Sanitary Manufacturing Company under which he was employed as general superintendent at the Allegheny City factory, but not at an increased salary, but at the same salary he had formerly received from the Standard Manufacturing Company, and that he continued in the employ of the Standard Sanitary Manufacturing Company under that contract until about May 19, 1901, when he resigned his position and left the company's employ; he denies that by the contract of employment of January 26, 1900, he confirmed to the Standard Sanitary Manufacturing Company the right to the patent No. 633,941, and denies that he thereby agreed to assign said letters patent to said company; he avers that at the time he entered the employ of the Standard Sanitary Manufacturing Company, and thereafter until he left its employ, he was ready and willing to grant to that company a license under his said letters patent to use the improvement upon the payment to him of a satisfactory royalty or compensation therefor, and that he so advised the managing officers of that company; he denies that he ever at any time consented to the use by that company of the said improvement otherwise than under the understanding that he should be duly compensated therefor; he further denies the averment in the bill of complaint that he did not prior to his resignation on May 19, 1901, deny any alleged right of the Standard Sanitary Manufacturing Company to the said letters patent or to the use of the improvement, and avers the fact to be that during his term of employment he gave to that company notice, through one or more of its proper officers, of the said letters patent and his claims thereunder and de-

nied the right of the company to use the improvement without making due compensation to him; and he expressly denies that the Standard Sanitary Manufacturing Company, by the contract of employment of January 28, 1900, or otherwise, acquired any equitable title or interest in or to the said letters patent."

We agree with the statement of the learned judge, that the answer of James W. Arrott, Jr., is responsive to and traverses all the allegations of the cross-bill, upon which the right of the appellant, the Standard Sanitary Manufacturing Company, to equitable relief depends.

From the testimony on both sides, as fully set out in the record, it appears that at the date of the application for the patent, March 21, 1899, to which the appellant claims title, and for several years prior thereto, Arrott, Jr., the appellee, was and had been superintendent of the enameling department and a stockholder and director in the old or Standard Manufacturing Company, engaged in the manufacture of enameled goods, and continued to occupy that position until the latter part of the year 1899, when that company and others engaged in the same business were consolidated, the new company being known as the Standard Sanitary Manufacturing Company, the appellant in these suits. As already stated, he owned about one-eightieth of the stock of the said old company, his father and Dorrance owning (with the exception of a small holding by his brother) the balance thereof. For some time prior to March, 1899, the appellee, being superintendent of the enameling department, had been endeavoring to devise a new and improved apparatus for sifting the enameling powder upon bath tubs and other utensils and articles to be enameled, and finally invented the device of the patent in suit, for which, upon application made by him, he received letters patent, dated September 26, 1899. During the year 1899, and shortly prior to the issuance of the patent, this patented enameling device had been installed in the enameling department of the old company, of which the appellee was superintendent. In working out his invention, the appellee had the services of employes of the company in making models, etc., and it is admitted that the company defrayed the expenses attendant upon the application for and granting of the patent to the appellee. The patented device was used by the old company without special contract or license from the appellee, but without objection on his part, and without any understanding as to the terms upon which it should be so used, until October 23, 1899, when, at a meeting of the board of directors of the old company, at which the appellee was present, the following resolution, offered by Mr. Dorrance, was passed and recorded in the minute book:

"The matter of recognition of enameling appliances invented by J. W. Arrott, Jr., and appliance for molding bath tubs invented by J. C. Reed, was discussed, and it was agreed that such recognition be made on a royalty basis satisfactory to the said J. W. Arrott, Jr., and J. C. Reed."

There is no evidence that, after the date of this minute, any contract or understanding with reference to the said patent, other than that outlined in the minutes above quoted, was ever had between the appellee and the old company, or its officers, down to the consolidation into the new company, December 31, 1899. Shortly after or shortly prior

to the passage of this resolution, negotiations were commenced by Arrott, Sr., and Dorrance, with the representatives of certain other companies, for the consolidation of all the companies into the new company, called the Standard Sanitary Manufacturing Company, the appellant here.

During the period of these negotiations, certain representatives of the companies with which consolidation was proposed and afterwards effected, visited the plant of the old company for the purpose of inspection. The appellant much relies upon the testimony given by two or more of these representatives, to the effect that they were shown through the enameling department by the appellee, Arrott, Jr., who exhibited and explained the enameling process invented by him and descanted upon its advantages, but was silent, so they testify, as to any claim made by him as to ownership of the patent. Frequent meetings between representatives of the different companies were had down to the consummation of the consolidation scheme, December 31, 1899, when conveyance was made to the new company appellant of the stock of the old company, together with its plant, real estate, fixtures and all patents owned by it. No copy of the instrument of conveyance is exhibited in the record, but it seems agreed that there was no specific mention made of any patents, and certainly not of the patent here in question. In behalf of the appellant, it was testified by Dorrance, who with Arrott, Sr., were the principal owners in the old company, that he, Dorrance, had taken out patents at various times, some of which he assigned to the company and others held in his own name until the time of the combination, but he considered that they all passed to the new company, and that his understanding was that the patent of Arrott, Jr., passed in the same way, notwithstanding that he told the representatives of the other companies that the patent to Reed would not pass. There is no statement from Arrott, Sr., as he died before the taking of the testimony.

The claim is made by the appellant, the new company, that a definitive contract was made between it and James W. Arrott, Jr., by which the company acquired the equitable title to the patent in suit. Such a contract, of course, must have been made after December 31, 1899, the date of the consolidation, and was in fact alleged to have been made January 26, 1900. The learned judge of the court below has made a finding of fact as to this alleged contract, as follows:

"Immediately after the new company commenced business in January, 1900, Arrott was directed to send one of the patented dredgers to the Dawes-Myler plant at New Brighton, Pa., that being one of the constituent concerns constituting the new company. Thus it was that Arrott came to write the letter [of January 17th]. It contains the following clause: 'Yours of the 12th received, and am pleased to know that the dredger is satisfactory. I wish to state to you simply as a matter of record that the patent on the dredger belongs to me and that the Standard Manufacturing Company has given me credit for the invention and made satisfactory arrangements for its use here. I am not, of course, worrying about the action of the new company in regard to such matters, but do not wish the adoption of the dredger in your works to mean that I acknowledge the right of the Standard Sanitary Manufacturing Company to use the same without any consideration.' According to the testimony on behalf of the new company, the alleged contract between it and James W. Arrott, Jr., by which the company acquired the equitable title to

patent No. 633,941, was entered into at a meeting of the executive committee of the company held on January 28, 1900. The witnesses on the part of the company to show the alleged contract are Messrs. Myler, Cribben, Dawes and Ahrens. These gentlemen are all stockholders in the new company. It seems very clear from what these witnesses say, that the employment of Arrott and its terms were agreed on before any question was raised in respect to his patent. His salary was to be the same as that he had previously received from the old company, with an undefined further contingent based on the future result of the business. Mr. Dawes states: 'After the salary was fixed up, he asked the question, what was going to be done with reference to his patent dredger. Different members of the committee stated that as far as they were concerned he had no patent dredger; that the dredger was a part and parcel of the plant, and had been turned over with the plant by the stockholders of the Standard Manufacturing Company.' And Mr. Dawes proceeds to state that a heated conversation followed. It can hardly be said that any of the witnesses on behalf of the company testify directly to the specific terms of an agreement between the company and Arrott in respect to the patent, but their testimony indicated a belief on their part that Arrott had consented to the claim of the company that it had acquired the patent by purchase from the old company. Mr. Arrott himself testifies positively to the contrary and states that in the interview from first to last he denied the claim set up by the new company and refused to recognize it. It appears from the company's own testimony that a minute of the proceedings of that meeting was made at the time by Mr. Myler, the secretary of the company, and was entered upon the minute book (as of January 28th, 1900). That minute is an exhibit in this case offered by each party. So far as it is important to this controversy, I quote the minute at length, to wit: " \* \* \* Mr. Charles F. Arrott and James W. Arrott, Jr., then came before the committee, and after quite a discussion as to plans, management, etc., of the Standard Manufacturing Company, Mr. C. F. Arrott signified his entire satisfaction and the committee agreed to enter into a contract with him at an annual salary of \$3,600 as manager of the Allegheny Works and a further contingent based on the result of the business at the said Standard Mfg. Co.'s Works. It was then agreed to enter into a contract with Mr. James W. Arrott, Jr., as general superintendent of the Allegheny Works, known as the Standard Mfg. Co. Works, on a salary of \$3,600 per year, with the same understanding as to contingent as with Mr. C. F. Arrott. Further it was the general understanding of the members of the executive committee that the Standard Sanitary Mfg. Co. own and control, and that the same should be transferred to this company, the patents obtained by James W. Arrott, Jr., and those in process or already applied for with reference to the dredging of enamel. The company's control of these patents it is understood is in the United States only, and Mr. James W. Arrott, Jr., was advised to this effect. \* \* \* W. A. Myler, Secretary.' This minute in my judgment is decisive against the allegations of the company that Mr. Arrott entered into an agreement upon which the company relies. It contains in clear terms a memorandum of what was agreed on between Arrott and the company in respect to his employment. This is the only agreement with him recorded. If there had been any such agreement made in respect to his patent as the company alleges, undoubtedly it would have been stated in the minute, which Mr. Myler himself testifies contains a correct record of the facts as they occurred at the meeting. It will be perceived that the minute merely sets forth what was the 'general understanding of the members of the executive committee' in respect to the patent, and that Mr. Arrott was so 'advised.'"

A careful examination of the testimony contained in the record convinces us that the learned judge was correct in his finding of fact, and that no express contract between Arrott, Jr., and the new company, as set up in the answer to the infringement suit and in the bill for specific performance, was ever made. As equitable title, founded upon such alleged contract, is the chief defense in the in-

fringement suit, and the sole ground for the relief sought in the bill for specific performance, the approval of this finding by the court below would dispose of the appeals in both cases before us, were it not that it is urged in argument that the appellee was estopped by his acts and conduct during the period of the negotiations leading up to the consolidation of December 31, 1900, and thereafter denying title to the patent in suit in the appellant, or asserting the same in himself. Counsel for the appellee denies the right of appellant to rely upon or urge such an estoppel, for the reason that the same was not pleaded, either in the defense to the infringement bill or in the bill for specific performance. We hold, however, that where, in a suit in equity as in this case, testimony as to facts, upon which an estoppel is contended for, is introduced, not only without objection but contentious testimony disputing such facts is produced on the other side, the contention for an estoppel may be made at the hearing without having been pleaded.

We therefore have considered the question, whether the evidence in this case discloses facts upon which an estoppel may be predicated against the appellee. The contention is, that prior to the consolidation of the old company in the new, December 31, 1899, and during the negotiations for said consolidation, it was assumed between the representatives of other companies than the old Standard Company, that all patents, including appellee's patent for this enameling process, were to go with the plant and other property to the new company. There was testimony that representatives of the old company had dwelt on the importance of this patent as enhancing the value of what they had to contribute to the new company, and there is a general statement by two of the witnesses, that Arrott, Jr., was present at some of these interviews, where some of these things were discussed in his presence. We do not find, however, that any specific occasion is testified to with particularity and clearness, to establish the fact that Arrott, Jr., was present when such representations in regard to his patent going with the other property into the new company were made, or that he either assented thereto, or by his silence intentionally or negligently allowed the other parties to the negotiations to believe that such a conveyance was to be made. He himself testifies that he was present at only one interview, and that was the last before the consolidation, and that at it nothing was said in regard to the transfer of his patent to the new company. We agree with the learned judge of the court below in his finding in this matter. Where an estoppel is relied upon, the facts upon which it is based must be proved with particularity and precision, and nothing can be supplied by inference or intendment.

The same may be said of the testimony introduced by appellant, regarding the visit of the committee of three or four persons from the other companies to the enameling department, during their inspection of the works of the Standard Manufacturing Company, pending the negotiation for consolidation. The members of the committee visited the works, and together were shown through the enameling department by the appellee. The testimony of four of



them is in the record. They all say that the appellee explained the working of his department to them, and, among other things, the patent pneumatic dredger; that the appellee dwelt upon the advantages of this device, but said nothing about his claim to ownership, and all united in testifying that they thought, during their inspection, that the patented device belonged to the old company and would go with its plant to the new company. But none of these witnesses testify that any statement was made in the presence of the appellee, that their understanding was that the patented dredger would go with the plant to the new company, and that appellee expressly or by silence acquiesced therein, or was in any way responsible for this understanding, which, if it existed at all, probably arose from their negotiations with the managing officers of the old company. There is no testimony that anything was said in regard to the understanding had by these representatives of the other companies, which required an express assertion of title on his part.

We are of opinion that this testimony falls short of establishing the essential elements of an estoppel. All that occurred between the appellee and the members of the visiting committee during their tour of inspection, was consistent with the belief on appellee's part in his complete ownership of the patent, and with his understanding that the use by the old company of the device was pursuant to his permission under his agreement with the old company, as evidenced by the minute of October 23, 1899. In the absence of expressly proved fraud, there can be no estoppel based upon acts or conduct of the party sought to be estopped, where such conduct is as consistent with honest purpose or with an absence of negligence, as with their opposites.

We do not find, therefore, any misrepresentation that could be attributed to the appellee, either by express statement or by silence under circumstances when he should have spoken. Representations made by the managing directors and principal owners of the old company, even though they were more explicit than they are proved to have been, in his absence or without his certain specific knowledge, could not create an estoppel in favor of the new company as against him. If the appellee is estopped at all to assert his title to the patent issued to him, it must be by acts and conduct prior to the consolidation and conveyance to the new company, of December 31, 1899. Whether the officers of the new company thought, or had reason to think, from the representations of the principal owners and directors of the old company, that the patent in suit passed to the new company by the general conveyance of the old company's property to it, is not material or relevant. If deceived or disappointed by these representations, their remedy is against the old company.

What occurred between Arrott, Jr., and the new company after the consolidation, can have a bearing only upon the asserted special contract between them. This special contract, as we have seen, was the gravamen of the defense to the suit for infringement, and the basis for the title set up in the bill for specific performance, and we have indicated our agreement with the learned judge of the

court below, in his finding of fact that no such contract existed. We do not find, however, that there is any evidence of conduct on the part of Arrott, Jr., after the consolidation, as is contended by the appellant, that is inconsistent with the assertion of his title to the patent in suit. We have seen in his letter of the 17th of January, to Mr. Dawes, one of the directors of the new company, as also in his letter of the 26th of January to his father, communicated to Mr. Aherns, and from his own testimony, that he emphatically, by writing and speech, asserted his ownership of the patent, and denied the right of the old company to transfer the same to the new.

Appellants contend that, whatever may be the conclusion as to their right to a conveyance of the title to the patent, or of their equitable ownership therein, there was an implied irrevocable license in the old company to use the device of the said patent, resulting from the facts and circumstances attending the making and perfection of the invention, the issuance of the patent therefor, and the relations existing between the old company and the appellee as a stockholder and officer thereof. No issue of license, irrevocable or otherwise, was raised by the pleadings in either case. In both the infringement suit and the bill for specific performance, the case of appellant was put, as we have seen, distinctly upon one ground, and that was the alleged equitable ownership of the patent, and upon that issue complainant and defendant went to proofs and to hearing. But the question thus mooted could not under any circumstances be determined in favor of the appellant. The evidence is undisputed of the contract of October 23, 1899, by which it was agreed that the old company recognized the title of the appellee to his patent, and would pay a satisfactory royalty to him for a license to use the same. No implied contract of license, arising from the circumstances under which the patent was taken out and the relations of the parties, can be set up in the face of a proved special contract of license. The contract, evidenced by the minute of October 23d, fixed the relations of the parties, and absolutely removes all ground upon which the implication of a license could be raised. The reciprocal rights and obligations of the old company and of the appellee, with reference to the patent in suit, have been established by this voluntary contractual act. The license so granted is personal in its nature, and unassignable, no intent being shown in the contract that it should be otherwise. The appellants have apparently recognized this, as well as the unassignability of an implied contract, and instead of proceeding to make a satisfactory arrangement for themselves with the appellee for the use of his patent, have endeavored, both in the infringement suit and in the bill for specific performance, to set up an equitable title, which they no doubt honestly believed they had derived from the old company.

The decrees of the court below in both cases are affirmed.

THOMSON-HOUSTON ELECTRIC CO. v. BLACK RIVER TRACTION CO.

(Circuit Court of Appeals, Second Circuit. January 23, 1905.)

No. 23.

1. PATENTS—CONSTRUCTION OF CLAIMS OF REISSUE.

Where claims of a patent were construed to include by implication an element not expressly claimed therein, but which was described and shown in the specification and drawings, and, as so construed, held anticipated, and, to avoid the effect of such decisions, the patentee applied for and was granted a reissue on a new specification, which expressly disclaimed such element, it should not be read into the claims of the new patent, although they are in terms substantially like those of the old, but the courts should, if possible, adopt the construction placed on them by the patentee and the Patent Office giving effect to the disclaimer.

2. SAME—SUBCOMBINATION.

A patentee of a combination may also obtain a patent on a divisional application for a subcombination of some of the same elements if new and useful in itself, or in connection with previously known means or devices necessary to make the whole an operative machine or structure.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 27–29.]

3. SAME—REISSUE—VALIDITY.

Even though the changes in description in the specification of a reissued patent are not material, and the claims are identical with some of those of the original patent, such facts do not impeach their validity.

4. SAME—INFRINGEMENT—TRAVELING CONTACT FOR ELECTRIC RAILWAYS.

The Van Depoele reissued patent, No. 11,872 (original No. 495,443), for a traveling contact for electric railways, covers a novel and useful combination, and discloses invention. Also *held* infringed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

For opinion below, see 124 Fed. 495.

Frederick H. Betts, for appellant.

John R. Bennett, for appellee.

Before WALLACE, Circuit Judge, and WHEELER and HAZEL, District Judges.

WALLACE, Circuit Judge. This is an appeal from a decree dismissing the bill of complaint in an action for the infringement of reissued letters patent No. 11,872 to Thomson-Houston Electric Company, assignee of Charles J. Van Depoele, granted November 13, 1900. It was decided by the court below that the reissue was void, among other reasons, because the invention described and claimed therein had been described and claimed by Van Depoele in letters patent No. 424,695, granted to him April 1, 1890, and previously to the patent of which the patent in suit is the reissue. The original patent, No. 495,443, was granted April 11, 1893, upon an application by Van Depoele filed March 12, 1887, and is for "traveling contact for electric railways."

The questions which have been argued upon this appeal are whether the reissued patent is void because the invention claimed therein had been patented by Van Depoele previously to the issue of the original letters patent, whether there was any statutory ground for a reissue, and whether the reissue is not for the same invention as the original.

The invention of Van Depoele described in the original patent relates to improvements in the class of electric railways in which a suspended conductor is used to convey the working current, and a traveling contact is carried by the car for taking off the current and operating the motor for propelling the car, the return circuit being completed through the rails; and the invention consists generally in a combination with a supply conductor, suspended above the track and line of travel of the car, of devices carried by the car so as to form a unitary structure therewith, of which the principal are a contact device, and devices employed for maintaining it in traveling contact with the conductor. These consist of a contact device carried at the end of a contact arm, a contact arm hinged and connected with the car so as to bridge the space between the car and the conductor, and moving freely both vertically and laterally, and a tension device operating upon the hinged arm so as to maintain constant upward pressure and keep the contact device in proper engagement with the conductor. As described in the specification and shown in the drawings, the contact device is a grooved wheel, carried at the end of the contact arm which approaches the conductor, and arranged to rotate thereon. The arm is mounted upon a post upon the top of the car, and hinged and pivoted upon the post so as to be capable of swinging both vertically and horizontally through considerable arcs, and is of a length that will place the contact wheel about over the rear wheels of the car; and the tension device is attached to the short end of the arm, and regulates the movement of the arm by pulling and holding that end down and pressing the long end upward to bring the grooved wheel into engagement with the under side of the conductor. The tension device is thus described in the specification:

"To the lower end of the arm, F, is attached a spring, G, to the lower extremity of which is secured a cord which passes downward through suitable grooves or over suitable rollers, and is provided with a weight, H, which serves to hold the spring down and keep the contact wheel, E, always pressed up against the under side of the conductor, D, at the same time the spring will instantly yield to allow the wheel to pass under the switches or any obstruction. Being held in position by the weight, the motorman can at any time lower the contact wheel by raising the same, rendering the arrangement very convenient for many reasons."

The patent contained 16 claims, of which for present purposes it is necessary to refer only to the following:

"(4) The combination of a car, an overhead conductor above the car, a contact device making underneath contact with the conductor, and an arm upon the car movable upon both a vertical and a transverse axis and carrying the contact device."

In *Thomson-Houston Electric Company v. Union Railway Co.*, 86 Fed. 636, 30 C. C. A. 313, it was decided that claim 4 was void because the invention therein specified had previously been described and claimed in the patent granted Van Depoele (No. 424,695) on April 1, 1890. In *Thomson-Houston Electric Co. v. Jeffrey Manufacturing Co.*, 101 Fed. 121, 41 C. C. A. 247, the Circuit Court of Appeals for the Sixth Circuit reached the same conclusion.

The patent of April 1, 1890, was for "suspended switch and traveling contact for electric railways." The invention therein described consist-

ed of certain devices and their relative arrangements by means of which a contact device carried by a rod or pole extending from the car and pressed upwardly into contact with the conductor is switched from one line to another correspondingly with the vehicle. It contained 35 claims, a number of which were for a combination between the switches and the traveling contact devices, and a number were for a combination of the traveling contact devices irrespective of the switches. The description of the devices comprising the unitary structure of the traveling contact was practically identical with that in the patent granted April 11, 1893, and the drawings illustrating the same were identical.

Subsequent to the decisions referred to, and on September 28, 1900, the complainant applied for the reissued patent now in suit. The specification omits descriptive matter contained in the specification of the original, and contains new matter by way of disclaimer. Instead of the detailed description of the spring and weight which has been quoted, the new specification reads as follows:

"To the lower end of the arm, F, is attached a suitable tension device; but as the particular form and arrangement of this tension device are not essential to the present device, it need not be further described."

It contains also the following disclaimer:

"The combination with the contact carrying arm of a weighted spring, or of a weight and spring, as the special means for holding the contact arm pressed upward, and enabling the motorman to lower the contact wheel, are not claimed herein, because this special improvement has been claimed already in the patent No. 424,695, dated April 1, 1890, which was issued as a division of this application. Nor is there claimed herein the so arranging of the weight or spring (as by causing it to work through suitable grooves or rollers arranged in the car roof) as to tend to cause the arm to assume a normal central position, or one parallel with the longitudinal center of the car, as that has also been claimed already in the said divisional patent No. 424,695, being an arrangement which is of especial value only in connection with the switches to which said divisional patent more particularly relates. In the present application no special form or arrangement of tension device is essential to or a part of the invention claimed."

The claims are as follows:

- "(1) In an electric railway, the combination of a car, an overhead conductor above the car, an upwardly extending and laterally swinging arm mounted on the roof of the car, and carrying a contact device at its free end, and making underneath contact with the conductor, substantially as described.
- (2) In an electric railway, the combination of a car, an electric overhead conductor above the car and parallel with the line of travel, an upwardly extending trailing arm carrying a contact device at its free end, adapted to make underneath contact with the conductor, said arm being supported on the car on vertical and transverse axes, so as to permit said contact device to follow the position of the conductor, notwithstanding the great variations of height and of lateral displacement thereof, substantially as described."

The question whether the inventions of the two claims had been patented previously to the original patent depends upon the construction which is to be given to these claims. It was the purpose of the reissue so to modify some of the claims of the original patent that they should no longer specify the same invention claimed in the patent granted to Van Depoele April 1, 1890. Although in claim 4 of the original patent the tension devices were not in terms an element of the claim, it was

held by this court in *Thomson-Houston Electric Company v. Union Railway Co.*, 86 Fed. 636, 30 C. C. A. 313, that the device was an element of the claim by implication, and for that reason that it was for the same invention which was covered by some of the claims of the patent of April 1, 1890. It seems to us quite clear that the object of the reissue has been effectually accomplished. The combination of the claims is by their terms one of which the four elements are the overhead conductor, the car, the swinging arm, the contact device proper, and these four elements alone. The omission in the reissue of the detailed description of the tension device in the original patent, and the disclaimer inserted in the reissue by way of abundant caution, are to be given due effect in determining the meaning and correct construction of the claims; and the claims are to be read in the light of the extrinsic facts surrounding their allowance by the Patent Office. Having been applied for and allowed expressly to differentiate them from some of the claims of the patent of April 1, 1890, the proceeding in the Patent Office would be a nugatory one if they are to be read as meaning to specify the identical invention claimed in the original patent. When the meaning of a grant or other document is so clearly deducible from its language as not to be capable of different interpretations, the construction which the parties to it have themselves placed upon it is of no assistance in its construction by a court; but when there is room for different interpretation the construction which the parties have placed upon its meaning is of persuasive, and often of controlling, force. It is true that it is to be inferred that neither the Commissioner of Patents nor the patentee contemplated the insertion of claims in the original patent which would be worthless because the inventions had been previously patented; but when the original was granted the attention of the parties to the grant had not been called to the question of the possible identity of some of the claims, and, owing to the difference of phraseology, the possibility of identity would naturally escape their attention. When, however, the reissue was granted, this question was specifically presented to their attention, and the construction which they have placed upon the meaning of the new claims is so definite and unmistakable that it must prevail in determining what construction the court should place upon them if their meaning is open to doubt. In view of these considerations, we are not constrained to decide that the new claims are, in substance, identical with claim 4 and other similar claims of the original; and, notwithstanding this court in its previous decision was of the opinion that claims in the original patent which did not in terms include the tension device as an element did include it by implication, we are not constrained to place the same meaning upon claims in the reissue which may be phrased substantially like some of the claims in the original.

The learned judge who heard the cause in the court below placed his decision mainly upon the effect which he deemed should be given to the decision of this court in the *Union Railway Company Case*, and was of the opinion that, because in that case this court had considered the tension device to be an element of the fourth claim of the original patent, it should also be considered an element of the claims of the reissue.

If the combination now claimed was new and useful, Van Depoele was entitled to make a claim for it, as for a subcombination, notwithstanding additional means may have been necessary to place the specific parts in co-operative relations with the overhead conductor to effect a traveling contact. As the means for doing this are described in the patent, and as at the date of the patent tension devices of various kinds for maintaining the normal relations between the contact device and the overhead conductor were well known in the art, it was unnecessary to specify these means in the claims. Thus the exact combination of Van Depoele, except a spring or weight, and with a magnet substituted therefor, had been described before the original patent issued, but subsequent to the application therefor, in the Hunter patent, No. 444,556. In the patent to Parrish and Munn of April 22, 1884, a tension device for producing an effectual and yielding engagement between the overhead conductor and the contact device, consisting of a swinging arm mounted upon the top of a car, the co-ordinated devices being designed for the transmission of an electric current through the swinging arm, had been described. These tension devices were springs carried by braces extending from the post on which the swinging arm was mounted to the swinging arm. In the patent to Atwood of August 26, 1890, a contact support is described which consists of an arm that is in itself a spring.

Many subcombinations, although new, are not useful, except to perform their appropriate functions in the machine of which they are a part. The description in the patent of the whole machine, and of the means or mode by which the subcombination is brought into co-operative relation with the other parts, usually indicates how the subcombination may effect a useful result. When this is so, the combination need not be operative alone, because (to use the language of Mr. Walker) "utility is justly ascribed to things which have their use in co-operating with other things to perform a useful work." In *Taylor v. Sawyer Spindle Co.*, 75 Fed. 301, 309, 22 C. C. A. 203, in considering the objection that the claims by themselves were void because not composing an operative mechanism, the court said:

"The law upon this subject is too well settled to be open for discussion. A patentee is not required to claim the entire machine in each claim. Each of the claims at issue is for a complete combination of the spindle and its supporting tube and devices, and there was no necessity for expressing in terms the devices for revolving the spindle. Any appropriate means for operating it will be understood. The omission of the sleeve wheel does not affect the validity of either of the claims, which belong to that class where reference may be made to the specification to supply in a claim what is plain to any one skilled in the art."

The language of Mr. Justice Bradley in *Loom Co. v. Higgins*, 105 U. S. 585, 586, 26 L. Ed. 1177, is in point:

"If a mechanical engineer invents an improvement upon any of the appendages of a steam engine, such as the valve gear, the condenser, the steam chest, the walking beam, the parallel motion, or what not, he is not obliged, in order to make himself understood, to describe the engine, nor the particular appendage to which the improvement refers, nor its mode of connection with the principal machine. These are already familiar to others skilled in that kind of machinery. He may begin at the point where his invention begins, and describe what he has made that is new, and what it replaces of the

old. That which is common and well known is as if it were written out in the patent and delineated in the drawings."

In *Thomson-Houston Electric Co. v. Elmira Railway Co.*, 71 Fed. 396, 405, 18 C. C. A. 145, 154, this court used this language:

"There may be subcombinations in a machine which are new and useful, and operate conjointly to perform some subordinate function. Such a subcombination, if not patented by a claim, might be appropriated by another without infringing a patent for the machine. Being for a different invention, it is the proper subject of a distinct patent."

The court was considering a case in which distinct patents had by the action of the Patent Office been carved out of one application, and it is obvious that the court did not mean to say that the subordinate invention could always be the subject of a distinct patent. In another part of the opinion the court said:

"An inventor, by describing an invention in a patent granted to him, does not necessarily preclude himself from patenting it subsequently. His omission to claim what he described may operate as a disclaimer, or an abandonment of the matter not claimed, but it has no such effect when it appears that the matter thus described, but not claimed, was the subject of a pending application in the Patent Office by him for another patent."

The original patent in the present case was a division of the application for the patent to Van Depoele of April 1, 1890, required by the Patent Office; consequently the description of the unitary structure or mechanism of the original patent, together with claims for combinations embracing the whole structure or apparatus, or combinations of the elements of the reissue with additional elements, such as the tension device, did not work an abandonment or disclaimer of the combination specified in the reissue. *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76; *Barbed Wire Case*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154. Holding, as we do, that the tension device is not an element of the claims of the reissue, it is plain that the invention of those claims had not been patented previously to the original patent, because in none of the claims of the patent of April 1, 1890, was there one for a combination of the elements now claimed which did not also specify a tension device as an element.

The question of the novelty and utility of the inventions specified in the claims of the reissue was not greatly discussed in the argument at bar, but has been considered in the briefs of counsel. For the reasons we have stated, their utility cannot be impeached. They are useful because they are for subcombinations which are capable of doing useful work in the machine or structure of which they are a part. We have carefully examined the proofs in the record which bear upon the question of the novelty of the combination of the claims. We find nowhere in the prior art a combination between such an overhead conducting wire, underrunning grooved wheel contact device, and swinging arm mounted upon the car as are described in the patent. The swinging arm was old; the overhead wire in practically the same substantial arrangement with the tracks was old; a grooved contact wheel, but so mounted as to run



upon a track beneath the car, was old; and, as has been shown, tension devices to hold contact devices in engagement with conductors were old. But the history of the prior and subsequent art shows that Van Depoele devised a construction and arrangement of these parts such as others seeking to accomplish the same result had failed to conceive. As this court pointed out in *Thomson-Houston Electric Company v. Kelsey Electric Railway Specialty Company*, 75 Fed. 1006, 22 C. C. A. 1, Van Depoele's combination of devices proved to be one of great utility, and which superseded pre-existing attempts at trolley road equipment. Considered with respect to the devices of the combinations now claimed, the nearest approximation to the inventions is shown in the patent to Parrish and Munn, to which we have referred. That patent shows an overhead conducting wire located above each of the rails of the track, and an arm mounted upon the car so as to swing vertically and laterally. But it shows no grooved contact wheel, and, indeed, it has no distinct contact device, the arm being a straight rod, which of itself is the conducting arm. The patentees in a later patent describe a friction plate attached to the end of the arm as an improved means of contact between the arm and the overhead wire. In neither patent is there shown an underrunning contact device, the parts being arranged for an overrunning contact between the arm and the conducting wire. The mechanism of these patents was designed for use in a system of train signaling, and, while it contains what in general terms are the devices of the present combination, the devices are so essentially different in construction and arrangement as hardly to afford a suggestion of value for use in supplying the operating current in a trolley system. What Van Depoele did was something more than a mere mechanical adaptation of the several parts. He was the first to point out to the inventors in this branch of the electrical art how modifications of construction and arrangement could be introduced which would substitute success for failure.

The question next arises whether the inventions of the two claims are different from any which were described and intended to be claimed in the original. That the invention was described in the original cannot well be questioned. It was also claimed in the original in terms, but the court in the *Union Railway Co. Case* modified the claims as expressed by incorporating a tension device into them by implication. The court did not express any opinion that the claim was void upon its face, and the opinion apparently proceeded upon the reasoning that, as there would be no combination between the parts without a suitable tension device, and as it was the combination which was claimed, the tension device was to be deemed incorporated into the claims, notwithstanding it was not in terms included, applying the rule which is found, among other authorities, in *Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 678, 7 Sup. Ct. 421, 30 L. Ed. 539, and *Consolidated Roller Mill Co. v. Walker*, 138 U. S. 124, 133, 11 Sup. Ct. 292, 34 L. Ed. 920. We are not now called upon either to question or to reaffirm the correctness of that decision. It suffices for present purposes that the patentee not only

described the same invention as is described in the reissue (with an amplification now omitted as to the details of construction and arrangement of the tension device), but also endeavored to claim the combination now claimed. Unless a reissue is invalid because unimportant changes are made in the descriptive matter and the language of the claims so as to express beyond any chance of misapprehension what the patentee intended to claim in the original, there is nothing to militate against the present reissue. It is urged for the appellee that there was no statutory ground for a reissue, because the specification for the original was not in any sense defective. If it should be conceded that the changes in the description of the reissue are of no materiality, and that the claims are identically such as some of the claims of the original, the circumstance would not impeach their validity. In many cases where the new claims in a reissue have been held invalid, the claims repeated from the original have been sustained. It suffices to refer to *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601; *Mahn v. Harwood*, 112 U. S. 354, 6 Sup. Ct. 451, 28 L. Ed. 665. A patentee who reissues his patent for the purpose of correcting a clerical error or improving the phraseology of his description may do what is unnecessary, but the public are not injured. Although the commissioner exceeds his statutory authority by granting a reissue for an invention which was not described or intended to be claimed in the original patent, he does not do so by permitting a change in the phraseology for the purpose of defining more perfectly what was described and claimed in the original. When patents were issued by the Secretary of State it was held that the power to correct a mistake resided in that officer, irrespective of the statute. *Grant v. Raymond*, 6 Pet. 243, 8 L. Ed. 376. By the laws creating the office of Commissioner of Patents, and transferring to the Secretary of the Interior the power previously exercised by the Secretary of State, it has devolved upon the commissioner to superintend, execute, and perform all acts respecting the granting and issuing of patents, subject to revision by the Secretary of the Interior. Original power was conferred upon him to grant reissue by permissive language. By the act of July 8, 1870 (16 Stat. 205, c. 230), the permissive words were substituted by the mandatory words of the statute as it now exists. It is the effect of this legislation to delegate to the commissioner, subject to the interposition of the Secretary of the Interior, all those acts with respect to the issuing of patents which originally devolved upon the Secretary of State. If the claims in a reissue are valid which were contained in the original notwithstanding its new claims are invalid, it would seem to follow that, where there are no new claims in the reissue all the claims should be valid, although in attempting to correct a mistake the commissioner has done nothing more than to introduce unimportant changes into the description.

No question has been raised as to any laches upon the part of the complainant in obtaining the reissue, and infringement by the defendant is not contested. If the reissue is not invalid, and the in-

ventions of the claim were not covered by the claims of the patent of April 1, 1890, the complainant is entitled to a decree for an injunction and accounting.

The decree of the court below is reversed, with costs, and with instructions to decree conformably with this opinion.

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PRESS PUB. CO. v. WESTINGHOUSE MACHINE CO.

(Circuit Court of Appeals, Third Circuit. February 24, 1905.)

No. 49.

1. PATENTS—ANTICIPATION—REGULATOR FOR GAS ENGINES.

The Westinghouse and Ruud patent, No. 583,585, claims 12 and 18 for a device for controlling and regulating the operation of gas engines, which may be adjusted at will to admit different proportions of air and gas to the mixing chamber, and also by means of a governor automatically regulates the quantity of the mixture fed to the engine, are void for anticipation, especially by the Hirsch patent granted in 1894.

2. SAME.

Claims for a patent for a device for regulating both the quality of the mixture of air and gas in a gas engine, and the quantity of the mixture supplied to the engine, which would otherwise be void for anticipation, are not saved by including in the combination some one of the old forms of automatic governor to actuate the quantity regulating valve, which is too obvious a step in the art to involve invention, such valves having been long in use for the same purpose on steam engines.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 127 Fed. 822.

L. P. Whitaker, for appellant.

Thomas W. Bakewell and J. Snowden Bell, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court for the Western District of Pennsylvania, in a suit in equity brought by the Westinghouse Machine Company, the appellee, against the Press Publishing Company, the appellant, charging infringement of claims 2, 12 and 18 of patent No. 583,585, granted June 1, 1897, to George Westinghouse, Jr., and Edwin Ruud, and by them assigned to complainant, for "means for controlling and regulating the operation of gas-engines."

The defenses were noninfringement and invalidity of the patent. Both of these defenses were disallowed in the court below, and the patent sustained and declared valid as to claims 12 and 18, and the defendant decreed to have infringed the same. The second claim of the said letters patent was declared to be invalid. The patentees, in the specifications of the patent, thus describe the object of their invention:

"The object of our invention is to provide improved means for controlling and regulating the operation of gas-engines; and to this end it consists in a novel regulating apparatus for effecting a mixture of the air and other gases and varying the capacity of or entirely closing the supply passage or passages through which air and other gases are supplied to the cylinder or cylinders of

a gas-engine, whereby the mingling of the gases may be effected and the quantity and relative proportions of the air and other gases may be varied, and in certain combinations and features of construction, all as hereinafter fully set forth."

The proportions of air and other gases is regulated by a horizontal rotation by hand of the two sections of a valve, in one of which is the air port and in the other the gas port. The specifications thus speak of the regulation of the quantity of the mixture of air and gas admitted to the cylinder:

"Independent of the rotative adjustment of the valves the quantity of air and other gases will be controlled by the longitudinal movement of the valves, however such movement may be effected, without varying the proportions of the air and other gases. When longitudinal movement of the valves is controlled by means of an automatic governor, the supply of air and other gases will be regulated by and in accordance with the speed of the motor and according to the quantity required; but at any time and independent of the operations of the governor the proportions of the air and other gases may be varied by the movement of the sliding plates 36 and 46.

"So far as the rotary adjustment of the valves 8 and 11 is concerned—that is, the adjustment by which the proportions of the air and other gases are regulated—the valves 8 and 11 operate as two separate valves, but in their longitudinal adjustment they operate and move together in the same manner as a single piston-valve. The dividing of the two valves or their formation in two separately-adjustable parts is for the purpose of varying the relative proportions of the air and gases, but without such division they form a single throttling and mixing valve, whereby the quantity of air and other gases is controlled, and their mixture is effected before passing to the cylinder or combustion-chamber of the motor."

Claims 2, 12 and 18, the only ones with which we are here concerned, are as follows:

"(2) In a regulating device for controlling the supply of air and other gases to a gas-engine, the combination, with air and gas supply passages, of a valve device controlling the air and gas supply ports, or passages, which is adapted to be adjusted in one direction to vary the quantity of air and other gases and in another direction to vary the proportions of the air and other gases, substantially as set forth.

"(12) In a regulating device for controlling the supply of air and other gases to a gas-engine, the combination, with air and gas supply passages, of a valve device controlling the air and gas supply ports, or passages, which is adapted to be adjusted in one direction to vary the proportions of the air and other gases, and in another direction by means of a governor to vary the quantity only of the air and other gases, substantially as set forth.

"(18) In a regulating device for controlling the supply of air and other gases to a gas-engine, the combination, with air and gas supply passages, of a valve mechanism, controlling the air and gas supply ports, or passages, which is adapted to be adjusted to regulate the proportions of the air and other gases, and which is operative by a governor to vary the quantity of air and other gases admitted to the engine without variation of the proportions, substantially as set forth."

The learned judge of the court below, with his usual clearness, thus explains the operation of this class of governing devices:

"Proper relative proportions of gas and air are the essentials to obtaining quality and on quality depend proper explosive results and economy of operation. The other is the feeding of such a proper quantity of such quality and no more as shall meet power operative requirements. The conditions affecting these essentials of quality and quantity are variable and therefore necessitate

the use of adjustable controlling factors. Thus as affecting quality different gases vary in kind, as natural, artificial or producer gases; natural gases differ from each other and while received from a single source of supply will vary from time to time; temperature, pressure and other factors also affect quality. These factors all require a different proportionate adjustment of gas with air in order to obtain the quality of mixture essential to maximum efficiency. The demands for such proportionate changes are so instant that they should be made while the engine is running and the variation of power requirement is so rapid that an automatic means for increasing and decreasing the fuel supply is required. Such a unitary adjustable mechanism is shown in the patent in suit. Briefly stated the mechanism is such that it controls the respective quantity of gas and air admitted through separate ports by horizontally rotating independently of each other two sections of a valve, and thereby narrowing the width of such air and gas port openings. This rotating action affects the relative proportions of air and gas, since each valve section is independent of the other, and so permits individual sectional rotary movement. But these valve sections are adapted to a vertical conjoint, synchronous movement which vertically narrows both the air and gas openings at the same time and so increases or decreases the quantity fed to the engine without affecting the quality of the mixture. This vertical movement of the valve is effected by a governor of the ordinary type, so adjusted that as the speed of the engine increases the quantity fed is diminished, and vice versa. The device is well described by one of respondent's witnesses who says: "The controlling and regulating device of the patent in suit affords means whereby the separate and independent supply of the constituents of the mixture, that is, the air and gas, may be so controlled and regulated that any desired proportion of these constituents may be established to form a desired character of explosive mixture and thereafter the quantity of the constituents may be controlled or regulated according to the load upon the engine, without varying the established proportions of the constituents. The first of these controlling adjustments is regulated by hand, the second, by a governor performing in this connection the usual office of a governor."

That a unitary valve device for regulating the proportions of gas and air in the mixture to be admitted to the cylinder by one movement, and also for regulating the quantity of mixture of gas and air fed to the engine by another, without affecting the proportions of gas and air in the mixture, was in the art at the date of the patent in suit, seems to have been admitted by the court below in its decree, declaring invalid the second claim of the patent. In its opinion, the court said:

"We are, however, of opinion that the second claim is invalid. Read literally, it is conceded that in view of the disclosure of the Foulis patent, such must be the case."

No appeal has been taken by the complainant below from this part of the decree, and we must assume that the invalidity of this broad claim is acquiesced in, and that no patent monopoly for a combination with air and gas supply passages, of a valve device controlling the air and gas supply ports or passages, adapted to be adjusted in one direction to vary the quantity of air and other gases, and in another direction to vary the proportions of the air and other gases, can be claimed. Claims 12 and 18, which are substantially the same, are only less broad than claim 2, by reason of the requirement that the regulation or varying of the quantity of gas and air, as broadly claimed in claim 2, shall be by means of a "governor"; otherwise, the claims are identical with the admittedly invalid claim 2. Upon this feature, then, must depend the validity of claims 12 and 18 of the patent.

It cannot escape attention that the specifications of the patent,

above quoted, place no emphasis on the use of a governor for regulating the movement of the quantitative valve, but make the distinguishing features of the invention the control of the proportions of the mixture of air and gas by one movement, and of the quantity thereof by another, "however such movement may be effected, without varying the proportions of the air and other gases." The specifications refer to the use of a governor as one well-known means of regulating valve movement. That the second, out of the 18 claims of the patent, covers broadly these two horizontal and longitudinal movements for regulating proportion and quantity, without reference to any particular means of adjusting the longitudinal movement, confirms this view of the essential features of the combination, as to which invention was asserted. That the old device of an automatic governor, to regulate the opening in a steam valve, is also old in the art of gas engine valves, we think is shown with sufficient clearness by the evidence in this record.

Claim 2 was declared invalid by the court below, expressly upon the reference to the British patent to Foulis, one of the patents shown in the record here by appellant to support its claim of anticipation. "That patent," says the court, "shows a valve adapted (if combined with proper controlling mechanism) to provide the quality and regulate the quantity of air-gas mixture supplied to a gas engine. Thus one of complainant's experts says it shows 'a valve for controlling the air and gas supply, which is adapted to be adjusted in one direction to vary the proportions of the air and gas, and in another direction to vary the quantity only of the air and gas'; the other describes it as containing 'air and gas passages and a valve mechanism adapted to be adjusted in one direction to vary the proportions of air and gas and movable in another direction to vary the quantity of the air and gases passing through it.'" Notwithstanding this, says the court, "when it comes to the control of the vertical movement, which in the complainant's device is through a co-acting governor, \* \* \* we find such controlling appliance is not disclosed in the Foulis device or any such combination shown."

We may accept this as true, and still not concede that claims 12 and 18, by claiming the combination described in claim 2, only, when the mechanism for regulating the supply of air and gas is controlled by an automatic governor, are rendered valid. No special form of governor is defined, and the claim is therefore broad enough to cover any automatic governing device. The centrifugal or ball governor, illustrated in the drawings of the patent, is, as we have said, one of the oldest of these governors, as used to regulate the supply of steam to a stationary engine. The record also discloses the use of such a governor in gas engines precisely in the manner in which it is shown to be used in the patent in suit, notably in the "Fletcher," the "Drysdale," and "Hirsch" patents. These patents are not referred to by the court below in its opinion, but we think they have an immediate bearing upon the validity of the claims in question. The patent to Hirsch was issued in 1894. In it is shown a valve device in which the air and gas inlets are sep-

arately controlled and adjusted by a rotary hand movement, thus regulating the proportion of air and gas, and the quantity of mixture fed to the engine is controlled by a vertical adjustment, regulated by a centrifugal governor mounted upon the stem of the valve, as in the patent in suit. We think the "Hirsch" patent is a clear anticipation of the whole combination of the 12th and 18th claims of the patent in suit. In the drawings, specifications and claims of that patent, we have the elements of the combination as set forth in the 12th and 18th claims of the patent in suit; that is, we have the combination with air and gas supply passages (1) of a valve device controlling the air and gas supply ports, adapted to be adjusted in one direction to vary the proportions of the air and other gases; (2) and in another direction, by means of a governor, to vary the quantity only of the air and other gases.

It is contended by plaintiff, upon the evidence of its experts, that the "Hirsch" patent discloses a construction substantially different from that of the patent in suit, and that commercially it could not be operated so as to accomplish what was claimed for it. A careful examination, however, of the patent, and the accompanying drawings, and the testimony of the experts for the defendant, convinces us that the criticism made upon the comparison between the "Hirsch" patent and the patent in suit, is not justified, and that the tests, when properly applied and under proper conditions, vindicate the commercial practicability of the device.

In the "Drysdale" patent, issued June 27, 1893, we also have a valve mechanism, in which there is a horizontal rotary adjustment by hand, regulating the proportion of air in mixture with the gas, the gas supply remaining fixed; also a horizontal rotary adjustment by a governor regulating quantity. There is also shown an arrangement in which, in combination with a horizontal rotary hand adjustment varying the proportion of air, there is a vertical adjustment by a governor regulating quantity.

It is not necessary that we should discuss in detail the more or less of anticipation shown by the "Fletcher" patent and the "Robison" patent, or the weighted bellows device in the British "Foulis" patent, which, it is contended, is an automatic governing device, though not of the centrifugal pattern. Although we think it is sufficiently shown that there has been an anticipation of everything in the combination covered by the twelfth and eighteenth claims, including the automatic governor, we are of opinion that the claim was not rendered patentable by the specific reference to some form of governing device, as a means of actuating the valve regulating the quantity of mixed gas and air fed to the engine. Governing devices of the kind indicated are old and of different forms. The combination broadly claimed in claim 2, and identically in claims 12 and 18, excepting the governing attachment, might be predicated on any means of actuating the quantity regulating valve. It could be moved by hand as the valves regulating the proportion are moved. To attach some one of the old forms of automatic governor as the actuating means of the quantity regulating valve, was too obvious a step in the art to involve invention, and the adoption of

so old and well-known a form as the centrifugal governor, as shown in the drawings of the patent, cannot serve to narrow the claims in question within patentable compass. These claims, too, 12 and 18, are broader than the special constructions shown in the specifications and drawings. These details of construction are not mentioned in the claims, which seek a broader field for their monopoly.

For the reasons stated, we think the court below should have dismissed the complainant's bill, and its decree is therefore reversed, and the cause is remanded to the Circuit Court, with directions to enter a decree dismissing the bill.

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**DE LAVAL SEPARATOR CO. v. VERMONT FARM MACH. CO.**

(Circuit Court of Appeals, Second Circuit. November 25, 1904.)

**1. PATENTS—SEPARATE INVENTIONS OF JOINT PATENTS—CREAM SEPARATORS.**

The Melotte and Reuther patent, No. 521,722, for improvements in cream separators, is void, as covering separate inventions of the joint patentees.

**2. SAME—ESTOPPEL OF PATENTEE.**

There is no estoppel which prevents a patentee from testifying contrary to the oath made by him when applying for the patent in a suit between his assignee and a third party.

Appeal from the Circuit Court of the United States for the District of Vermont.

For opinion below, see 126 Fed. 536.

Geo. J. Harding, for appellant.

Geo. L. Roberts, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree dismissing the bill of complaint in an action to restrain infringement of the patent to Jules Melotte and Wilhelm Reuther for improvements in "centrifugal creamers" granted June 19, 1894, upon an application filed by them August 24, 1893. The principal defenses urged in the court below and in this court were (1) that Melotte and Reuther were not the joint inventors, and the subject-matters of the claims were invented by Melotte alone; and (2) that the inventions of the claims had been patented by Jules Melotte in patents granted to him in Belgium February 29, 1892, in Germany March 13, 1892, in France August 1, 1892, and in England August 12, 1892. The court below adjudged the patent invalid upon the ground that the defense that Melotte and Reuther were not the joint inventors was satisfactorily established. With this conclusion we are constrained to agree, though we do so with regret, because the defense is purely technical, and destroys a meritorious patent, purchased by the complainant in ignorance of its infirmity, and at a very considerable price. Upon strict considerations the second defense may be said to be more incontestably established than the first, because there is no evidence in the record tending to



show that the subject-matter of the foreign patents granted to Melotte alone was actually the invention of Melotte and Reuther; and in the absence of such evidence, as those patents are antecedent in date to the application for the present patent, and are not granted to the same persons, and clearly describe the inventions described and claimed in the present patent, the defense that they anticipate the present patent must necessarily prevail. Upon those patents being proved by the defendant, the burden of proof was cast upon the complainant to show that Melotte and Reuther were earlier inventors. But the first defense, to our minds, is indubitably proved, and any consideration of the second is consequently unnecessary.

Giving due weight to the presumptions of validity which arise from the grant of the patent, the convincing force of the proof that Melotte was the sole inventor cannot be disregarded, notwithstanding the proof consists of his own testimony and the corroboration which it derives from the fact that the foreign patents were obtained by him alone. Although he was produced as a witness by the defendant, it is apparent from his testimony that he was a reluctant witness, not trying to defeat the patent which he and Reuther had sold to the complainant, but stating facts which his conscience would not allow him to deny. He was an intelligent and candid witness, and, although he was careful not to volunteer any explanatory statements in elucidation of those elicited by his examination, his testimony was full and explicit. It proved beyond any fair doubt that the improvements claimed in the patent were his sole invention, and that Reuther was the inventor of certain other improvements described in the patent and illustrated by some of the drawings in modification of the improvements specifically claimed. It is true that the testimony of an inventor in derogation of the validity of his own patent is usually open to suspicion; and in a case like this, where he has made oath, for the purpose of obtaining a joint patent, that he and another inventor were the joint inventors of the subject-matter, the court should reject his subsequent testimony to the contrary, unless it carries a clear conviction that he did not intend to falsify originally, but made the oath under misapprehension or mistake. In this case the applicants were foreigners, supposedly unfamiliar with our law of patents; and they had agreed to be joint owners of the patent. Each had devised improvements which were within its general scope, and those which had been the work of Reuther were disclosed and illustrated in the specification and drawings, as well as were those which were the work of Melotte. Thus both had contributed to the invention in its entirety. Under these circumstances it is not strange that they did not discriminate between the things devised and the things which were not necessarily covered by the claims, and that they should have considered themselves joint inventors of the entirety, although some of the improvements were independently devised by one and some of them by the other.

The argument for the appellant has rested exclusively upon the controlling weight to be given to the oath of the patentees when applying for the patent, and, indeed, it has been urged that the testimony of Melotte was incompetent upon the theory that he is estopped as against the bona fide owners of the patent from contradicting the oath. We

are not aware of any rule of evidence or any principle of estoppel which precludes a witness who has testified incorrectly, or even falsely, on a former occasion, from telling the truth later. Melotte and Reuther might be estopped from asserting that they were not joint inventors in a suit against them by the owner to enforce the patent, but a third party, who is in no way in privity with them or with the owner, cannot be affected by an estoppel. It appears in the record that Reuther was living and accessible when the proofs were taken, and declined to be interviewed by a representative of the defendant. Melotte previously, upon the advice of a representative of the complainant, had refused to be interviewed by a representative of the defendant. It would seem that it would have been wiser for the complainant to produce Reuther if his testimony would have been favorable, or explain the reason why he was not produced, than to rest its case solely upon the presumption raised by the oath of the patentees when applying for the patent.

We think the court below reached a correct conclusion, and that the decree should be affirmed.

Decree affirmed, with costs.

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**CHRISTENSEN ENGINEERING CO. v. WESTINGHOUSE AIR BRAKE CO. (two cases).**

(Circuit Court of Appeals, Second Circuit. February 1, 1905.)

**1. PATENTS—INFRINGEMENT—INJUNCTION—SERVICES—CONTEMPT.**

Where a copy of an injunction issued against the infringement of a patent was served on defendant's attorneys, and a copy was inclosed in a letter properly addressed and mailed to defendant, such service was sufficient to sustain a proceeding for contempt, defendant being bound by the injunction if actual notice thereof was acquired by it, independent of service.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 68-70; vol. 27, Cent. Dig. Injunction, §§ 437, 445-447.]

**2. SAME—INFRINGEMENT—FINDINGS.**

Where, in proceedings against defendant for contempt in selling certain valves alleged to infringe complainant's patent in violation of an injunction, complainant's statements were based on information derived from the parties in whose possession the infringing valves were found, and defendant did not deny making the sales, the trial court was justified in finding that the valves were infringements.

**3. SAME—CONTEMPT PROCEEDINGS—NOTICE.**

Where, in a proceeding to punish defendant for contempt in violating an injunction restraining the infringement of a patent, notice of the commencement of such proceedings was properly given to defendant's solicitors, and, under order of court, a notice of the application for attachment and a copy of the affidavits to be used thereon were sent to defendant by registered mail, and returned marked "Refused," defendant not having controverted the charge of contempt, an objection that the notice of the proceedings was not properly served was unsustainable.

**4. SAME—PUNISHMENT—DISPOSITION OF FINE—REVIEW.**

Where in contempt proceedings a part only of the fine assessed against defendant was awarded to the complainant, the proceeding was

reviewable by appeal, though, if the entire fine had been so awarded, the order could have been reviewed only on writ of error.

**5. SAME—LIMITATION OF AWARD.**

Where, in a proceeding to punish defendant for contempt in violating an injunction restraining infringement of a patent, the court found that complainant was entitled to a portion of the fine, only so much thereof should be so awarded as evidence disclosed would be sufficient to reimburse complainant for its expenses necessarily incurred in prosecuting the contempt proceeding and loss consequent on violation of injunction.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 121 Fed. 562, 130 Fed. 735.

See 128 Fed. 749.

Wm. A. Jenner, for plaintiff in error.

Frederic H. Betts, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. These cases are before us on writs of error to review two proceedings in contempt, in each of which the order of the court below adjudged the defendant, in an equity suit brought to restrain the infringement of a patent, guilty of contempt for violation of an interlocutory injunction restraining such infringement. The two cases may be considered together conveniently.

The order in the first proceeding fined the defendant \$1,000, and directed one-half of the fine to be paid to the clerk of the court for the use of the United States, and one-half to the complainant in the suit. The order in the second proceeding fined the defendant \$4,000, and directed one-half of the fine to be paid to the clerk of the court for the use of the United States, and one-half to be paid to the complainant.

The injunction was granted October 18, 1901, and restrained the defendant from making or selling certain automatic air-brake apparatus particularly described therein. The defendant's principal place of business was in Milwaukee, Wis., but it had an office and a managing agent at New York City. A copy of the injunction was duly served upon its solicitors in the cause by the complainant's solicitors, October 21, 1901. October 28, 1901, the solicitors for the complainant sent a copy of the injunction to the defendant, inclosed in a registered letter properly addressed to the defendant at Milwaukee, and mailed at the city of New York, with postage prepaid. In July, 1902, the complainant, having been informed that the defendant had sold certain valves which were an infringement of the injunction to the Boston & Maine Railroad Company, called the attention of the defendant to the fact, and sent a representative to Concord, N. H., to investigate. One of the valves found there which had been sold by the defendant was submitted to experts, and pronounced to be an infringement of the patent. In December, 1902, a notice of an application for an attachment for the violation of the injunction, together with a copy of the

moving papers, was served upon the defendant's solicitors by the complainant's solicitors. These papers were transmitted by the latter to the counsel of the defendant at Milwaukee, and their contents were communicated by him to the manager of the defendant there. The defendant appeared upon the hearing of the application, and filed various objections to the proceedings. The court found that the defendant had sold four of the infringing valves on or about July 21, 1902. The affidavits introduced by the defendant in opposition to the application set forth, among other things, in substance, that the infringing devices had not been constructed according to the directions given to its workmen, that its workmen were five or six hundred in number at its Milwaukee shops, and that the four valves had "slipped through the shop" inadvertently. In deciding the motion, the court in its opinion said:

"The defendant, upon the record here presented, must be acquitted of any deliberate violation of the order of the court, its officers having given instructions not to make or sell such structures. Nevertheless, it is thought that an enjoined defendant should take such steps as will enforce obedience to its instructions on the part of its employes. This motion might have been avoided had proper attention been given to the notification served upon the defendant last summer that infringing valves had been found which had been sold by its employes since injunction."

The order imposing the fine was entered January 10, 1903.

In July, 1903, the complainant learned from information derived from the American Car & Foundry Company that the defendant had sold to that company, upon an order given July 26, 1902, equipments embracing the infringing valves for between 25 and 30 cars, which were delivered to that company on the 28th of August, 1902, and by it shipped to the Denver & Northwestern Railway Company in April, 1903. Thereafter notice of a second application for an attachment for this violation of the injunction, together with copies of the affidavits upon which the application was based, was served by the complainant's solicitors upon the defendant's solicitors. When this motion came up for hearing, the defendant's solicitors appeared, and objected that such service was unauthorized. Thereupon the court made an order directing the complainant's solicitors to serve notice of the application for an attachment, and a copy of the affidavits to be used thereon, upon the defendant by registered mail. Pursuant to this order, the notice and a copy of the affidavits were duly mailed to the complainant's solicitors by depositing the same in the post office at the city of New York, May 21, 1904, in a registered letter properly addressed to the defendant, with the postage thereon prepaid. This letter was indorsed with the names of the complainant's solicitors. On May 26th the letter was returned to the complainant's solicitors by the postmaster with the official indorsement "Refused." At the time and place of hearing mentioned in the notice, the defendant's solicitors appeared, and filed an objection as follows:

"The undersigned, solicitors of defendant in the above-entitled suit, respectfully represent to the court that they are not authorized to accept service of process or other papers in criminal contempt proceedings against the defendant, or to waive any rights which the defendant may have had

in such proceedings, and object that the complainant has not duly served its motion for attachment in the pending proceeding upon the defendant, and that the court has no jurisdiction to entertain the pending proceeding because, among other reasons, the defendant has not been brought into court."

The affidavits used upon the hearing contained a recital of the previous proceedings and copies of the moving and answering affidavits used thereon, besides additional affidavits setting forth the facts in regard to the further infringement, and to the service of the motion for an attachment, which have been referred to. In deciding the motion, the court in its opinion, among other things, said:

"This is the second violation of the same injunction, and defendant does not offer even the excuse of inadvertency which it presented before."

The assignments of error in each of the proceedings assert that the court erred in deciding that the injunction was duly served on the defendant, in deciding that the defendant had infringed the injunction, in deciding that proper notice to the defendant of the motion for attachment had been given, and assert that the court imposed an excessive fine. Various other errors were assigned, but, as they have not been argued, it is unnecessary to refer to them.

The service of a copy of an injunction upon the solicitors for the defendant in an equity suit ordinarily affords sufficient notice to the defendant, and should be deemed equivalent to actual notice to the defendant of the contents. It is the duty of the solicitor promptly to inform his client of the contents of the document, and the presumption is that he has done so. If it should appear that he has not done so, the court would doubtless acquit the defendant of any intentional misconduct in a proceeding to punish him for violating the order. In this case there was the additional presumption that a letter properly addressed and mailed reached its destination at the proper time and was duly received by the person to whom it was addressed. This is a presumption of fact resting upon the consideration that the post office is a public agent charged with the duty of transmitting letters, and that what ordinarily results from the transmission of a letter through the post office probably resulted in the given case; it is deduced from the known course of business, and the presumption that the officers of the postal system have discharged their duty. *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 26, 11 Sup. Ct. 691, 35 L. Ed. 332; *Schutz v. Jordan*, 141 U. S. 213, 11 Sup. Ct. 906, 35 L. Ed. 705. According to the modern practice, actual service of an injunction upon the person sought to be restrained is not requisite to lay the foundation of a proceeding against him for contempt. The authorities are collected in *Rapalje on Contempt*, § 46, where the author, after referring to some conflict in the cases, uses this language:

"The weight of authority, however, and in our judgment the better opinion, is that a defendant against whom an injunction is issued, who has

actual notice thereof, will be bound thereby, although the same is not served upon him."

In *re Lennon*, 166 U. S. 548, 554, 17 Sup. Ct. 658, 41 L. Ed. 1110, the court said:

"To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."

In deciding that the defendant had violated the injunction, the court necessarily passed upon the questions whether the defendant had sold the valves, and whether the valves were an infringement of the complainant's patent. Upon writ of error the court cannot review questions of fact. Its review is confined to questions of law only. This is the rule when contempt proceedings are under review. In *re Debs*, 154 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Besette v. Conkey Co.*, 194 U. S. 334, 24 Sup. Ct. 665, 48 L. Ed. 997.

The affidavits did not contain any positive statements of the sale of the valves by the defendant, but the statements were founded upon information derived from the parties in whose possession the valves were found. The defendant did not deny making the sales. There was certainly sufficient evidence to justify the court in finding that the valves were infringing valves, and this court cannot enter upon an inquiry as to its weight or conclusiveness.

The question whether notice of the motion for an attachment had been properly given to the defendant was not raised by the objections taken in the first proceeding, and need not be considered. In *Matter of Nichols*, 54 N. Y. 62. In the second proceeding, however, the objection was raised. It may be conceded that generally the rule obtains that, before a party will be punished for contempt, it must appear that he has been personally served with notice of the application. The precedents, however, are not unanimous. In *Encyclopædia of Pleading & Practice*, vol. 4, p. 783, the text states the rule as follows:

"While, from the character of contempt proceedings, the order to show cause is the most natural and ordinary process of reaching the offender, and most in vogue under American practice, nevertheless the court will issue an attachment without an order nisi where one is present in court, and with full knowledge of an order passed, is guilty of disobedience; or against an officer of the court failing to comply with its mandates, such officer being presumed to be always before the court."

In *Zimmerman v. Zimmerman*, 14 N. Y. Supp. 444, the Supreme Court of New York held that service on the attorney of the party was sufficient. In *Petrie v. The People*, 40 Ill. 334, 344, it was objected that the defendant had not been served with any notice of the application prior to the issuance of the attachment, and it was held that as the defendant was fully aware of the order which he was charged with having violated, and knew he was in default under it, and subject to attachment for contempt for noncompliance, service was unnecessary. In *Eureka Lake Co. v. Yuba County*, 116 U. S. 410, 6 Sup. Ct. 429, 29 L. Ed. 671, it was decided

that when a court, having acquired jurisdiction of a cause and the parties to it, issues an order upon one of the parties to show cause why he should not be punished for contempt in disobeying a temporary restraining order of injunction made in the cause, and he conceals himself to evade service of a process, the court may, on proper return of the facts, direct service of the order to show cause to be made on his attorney of record, and, after due service thereof, may proceed to hear the order to show cause, and to adjudicate the same. The court in its opinion said:

"To deny the power of calling on a concealed corporation through its chosen attorney of record in a suit to appear and answer to a charge of contempt for disobeying the orders of the court duly entered in that suit, would be to deny it the power of vindicating its authority and enforcing obedience to its lawful commands against a party personally subject to its jurisdiction."

These authorities show that it is not indispensable that the party proceeded against be actually served with notice of the application for the attachment. In the present case the presumption that its solicitors gave it prompt notice of the application of which they had been notified has as much force as the presumption that they gave the defendant notice of the injunction; and the presumption also obtains, from the proper mailing of notice of the application to the defendant, that it had an opportunity to acquaint itself of the contents. If the defendant chose to refuse to receive the registered letter which had been sent to it, it was in no better position to raise the objection which has been urged than a party would be who had concealed himself to avoid service. As a matter of fact, it cannot be doubted that the defendant had a sufficient opportunity to appear and controvert the charge of contempt. Instead of doing this, it contented itself with opposing the application upon purely technical grounds. We think the objection was not well taken, and the assignment of error is not valid.

The contention of the defendant that the fines were excessive involves a review of the judicial discretion exercised by the court below, and the rule is that decisions of that character will not be reversed unless it is manifest that they have proceeded upon wrong principles or that the discretion has been abused. Proceedings of contempt are of two classes: Those prosecuted to preserve the power and vindicate the dignity of the courts by punishing the contemnor, and those prosecuted to compel observance and redress the violation of orders or decrees made in behalf of a party to an action pending before the court. The former are punitive and essentially criminal in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly interested in their conduct and prosecution are the individuals whose private rights and remedies they are necessary to redress. The intentional violation of an injunction by a party to the cause is an act in defiance of the authority of the court and in derogation of the rights of the adverse party, and a prosecution for contempt in such case may partake of both a punitive and a remedial char-

acter. The proceeding is not one to enforce the criminal laws, but is one of a quasi criminal nature. If the adjudication imposes a fine on the contemnor in favor of the government, it is a criminal judgment; if it imposes a fine in favor of the adverse party, in reparation of the loss which has been occasioned him by the act of the contemnor, it is a civil judgment. If the fines in the present case had been imposed solely in favor of the government, the question whether they were reasonable or excessive in amount would be so largely one of the discretion of the court below that we should not feel justified in disturbing them. Different judges and different tribunals may well reach different views in deciding, upon the same state of facts, whether a given penalty is an adequate, or a moderate, or an excessive punishment for an offense, and, because the correct measure of the punishment cannot be ascertained by any fixed criterion, a reviewing tribunal should interfere only in an extreme case. *Rogers Manufacturing Co. v. Rogers*, 38 Conn. 121; *The People v. Delvecchio*, 18 N. Y. 352; *Myers v. The State*, 46 Ohio, 473, 22 N. E. 43, 15 Am. St. Rep. 638. The defendant was a large manufacturing corporation. It had infringed a patent of sufficient importance to induce it to contest its liability in an expensive litigation, and, when defeated in the Circuit Court, to prosecute an appeal to the Circuit Court of Appeals, where it was again defeated. Its officers were presumably men of sufficient intelligence and business experience to appreciate their obligations to respect and observe the mandate of the court, and to apprehend the probable consequences of neglect or evasion or contumacy. In the first proceeding the violation of the injunction may not have been a willful in the sense that it was a deliberate act; but upon what consideration can this court say, in view of the fact that the defendant had failed to exert proper supervision over those in its employ, that the fine was excessive? In the second proceeding the court below was certainly not without justification in considering that the violation of the injunction had not been inadvertent. It was not such a trivial violation as would have been likely to be accidental. The silence of the defendant, and its attitude in meeting the charges against it by merely technical objections, were quite properly taken into consideration in fixing the amount of the fine and in disciplining it for its contumacy.

We entertain some doubt whether we are at liberty to review that part of the orders by which half of the fine imposed upon the defendant was awarded to the complainant. Although the orders do not in terms recite that this half of the fine was awarded as a compensation to the complainant for the loss and expense to which it had been put in obtaining evidence and prosecuting the contempt proceedings, we assume that this was the meaning of the orders. If the whole fine had been awarded to the complainant, the orders could not have been reviewed on writ of error, and could only be reviewed upon an appeal from the final decision in the cause. It was held by the Supreme Court (*Re Christensen*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072) that because the fine (in



the first proceeding) was imposed in part in vindication of the authority of the court, this feature of the judgment dominated the proceeding, and fixed its character as one which was reviewable by this court upon a writ of error as a final decision in a proceeding of a criminal nature. The court did not suggest that the part which was not punitive could be re-examined, and the question was not before the court. Nevertheless we derive the impression from the opinion that it was not the meaning of the court that there should be a partial review only, and that the court regarded the whole proceeding as open to review, because it was one which was to be regarded as having for its primary though not its sole purpose the vindication of the authority of the court.

This court had occasion to consider the propriety of such an order in *Cary Manufacturing Co. v. Acme Flexible Clasp Co.*, 108 Fed. 873, 48 C. C. A. 118. In that case we said:

"The power of the Circuit Court to direct the payment of part or all of the fine to the complainant in an application for contempt, as a compensation for his time and outlay in prosecuting the application, has been recognized often in the Circuit Courts, especially in this circuit, and in practice is a power which ought to be exercised when the expense and trouble to which the complainant has been subjected justified its exercise."

Some of the adjudged cases in which the practice has been sanctioned are cited in the opinion in that case. There are cases in which the court upon the hearing may be able, from the depositions and from the character of the proceeding, to award the complaining party a sum which will not exceed a fair indemnity, and in which it may be proper to do so without incurring the expense of a reference to a master or the taking of further proof. In *Macaulay v. White Sewing Machine Co.* (C. C.) 9 Fed. 698, Judge Blatchford directed the defendant to pay a fine of \$250, "to go to the plaintiff towards his expenses and counsel fees about this motion." In *re North Bloomfield Gravel Mining Company* (C. C.) 27 Fed. 795, Sawyer, C. J., in imposing a fine of \$1,500, directed that the whole be paid to the complainant, "as a compensation, in part, for the large expenses that must have been incurred in procuring evidence and prosecuting this proceeding for contempt." In *Ready Roofing Co. v. Taylor*, 15 Blatchf. 94, Fed. Cas. No. 11,613, the order adjudging the defendant guilty of contempt directed an account to be taken by a master of the damages caused by the act of the defendants, and then fined them in that amount, together with the costs of the proceeding. In *Doubleday v. Sherman*, 8 Blatchf. 45, Fed. Cas. No. 4,020, the defendant was fined in the sum of \$3,703, part of the amount being the taxed cost of the proceeding, and the balance for solicitors' and counsel's fees and disbursements, which had been ascertained upon a reference. In *Searls v. Worden* (C. C.) 13 Fed. 716, the court awarded the proved expenses of the complainant, but refused to allow a counsel fee which had been charged of \$1,000, Judge Brown (now Mr. Justice Brown) saying, "I am not disposed, however, to impose upon the defendants the burden of paying the fees of complainant's counsel, brought here from a distance to press this motion." In *re Tift* (D. C.) 11 Fed. 463, the court allowed the complaining party \$1,000 "in reimbursement of the expenses and trouble" of the contempt pro-

ceeding. In *Wells, Fargo & Co. v. Oregon Railway & Navigation Co.* (C. C.) 19 Fed. 20, the court ordered a reference to a master to ascertain what loss, expense, or injury the plaintiff had sustained by reason of the misconduct of the defendant, "with a view of enabling the court to impose by way of punishment a corresponding penalty on the defendant for the benefit of the plaintiff." In *Indianapolis Water Co. v. American Straw Board Co.* (C. C.) 75 Fed. 972, the court ordered the fine to be paid to the clerk for the use of the complainant, and fixed the amount at \$250, "as a moderate allowance for solicitor's fees," together with taxable costs.

It will thus be seen that the practice has not been uniform, and that in some of the adjudged cases the award, like that in the present case, was for a round sum, not based upon any proved items of loss or expense, but apparently intended to cover probable loss and expenses. It is obvious that a fine exceeding the indemnity to which the complainant is entitled is purely punitive, and, notwithstanding the foregoing precedents to the contrary, we think that when it is imposed by way of indemnity to the aggrieved party it should not exceed his actual loss incurred by the violation of the injunction, including the expenses of the proceedings necessitated in presenting the offense for the judgment of the court. We are also of the opinion that when the fine is not limited to the taxable costs it should not exceed in amount the loss and expenses established by the evidence before the court. Unless it is based upon evidence showing the amount of the loss and expenses, the amount must necessarily be arrived at by conjecture, and in this sense it would be merely an arbitrary decision. Another reason why it should be based upon evidence is that otherwise the question of its reasonableness cannot be re-examined upon an appeal from a final decree in the cause, and the appellate court would have to treat the fine as a purely arbitrary one, or deny to the appellant his right of review.

The orders under review did not proceed upon any estimate of the actual loss or expenses which the complainant had incurred made from the evidence before the court, and for this reason we think they were erroneous. It may be that the sum directed to be paid to the complainant in the first proceeding was not excessive in amount, but whether it was or was not, and how much of it was intended to cover the expenses of the proceeding, and how much the loss directly suffered by the violation of the injunction, can only be conjectured. The amount directed to be paid to the complainant in the second proceeding is so large that it is difficult to believe that it was not excessive. It follows that, although so much of the orders as directs the payment of half of the fine to the clerk for the use of the United States should be affirmed, that part which directs the payment of half to the complainant should be reversed, with instructions to the court below to take evidence and order payment to the complainant of such sum only as may be found to be a sufficient indemnity.

The orders are accordingly affirmed in part and reversed in part, with instructions to the Circuit Court to proceed conformably to this opinion.

CLEVELAND PNEUMATIC TOOL CO. et al. v. CHICAGO PNEUMATIC  
TOOL CO.

(Circuit Court of Appeals, Third Circuit. March 6, 1905.)

No. 86.

PATENTS—INFRINGEMENT—PNEUMATIC TOOL.

The Boyer patent, No. 537,629, for a pneumatic tool, as construed and limited by prior adjudication, *held* not infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Hector T. Fenton and E. Hayward Fairbanks, for appellants.

John R. Bennett, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judge.

DALLAS, Circuit Judge. The specification by which it is averred that "the Circuit Court erred, for want of jurisdiction, in making the order appealed from," is not sustained; but while it is proper, and perhaps requisite, that this should be stated, it is not necessary to enlarge upon the question of jurisdiction, for we are of opinion that, upon the merits, the preliminary injunction which was granted by the court below should not have been awarded.

This suit was begun by bill of complaint charging the defendants below (appellants here) with infringement of claims 42, 45, 46, 47, and 48 of patent No. 537,629, dated April 16, 1895, issued to Joseph Boyer, for a "pneumatic tool." These claims were before this court in the case of Boyer v. Keller Tool Company, 127 Fed. 130, 62 C. C. A. 244, and the opinion which was then delivered renders any extended discussion of them now unnecessary. Their validity was upheld, but they were, of necessity, very narrowly construed. Among others, a certain British patent was set up as an anticipation, and as to it the court said:

"It is to be noted that the pressure supply in the Low is conducted the same as in the Boyer, through the grasping portion of the handle, and is controlled by a valve so placed as to be opened and shut by the finger of the workman. The only distinction is as to its position, and this is a narrow one. It is not located, in our judgment, in the grasping portion of the handle, as is required by the claims in suit, but beyond it, in a distinct recess or chamber of the tool body, specially fashioned to receive and hold it. \* \* \* This distinction, in our judgment, is sufficiently material to sustain the novelty of the plaintiff's device, and relieve it from the charge of having been anticipated by this reference any more than by any of the others."

We need not reconsider the question of anticipation upon the additional evidence which was introduced in this case. The court below did not refer to it with particularity, but contented itself with saying that no additional facts had been shown to qualify the conclusiveness of our decision in the case of the Keller Company; and the correctness of this statement may be assumed, for our present judgment will be rested wholly upon the ground of noninfringement.

A device which, if existent before the making of a patented invention, would not anticipate it, cannot, if made after the issue of the

patent, be said to infringe it; and we perceive no material difference between the Low tool, which, as we have seen, was found not to be an anticipation, and those of the appellants. The distinction upon which alone the patent was sustained related solely to the position of the valve, which, in the Low, "was not located \* \* \* in the grasping portion of the handle, as required by the claims in suit, but beyond it, in a distinct recess or chamber of the tool body, specially fashioned to receive and hold it"; and this distinction is quite as apparent in the tools of the appellants as in that of Low. Their valve is not, it is true, located at the same point as his, but it is placed, nevertheless, in a chamber specially fashioned in a projection which, though connected with the grasping portion of the handle, is no more a part of it than is Low's recess portion of the tool body; and the fact that the valve chamber in the one case is at the upper, while in the other it is at the lower, end of the handle, is immaterial.

The court below erred, we think, in not giving controlling effect to that portion of the former opinion of this court to which we have especially referred, and for that reason the decree appealed from must be, and it hereby is, reversed.

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**BRILL et al. v. PECKHAM MFG. CO.**

(Circuit Court of Appeals, Second Circuit. January 9, 1905.)

No. 201.

**PATENTS—VALIDITY—CAR TRUCKS.**

An order granting a preliminary injunction against infringement of the Brill patents, Nos. 627,898 and 627,900, for a car truck, reversed on the authority of a decision of an appellate court adjudging such patents invalid.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 129 Fed. 139.

Charles H. Duell, for appellant.

Edmund Wetmore and Francis Rawle, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

**PER CURIAM.** Upon the authority of *North Jersey Street Railway Company v. John A. Brill* (decided by the Circuit Court of Appeals for the Third Circuit on January 4, 1905) 134 Fed. 580, the order granting an injunction is reversed, with costs.

MANHATTAN GENERAL CONST. CO. V. HELIOS-UPTON CO.

(Circuit Court, E. D. Pennsylvania. February 6, 1905.)

**1. PATENTS—CONSTRUCTION—METHOD PATENT.**

A patent for a method of maintaining a constant electric current in an alternating current circuit, in which there are translating devices in series, is not limited by the description therein of an apparatus for practicing such method, which must be taken as merely illustrative.

**2. SAME—METHOD OR PROCESS—PATENTS.**

To support a process or method patent there must be a tangible product, or a change in character or quality brought about, and not simply a principle or result underlying or involved in certain mechanical or electrical means or steps. Telephone cases, 128 U. S. 1, 8 Sup. Ct. 773, 81 L. Ed. 863, distinguished.

[Ed. Note.—For cases in point, see vol. 88, Cent. Dig. Patents, §§ 6, 7.]

**3. SAME—METHOD OF REGULATING ELECTRIC CURRENT.**

The Baker patent, No. 684,165, for a method of regulating electric circuits, is void, as being merely for an operative theory, and one which, if sustained, would monopolize every means by which such theory may be utilized or applied.

**4. SAME—MECHANICAL PATENT—ABSTRACTION**

Where no concrete conception can be worked out of a claim for a mechanical patent, nothing, indeed, but an ill-defined principle of construction, the only key to which is the abstract result to be attained, it cannot be sustained.

[Ed. Note.—For cases in point, see vol. 88, Cent. Dig. Patents, §§ 7, 9.]

**5. SAME—SPECIFICATIONS—HOW FAR RECEIVED TO REMEDY CLAIMS.**

A claim for a mechanical or apparatus patent, otherwise invalid as an abstraction, will not be sustained by reference to the specifications, where it not only goes far beyond anything which is there suggested, but fails to refer to that which is admittedly a distinguishing feature of the invention upon which its novelty is made to depend.

**6. SAME—LIMITATIONS IMPOSED BY SEPARATE SPECIFIC CLAIM.**

While an invention is undoubtedly to be regarded as residing in a structure of the same general character as that which is described in the specifications, to which the inventor is to be confined, this does not restrict him to the particular form to which prominence is there given, where it is evident that he had variations of it in mind, and has formulated a claim in broad terms to cover them; the particular form having also been made the subject of a separate claim.

**7. SAME—DISCLAIMER AFTER ISSUE—PURPOSE AND EFFECT OF—PRIOR ART—ADMISSION.**

The purpose of a disclaimer after issue is to take out of a patent that which has been mistakenly or inadvertently included in it, by which it is made too broad. It must be of some distinctive and separable matter, and may be made use of to avoid the effect of having included more devices than could properly be the subject of one patent, or to remove an ambiguity. Matters so disclaimed cease to be a part of the invention, and the patent is to be construed as though they had never been included in it. They are not, however, to be taken as admitted to have been a part of the prior art.

**8. SAME—VALIDITY AND INFRINGEMENT—REGULATOR FOR ARC LIGHT CIRCUITS.**

The Baker patent, No. 684,340, for a regulating device for arc lamp circuits, claim 1, is void as too broad and abstract in its terms. Claim 4 was not anticipated by anything in the prior art, but covers a device of greater simplicity and a greater range of effectiveness than any previously known, and discloses patentable invention. Such claim is not

confined to the specific device described in the specification, which is illustrative only so far as said claim is concerned, but covers any other device of the same general character, and which comes within the terms of the claim, and operates on the same principle as that shown; nor was it limited by the amendment of the specification made in the Patent Office in relation to the description of such device. As so construed, also *held* infringed.

**9. SAME—CONSTRUCTION OF CLAIMS—AMENDMENT OF SPECIFICATION.**

Claims of a patent are to be taken as they read, and are not limited by an amendment of the specification more particularly describing the device shown in the drawings to meet objections of the Patent Office, where the claims themselves are left unchanged.

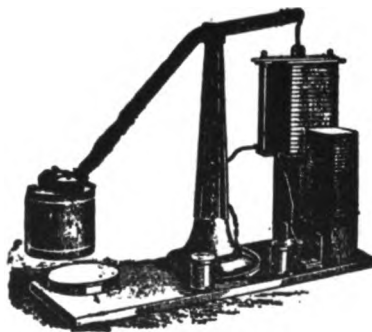
**10. SAME—OTHER CONTEMPORANEOUS PATENTS BY SAME INVENTOR.**

An invention covered by a patent is not necessarily to be cut down by the fact that, while the application for it was pending in the Patent Office, other applications were brought forward from time to time by the same inventor, representing different developments of the same idea; all being allowed and issued the same day.

In Equity. Suit for infringement of letters patent No. 684,165 for a method of regulating electric circuits, and No. 684,340 for a regulating device for arc lamp circuits, both granted to Malcolm H. Baker, October 8, 1901. On final hearing.

Thomas B. Kerr and Richard N. Dyer, for complainant.  
Joseph C. Fraley, for defendant.

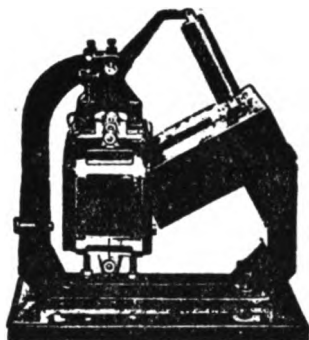
ARCHBALD, District Judge.<sup>1</sup> The difficulty in the use of the alternating current for electric lighting, in a circuit with arc lamps in series, lies in the fact that the potential of the current having necessarily to be kept constant, at the maximum required for the full number of lamps, as these are severally turned off one by one there is an accumulation of pressure, due to the varying decrease of



resistance, which is destructive to the apparatus employed. The means proposed to meet and obviate this in the patents in suit is the insertion in the circuit in series with the lamps of a reactance device, consisting of an induction coil and core, which are drawn together by the varying magnetic pull, as the energy of the current is increased by the cutting out of lamps, this being counterbalanced

<sup>1</sup> Specially assigned.

by an opposing mechanical force, consisting, as portrayed in the patents, of a lever and weight, the whole being so co-ordinated and arranged by means of a critical angle given to the lever (empirically determined according to the number of lamps and the amperage of current employed) that the core is always in position to successfully choke off or release the current to the extent required. The defendants make use of a similar core and coil, but the latter is hung vertically on a rigid arm like a pendulum, and operates as a counterbalance by its own weight, an equilibrium between the magnetic pull and the force of gravitation being found in the increasing effect of the latter as the coil is drawn upwards away from the perpendicular in the arc of a circle. It is denied that this infringes either



of the complainants' patents, except as they are given an unwarranted breadth of construction; and the novelty of the invention which they cover is also contested, outside at least of the special and peculiar features which are there described. These, then, are the issues presented for determination.

The patents relied upon were both granted to the complainants, as assignees of Malcolm H. Baker, the inventor, October 8, 1901; one being for the method of regulation, and the other for the mechanical apparatus or means by which it is accomplished, the specifications of the two being substantially the same, the result of a divided application. The method patent has four claims, differing somewhat in phraseology and breadth, but with no practical distinction between them, of which the first may be taken as sufficiently representative:

"(1) The method of maintaining a constant current in an alternating current circuit including translating devices in series and also including a reactance-coil in series with the translating devices, which consists in opposing to the magnetic pull of the coil a mechanical force, and so correlating the said mechanical force and the magnetic pull that the choking effect of the coil will vary automatically to compensate for changes in the resistance of the circuit."

If this is valid, the defendants clearly infringe, the device which they put out making use of the exact method so described. As just stated, they have a reactance-coil in series with the lamps, in an

alternating current circuit, the coil being hung like a pendulum, and the magnetic pull between it and the core, which is set above and in juxtaposition to it, being opposed by the weight of the coil and its inclination to swing back under the force of gravity to an approximately vertical position; the two opposing forces being so adjusted by previous experiment, as to the proper weight of the coil and the distance and angle at which the core is to be set, that the choking effect of the two will compensate automatically for the changes in the resistance of the circuit in which the device is to be employed. This is not to be disposed of by the suggestion that the specifications describe a particular form of apparatus of an essentially different kind from that of the defendants', in which the opposing mechanical force consists of a counterbalancing lever and weight not found, as it is said, in the defendants' device, to which in consequence the complainants are confined. What is shown in the patent must be taken simply as illustrative, and not as imposing a limitation, this being a method patent, and not, therefore, tied down to any concrete form. If it is good at all, it covers every means for the maintenance in the manner described of a constant current in an alternating current circuit in which there are translating devices in series. Neither can it be limited by the prior art, no such method being anywhere there found, the regulating reactance devices which do appear—as we shall more fully see in connection with the apparatus patent—differing materially in principle and mode of operation from anything we have here. Some which have been referred to have not the same purpose or scope, while in those which approach the nearest either a transformer is employed, or magnetic repulsion is the force relied on instead of magnetic attraction; this being not simply a matter of different polarity, but of strength and consequent action and treatment as well as results.

These observations, however, develop the weakness and inherent vice of the patent. It is not limited to any particular mechanical construction, because it monopolizes every form of regulation of the character specified, in which there is a correlation between the magnetic and mechanical forces employed, and that, too, without indicating, except by the broadest generalities, upon what basis that correlation is to proceed. We have practically nothing more than the forces made use of, the fact that they are to be correlated, and the result to be produced. This carries it beyond anything which it was the design of the patent law to secure and protect. But, more than this, to support a method or process patent there must be a tangible product or a change in character or quality brought about, and not simply a principle or result underlying or involved in certain mechanical, or, as here, electrical, means or steps. *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279; *Wicke v. Ostrum*, 103 U. S. 461, 26 L. Ed. 409; *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 7 Sup. Ct. 1304, 30 L. Ed. 1103; *Risdon Locomotive Co. v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899.



As said by Mr. Justice Brown in *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136:

"These cases assume, although they do not expressly decide, that a process, to be patentable, must involve a chemical or other similar elemental action, and it may be still regarded as an open question whether the patentability of processes extends beyond this class of inventions. Where the process is simply the function or operative effect of a machine the above cases are conclusive against its patentability."

Even in the *Telephone Cases*, 126 U. S. 1, 534, 8 Sup. Ct. 778, 782, 31 L. Ed. 863, in which the court went to the extreme, it was pointed out by Chief Justice Waite that the claim was—

"Not for the use of a current of electricity in its natural state, as it comes from the battery, but for putting a continuous current in a closed circuit into a certain specified condition suited to the transmission of vocal and other sounds, and using it in that condition for that purpose. So far as at present known, without this peculiar change in its condition it will not serve as a medium for the transmission of speech, but with the change it will. Bell was the first to discover this fact, and how to put such a current in such a condition, and what he claims is its use in that condition for that purpose."

This decision lends no countenance, therefore, to the idea that the operation of an electric force stands any different before the law from that of a mechanical force, or that a method devised for utilizing its peculiar properties and action can be patented any more than a method for utilizing those of any other element. In the present instance it is clear that the so-called method which is sought to be patented is merely the operative theory which is the basis of the apparatus patent. The one is the idea or principle of which the other is the concrete embodiment, the identity of the two being established by the specifications common to both. And if the method patent is sustainable the apparatus patent is redundant and superfluous, as are also all the others applied for by the same inventor and simultaneously taken out, the method covering the whole ground. It is thus virtually an attempt to monopolize the common underlying principle or mode of operation of them all, and of all others in which it might be employed, and as such cannot be sustained.

The apparatus patent as originally issued had five claims; but the third and fifth have been eliminated by a disclaimer, and the second has been withdrawn, leaving the first and fourth as the ones relied upon, as follows:

"(1) In an electric circuit, a regulating reactance device having operating parts whose relative position determines the choking effect of the device, magnetic means for causing relative movements of the parts, and mechanical means for controlling such movements, these mechanical means being adapted to so control the movements as to produce definite predetermined choking effects."

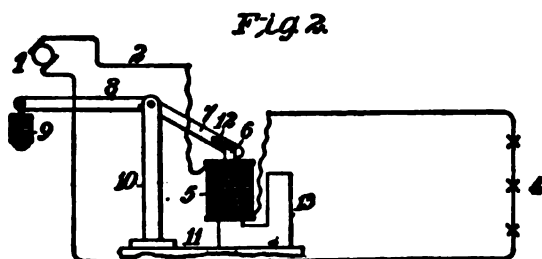
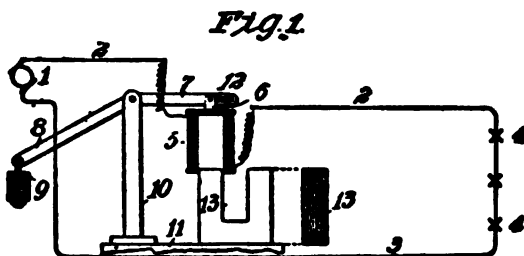
"(4) In an alternating circuit a series of translating devices and a regulating reactance-coil [device] having a moving part adapted, when moved to different positions by the magnetic pull of the coil, to cause varying choking effects, the said moving part being acted upon by a force opposing the magnetic pull, which force is so adjusted throughout its effective range of operation as to counterbalance the magnetic pull when the moving part is in such positions with respect to the coil as are adapted to produce constant current."

Taken as it reads, the first of these is a mere abstraction. The only approach to anything definite is that there shall be an electric circuit, with a regulating reactance device, having operative parts, whose relative movements, under the control of unspecified magnetic and mechanical means, shall be adapted to produce certain predetermined choking effects. But of what, in kind or character, these operative parts are to consist, or what are to be the magnetic means for causing relative movement to them, or the counter mechanical means for controlling such movement, is not in the slightest respect indicated. There is, in other words, no concrete conception to be worked out of the claim, nothing, indeed, at best, but an ill-defined principle of construction, the only key to which is the abstract result to be attained. If it be said that it is to be read in the light of the specifications, it is to be noted that it goes far beyond anything which is there suggested, the invention being there declared to relate "to improvements in regulators for alternating current arc lamps arranged in series," not a word of which is to be found in the claim. But more than this, it fails to refer in the remotest degree to that which is admittedly one of the distinguishing features of the invention, upon which in large part its novelty, when brought into comparison with the prior art, unquestionably depends, and that is the magnetic pull between the coil and core of the choking device, as contrasted with magnetic repulsion, which is made use of in the general electric regulators, among others, based on one of the Thomson patents. Not every "magnetic means," in other words, was open to the inventor, which is the virtual reading of the claim, but only the particular means which, according to the specifications, he was supposed to make use of, and to which by the prior art he was confined, which the claim entirely disregards. Passing beyond the bounds of the specifications as it does, and dealing in generalities and abstractions, the claim must therefore be regarded as inherently defective and invalid.

In order to pass upon the remaining claim, a more particular examination into the character and scope of the invention in suit than has yet been undertaken must be made.

"My invention," it is said by the inventor in the specifications, "relates broadly to automatically varying the reactance in a circuit such as described [that is to say, containing alternating current arc lamps arranged in series] to compensate for changes in the resistance of the circuit due to the cutting in or out of lamps or to any other cause. Otherwise expressed, my invention relates to automatically varying the value of a variable reactance in the circuit in accordance with changes of resistance in the said circuit in such a manner as to maintain the current practically constant. In carrying out my invention, I include in the circuit in series with the lamps a reactance device consisting of a coil of wire so placed as to have a free relative movement with respect to a laminated core inside the coil. It is well understood that the current passing through a coil having such a relation to a magnetic core is more or less choked or impeded, according to the relative position which the coil and the core occupy, the choking or impeding effect increasing with the farther and farther insertion of the core within the coil, and decreasing with the gradual withdrawal of the core from the coil. The relative movements of the coil and the core may be brought about by variations of the magnetic pull due to variations of the current passing through the coil. If now a force could be discovered which would automatically vary the choking effect produced in the coil in correspondence with variations in the resistance of the circuit, which force should oppose and vary with the

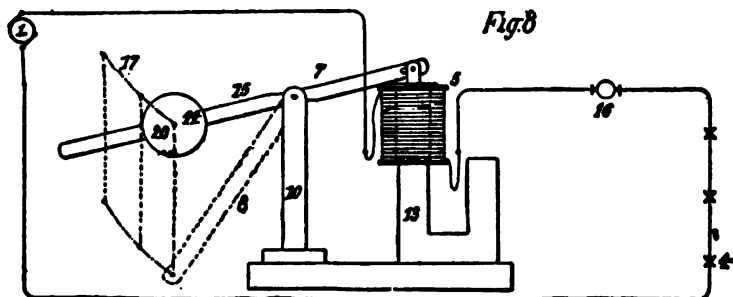
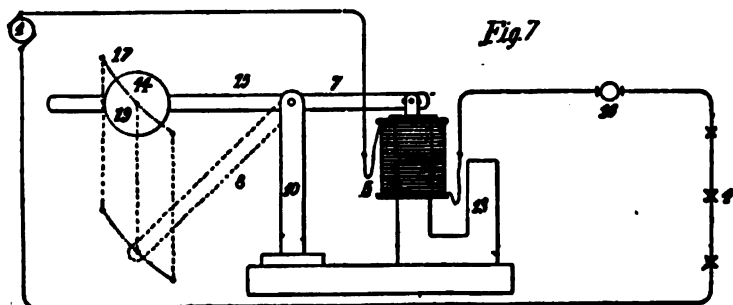
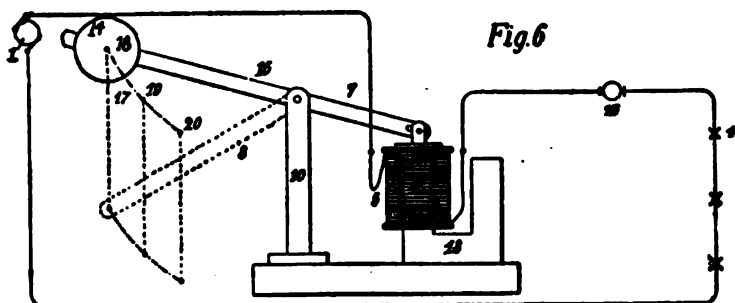
magnetic pull of the said coil, the value of the current traversing the coil might be made practically independent of the resistance of the circuit, so that a constant current could be maintained irrespective of the number of lamps in operation in the circuit. I have discovered that such a force can be supplied mechanically in several ways. In the present instance I make use of a compensating lever carrying a weight, and I attach to the end of said lever



remote from the weight either the laminated core or the coil, as the case may be, of a reactance device, and I pivot the said lever at such a point as to form a critical angle between the outer part of the lever and the inner part—that is to say, the two parts of the lever on opposite sides of the pivot—it being presupposed that the inner part of the lever will be approximately horizontal when the magnetic pull of the coil is at its minimum, while the outer portion of the lever will be in a position of least effectiveness at the same moment. A simple way of determining the critical angle for the lever of the compensating device is to construct a coil having a sufficient number of turns to show the proper voltage and amperage under the condition of no load, and then to connect the moving part of the apparatus containing the coil with a straight lever pivoted at a point between its ends, and carrying at its outer end a sliding counterbalance. Then, by cutting into the circuit successively one lamp after another until the maximum number of lamps is cut in, and at each successive step sliding the counterbalance into such a position that the readings of the ammeter will always show the normal current on the line, it will be found that between the extreme limits of its movement the sliding counterbalance will have traveled through a curve which is approximately the arc of a circle. It is manifest that the center of the arc just described lies outside the pivot of the straight lever. The object sought in making the lever angular is to utilize this pivot as the center of motion, so that a weight attached to the end of the lever by some permanent means of attachment, such as suspension therefrom, will during the movements of the movable part of the reactance device from one extreme of its motion to the other follow substantially the same curve as that traversed by the sliding counterbalance already described. It will be understood that, as lamps are successively cut into the circuit in the process described above, the sliding counterbalance has to be moved by hand nearer and nearer to the pivot in order to meet the conditions set forth above, and it will also be under-

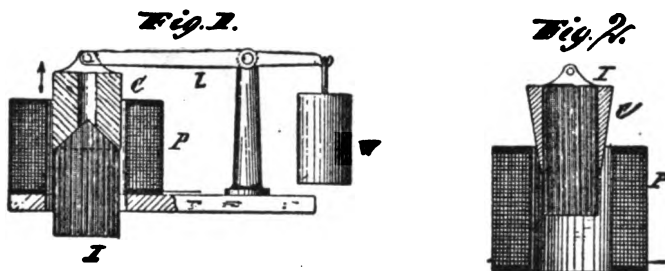
stood that the counterbalance moves during the same period through a curve in a downward direction, each successive change in the position of the counterbalance representing a single unit of movement corresponding to the switching in of a single lamp or other unitary translating device. The same will be true respecting the action of a weight of equal amount permanently attached to the end of a bent lever, provided the angle given to the lever is selected according to the method above described. We may suppose, for example, that the circuit is to carry a current of two thousand volts and seven amperes. The first requirement is that a coil should be provided having a sufficient number of windings to meet the described conditions, and being provided with a core of sufficient size to prevent undue heating. These conditions being attained, it is easy to determine the critical angle for the lever.

"It is immaterial whether the weight, 9, or any other counterweight or force, is attached to the coil or the core; the relative movements of these two parts being the feature upon which the choking effect depends. When the compensating lever is attached to the core of the reactance device instead



of to the coil (it being assumed that the coil is arranged above the core) the core itself forms part of the mechanical force opposing the magnetic pull of the coil."

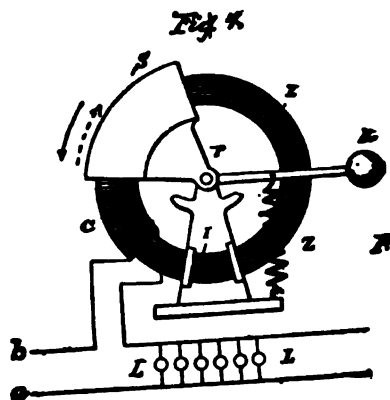
Comparing what is so specified and described with the prior art—which will be regarded as comprised within the references discussed by counsel—it will be found to be beset with some limitations. Thus, in United States patent No. 377,217, to the eminent American electrician Elihu Thomson (1888), a reactance device for use in an alternating current circuit is shown, consisting of a coil and core, arranged to act either by attraction or repulsion, or by a combination of both, avail being also made of the assistance of a counterbalancing lever and weight. The possibility of utilizing this for purposes of regulation is



distinctly claimed, the current in the coils being cut down, as it is said, as the magnetic core is drawn into them. The agencies employed in this device are thus, in a general way, common to the one in suit, and the purposes of the two are to a certain extent the same. But, whatever the limitations so imposed, there is nothing which amounts to an anticipation, the device being altogether too imperfectly developed for that. The difficulty is that while the inventor claims that it may be used as a regulator he fails to tell us how. And, assuming that the complainants are confined to a lever and weight, there is an entirely different use of these, the two acting merely as a counterpoise to the weight of the core, and not as an opposing mechanical force to the magnetic action between coil and core. Much less is there any correlation or adjustment between these forces, in order to vary the choking effect in the coil, corresponding with the variations in the resistance of the circuit, so as to maintain the current constant, as in the complainants' device.

The patent to the same inventor (Thomson) No. 397,616 (1889) comes a step nearer. This, in one form, is designedly a reactance device for automatically maintaining a constant alternating current with lamps in series, by relieving from the effect of an excessive potential when one or another lamp is cut out. In Fig. 4 is shown a hood or band, enveloping and tending to close down upon a coil in circuit with the lamps, which coil in turn encircles a laminated iron ring. The effect of the coil and ring is to choke the current, and it is to regulate this that the hood or band is designed. Being set, by means of the counterbalancing

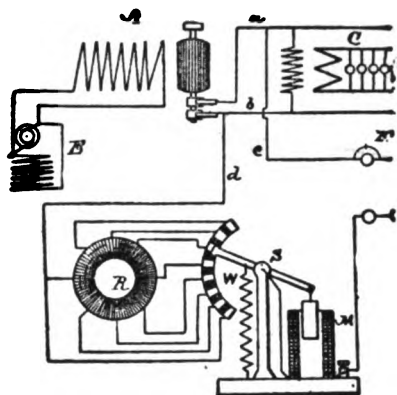
weight and spring, at a point where the current is normal, as the pressure or energy is increased in the coil, by the cutting out of a lamp or lamps, the inductive effect on the hood or band is increased, repelling it upwards and uncovering more of the coil, thereby allowing the latter to exercise greater self-induction or reactance, and so impeding the current. While, on the other hand, if for any reason the current is enfeebled, or its energy taken up, the hood, gravitating by its own



weight and being repelled to a less extent, moves down over the coil, restricting its reactive or choking power, and freeing or restoring the pressure of the current. It will be noted that the effective thing in this arrangement is the correlation between the reactive coil and the hood, in which the weighted arm and spring play a very inconsiderable part, acting as a mere counterpoise to the hood, and in no sense as a mechanical force opposed to the magnetic force which operates upon the hood, and varying to meet it as in the device in suit. There is thus a clear distinction in principle between the two, in addition to the fact that the one makes use of repulsion and the other of attraction; all that can be said of them—if, indeed, that—being that they belong to the same broad class. It may be added, in passing, that the attempt to see in the relative position of the hood and the arm of the lever the critical angle described in the patent in suit requires a decided stretch of the imagination. And even granting that it can in fact be made out, it is a mere happen so, of no practical significance.

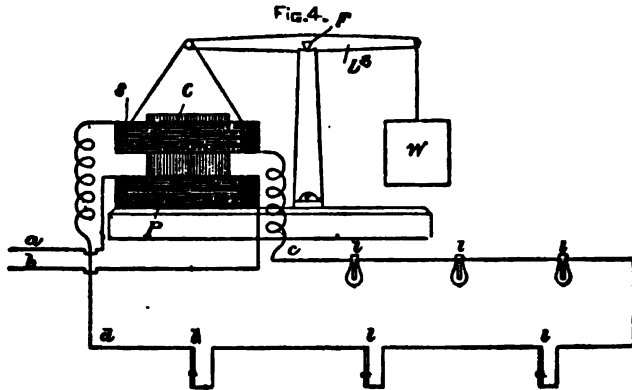
The Thomson and Rice patent, No. 413,293 (1889), is the first attempt to connect with the high potential mains of a constant potential alternating current circuit, a circuit having electric lamps in series, and to regulate the same by the introduction and withdrawal of a variable reactance. This is admittedly a practical device, and was nine years earlier than the Baker regulator, but it was not introduced commercially until about the same time. The reactance is secured by means of a coil, wound in sections upon a circular core, and is made to vary, according to the resistance in the circuit, by the connecting up or throw-

ing out of the different sectional windings. To accomplish this variation automatically, a pivoted switch is provided (Fig. 2), one arm of which is attached to an armature or core, which, as against the retrac-

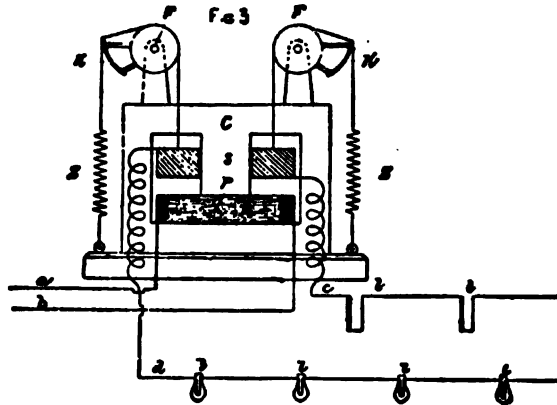


tion of a spring, is drawn down into a coil set in the circuit. As the energy of the current flowing through the mains is increased from any source the core is drawn further into the coil, and, the other arm of the switch being thereby moved up over the connecting plates, additional sections of the reactance coil are thrown in, the reactive effect being increased with each. It is idle to suggest that there is anything here in common with the device in suit, except the general idea of reactance regulation, which it must be admitted was not new with Baker, even with respect to an alternating current circuit, with either arc or incandescent lamps in series, as is thus shown. But the attempt to find in the electro-magnet, employed to shift the arm of the pivoted switch, the movable reactive coil and core of the Baker invention is far fetched. Granting that, of necessity, there must be some impedance of the current by this as well as by the rest of the device, the inventors ascribe no such function to it, and it is neither so obvious nor so considerable that others must be assumed to have noticed it and been instructed thereby.

A third patent to Thomson, No. 516,846 (1894), is also relied upon with some confidence by the defendants. This is, in terms, an alternating current regulator for arc lamps in series, but with an induced current, the regulation being effected through the arrangement of the opposing coils of the transformer, which operate upon each other through the medium of the core within the magnetic field of both. As one or more lamps are cut out, and thereby a current of less energy is required, the excess of current thrown back on the secondary coil repels the primary, and so lessens the inductive efficiency of the transformer, by air leakage, reducing the strength of the secondary or induced current. A counterbalancing weight and lever are used, the same as in the last Thomson, and for the same purpose; that is to



say, as a counterpoise merely, to hinder the downward tendency of the moving part, and not as an efficient mechanical force, opposed to or correlated with the magnetic force operating between the coils. As a variation (Fig. 3), the movable coil is also shown suspended by cords or flexible connections (attached at the other end to retracting springs) over pulleys having eccentric cam extensions. But this arrangement

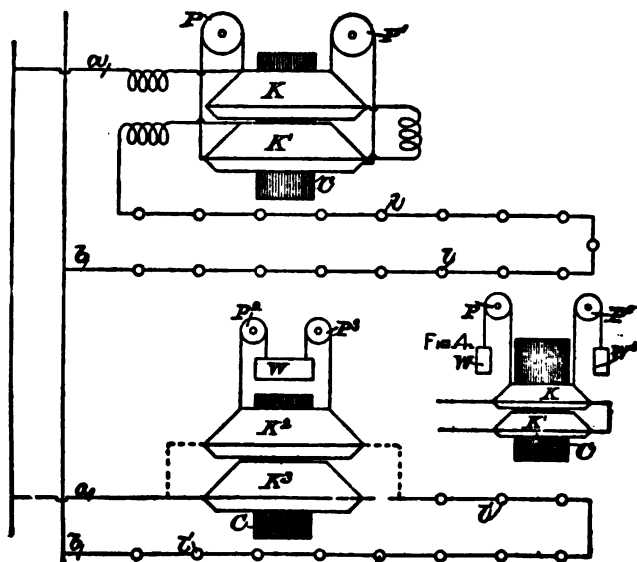


does not differ in principle or function, being nothing but another form of counterpoise, the cam surfaces being simply for the purpose of securing uniformity of action in the pull of the springs. And although it is declared that the device may be "varied to produce any desirable variation in the pull," this seems to be merely an incidental observation, of no especial significance, it being immediately added that "the action of this form of counterpoise is of course the same." This patent assumes some importance as the substantial basis of the General Electric Constant Current Transformer, to be hereafter more particularly referred to, and it is confirmatory of the view taken with regard to it



that at the outstart there was no provision in these transformers for varying the counterbalancing, which remained constant, that necessity being subsequently recognized and worked out by the company's electrician, Baker in the meantime having solved the problem in his own way.

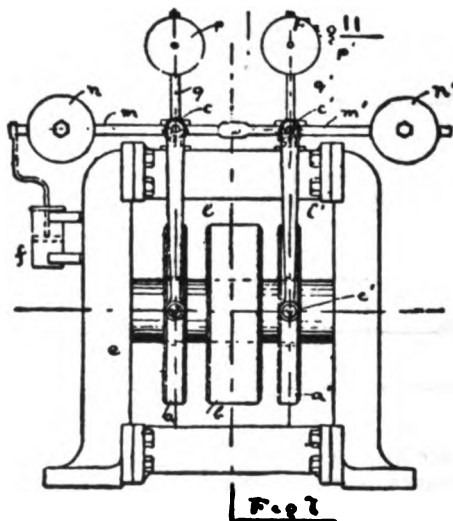
A further patent to the same inventor (Thomson), No. 516,847, issued the same day as the last (1894), shows an interesting modification of it.



Here the coils are in series with each other and with the lamps, but the regulating reactance is effected in substantially the same way, by the repulsion of the coils from each other, which increases as the resistance at the lamps lessens, their several effect upon the core, which they respectively surround, being thereby increased, introducing a reactive kick or self-induction, which brings the current to its former value. This increase of inductive effect on the core as the coils are separated is due to the fact that each coil is released or freed to a certain extent from the influence of the other. To this the counterbalancing pulleys and weights, the same as in the last patent, are merely incidental helps, and not substantial and effective forces to be reckoned with. It may be noted in passing that this patent is in part the basis of the General Electric Reactive Coil, of which more later.

The Ferranti British patent (1894) also shows a reactance regulating device for an alternating current. It is true that the current after leaving the regulator is rectified or changed to one that is continuous, it not being regarded as feasible at that time to operate arc lamps in series on any other; but that does not affect the character of the apparatus or the principle which is disclosed. Similarly to the Thomson, the regulation (Fig. 7) is effected through a trans-

former, having two movable primary coils, hung vertically with a fixed coil intermediate between them, all of them surrounding a common core. From the points where the movable coils are pivoted extend vertical and horizontal levers, at right angles to each other, at the extremities of which are counterbalance weights of different size. These are so arranged that, as the movable coils are repelled from the fixed coils by the increased force of the current, the weights at the ends of the horizontal arms oppose this, and tend to force them together again; but the weights at the top of the upright arm, being thrown out of the vertical, and gravitating in the other direction, work just to the contrary, the diminished repulsion between the fixed and the movable coils, as they get further apart, being thus met by a graduated decrease in the gravitational force operating to bring them together again. To the extent that a vary-



ing mechanical force is thus made use of, in opposition to a magnetic one, as well as in the way that an equilibrium is sought to be secured between them, by means of levers and weights acting automatically, it may be said that the same elements are here as are found in the patent in suit. But this is true only in the most general sense, and the gap between the two is nevertheless wide. Not only is there a difference in the character of the magnetic force employed, which is itself distinctive, but there is no suggestion how the opposing forces—magnetic and mechanical—are to be adjusted or correlated to produce constant current, without which it can hardly be said to have advanced beyond the theoretical stage.

The Bruger Swiss patent (1894) is of some importance as showing another kind of mechanical force, employed for purposes of regulation, in opposition to a magnetic one. In it an iron core is suspended on a spring above a series coil into which, as the energy of the current is increased, it is drawn by magnetic attraction

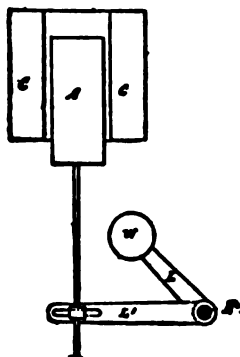
against the action of a spring, a counterbalance between the two being supposed to be secured by the increased resistance as the spring is extended. It is to be noted that the magnetic force in this arrangement is not repulsion, but attraction, the same as in the Baker regulator, and the mechanical force the retractance of a spring. But the device is of limited range and purpose, and, as was observed



FIG. 2.

with regard to the Ferranti patent, the correlation of the mechanical force with the other elements involved, if it is to be regarded as at all in the mind of the inventor, is very inadequately and unsatisfactorily treated. The mere hanging of a core on a spring to be drawn down by the magnetic influence of a coil is not enough without more, and it is a question, therefore, whether anything practical is shown. Assuming, however, that the special combination which

FIG. 3.



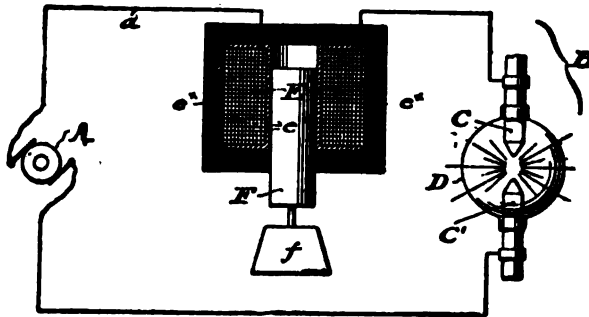
there appears would stand in the way of a similar subsequent one, or even of a construction of the patent in suit which would extend to a device having these particular features, that is the full extent to which it goes. There is certainly nothing in it to anticipate or limit the invention outside of that.

The Willans British patent (1883) is a mere sidelight. Designed to regulate the speed of a dynamo engine, its significance consists

simply in disclosing (Fig. 3) the use of a variable counterbalance lever, with bent arm and weight, opposed to the magnetic pull of a coil and core, varying according to the energy of the current, which is one of the details of the present invention, but, of course, falls far short of suggesting it. It was something which the inventor found at hand in the art for such further uses as it might be put to, but that is all.

The Spencer patent, No. 588,610 (1897), is another which is somewhat seriously pressed. This is ostensibly for a special style of arc lamp on an alternating current, supplied with a reactance regulator in series therewith, for the purpose of controlling and steadying the current, and so the luminosity, of the light. To this end there is

FIG. 2.



provided, as it is said, in electric circuit with each lamp a choking coil capable of automatic variation as to its magnetic field, and consequent variation in its self-induction. Suspended within the coil (Fig. 2) is a movable core, having a weighted end, which opposes itself to the upward sucking action of the coil. When the current passing through the coil is normal, the parts are so proportioned that the core is retained at a certain height; but when for any reason the energy of the current is diminished, and therewith the magnetic effect of the coil lessened, the core descends, and thereupon the self-induction of the coil is relieved, giving passage to greater force, and restoring the equilibrium. Here, as it is contended, is a reactance device for the regulation of an alternating current supply, in which a correlation between magnetic pull and mechanical force, the latter being represented by a gravitational weight, is made use of to secure constant current, thus fulfilling the terms of the patent in suit. Too much importance, however, is not to be attached to the general points of resemblance referred to. The whole purpose and design of this device is to overcome the slight variations in the electromotive force at the arc, due to the use of solid instead of cored electrodes in an inclosed lamp, although it must be confessed that its corrective effect of variations in the current supply is also recognized. But it is confined in its range of operation to a single lamp, and there is no attempted variation in consequence of the

mechanical force, such as is necessary to meet changes in the resistance of a circuit composed of many lamps in series, which is the feature of the Baker invention that gives it its distinctive place.

It may be that it was this patent that brought about the disclaimer,<sup>1</sup> entered by the complainants just before bringing suit, by which claims 3 and 5 and a cognate portion of the specifications were eliminated. These claims relate to the regulation of a single arc lamp, in series with the reactance coil; and in view of the terms of the disclaimer, by which it is averred that the patent is too broad, including that of which Baker was not the original inventor, it is contended that this has the effect of making that which is so disclaimed a part of the prior art; from which it is further argued that there was no patentable novelty in extending to a number of lamps that which was admittedly old as applied to one. But nothing of this can be received. The purpose of a disclaimer, after issue, is to take out of a patent that which has been mistakenly or inadvertently included in it, by which it is made too broad. It must be of some distinctive and separable matter, which can be ex-

<sup>1</sup> To the Commissioner of Patents: Your petitioner, Manhattan General Construction Company, a corporation organized and existing under and by virtue of the laws of the state of New York, and having its principal place of business at the city of New York, in said state, respectfully represents:

That it is possessed of the full and entire legal right, title, and interest in and to letters patent No. 684,840, granted October 8, 1901, to it as assignee of Malcolm H. Baker for regulating device for arc lamp circuits;

That it has reason to believe that through inadvertence, accident, or mistake the specification and claim of said letters patent are too broad, including that of which said Baker was not the first inventor.

Your petitioner therefore hereby enters this disclaimer to that part of the specification and claims which is identified as follows, to wit:

The construction illustrated in figure 5 of the drawings and described in the specification and claims in the following words:

"Fig. 5 illustrates diagrammatically my improved regulating coil in connection with a single arc lamp."

"I may apply my regulating reactance-coil to a single lamp structure as well as to a circuit including a series of arc lamps. In Fig. 5 I illustrate such an application. The regulating coil is in this instance placed in series with the carbons—that is to say, it is connected up in the main circuit of the lamp. Its action is precisely the same as has already been described in connection with a series of lamps in circuit."

"3. In an alternating current arc lamp a regulating reactance coil in series with the carbons, the said coil having a moving part adapted, when moved to different positions by the magnetic pull of the coil, to cause varying choking effects in the coil, the moving part being acted upon by a force opposing the magnetic pull, which force is so adjusted throughout its effective range of operation as to balance the magnetic pull when the moving part is in positions adapted to produce constant current."

"5. In an arc lamp, a pair of carbons and a regulating reactance coil in series therewith, the said coil having a moving part adapted to increase the choking effect in the coil, a pivoted lever connected to the moving part and a weight on the lever, the connection between the moving part and the lever being made at a critical angle, whereby the varying effects of the weight and the magnetic pull of the coil cause varying choking effects which are adapted to maintain the current constant."

Dated City of New York, February 11, 1902.

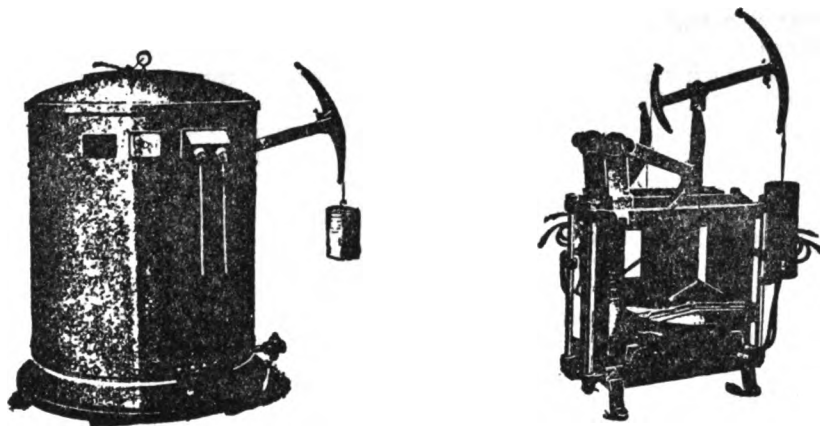
Manhattan General Construction Company,

By G. W. Hebard, President.

Attest: W. A. Esselstyn, Secretary.

cluded without disparagement to that which remains. *Hailes v. Albany Stove Co.*, 123 U. S. 582, 8 Sup. Ct. 262, 31 L. Ed. 284. But the right to disclaim is a beneficial provision, and is entitled to a certain liberality of treatment, and may be made use of to avoid the effect of having embraced more devices than could properly be the subject of one patent (*Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609); or even to remove an ambiguity (*Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 408, 22 Sup. Ct. 698, 46 L. Ed. 968). Matters duly disclaimed thus cease to be a part of the invention, and the patent is to be construed as though they never had been included in it. 22 Am. & Eng. Encycl. Law (2d Ed.) 402; *Dunbar v. Meyers*, 94 U. S. 187, 24 L. Ed. 34; *Schwarzwalder v. New York Filter Co.*, 66 Fed. 152, 13 C. C. A. 380. In the present instance the complainants merely disclaim that Baker, their assignor, was the original inventor of a regulating reactance device, such as is covered by the patent, as applied to a single arc lamp. That is to say, no claim is laid to this as a part of the invention. There is no admission, however, in this that the subject of the disclaimer appears in the prior art, which may not by any means be the case, nor is there any justification for so construing it. It merely takes out of the patent the excided matter, leaving it as though it had never been there. This does not, of course, prevent that which is disclaimed from being identified with anything to be found in the prior art—such as the Spencer lamp, for instance, in the case in hand—with whatever argument may be legitimately drawn therefrom. But there is no sanction for using the disclaimer as evidence that there is any such device in fact, which is the effect sought to be given it here, as to which it does not undertake to speak.

The most important reference has yet to be considered, and that is the General Electric Constant Current Transformer, to which allusion has already been incidentally made, which was installed at Hartford, Conn., in the early spring of 1898, somewhat less than a year prior to the Baker invention. This was the first successful attempt at complete regulation, and it is to-day, in its perfected form, the only kind outside the Baker which has gone into extensive commercial use. As already stated, it is based on the Thomson patent, No. 516,846, and, as observed in that connection, it was not at first provided with anything to vary the force of the counterweight, a detail which was subsequently worked out, but not till after the Baker regulator had made its appearance. Except in this superadded feature it makes use of no principle which is not to be found in the patent referred to, and as that did not anticipate the Baker neither does it. Granting that both are reactance regulating devices, in which a magnetic force is opposed to a mechanical one, and that the two are so correlated in each as to accomplish a generally similar result, the difference between them is nevertheless marked; being one not simply of mechanical construction, but of mode of operation and of type. In the General Electric Transformer, the main or primary current remaining unchanged, regulation is effected, partially, it is true, by reactance or the choking of the current, through increased self-induction in the transforming coils, but principally by varying the pressure of the induced current through a change in the ratio of transformation, as the primary and secondary coils are



repelled from each other under the force of the accumulated voltage. It is to facilitate this result, rather than to secure constancy of current, that the counterbalancing weights, hung upon adjustable eccentric winding surfaces, are employed, the transformer being actually set to give a varying current in the lamp circuit, at different loads, instead of a constant one, increasing or decreasing to meet the changing conditions by the cutting in or out of lamps; while, in the Baker, regulation is accomplished by a direct choking of the current, by means of a reactance interposed in the lamp circuit itself, the whole purpose being to maintain a constant current in the face of a constant potential, all the way from full load to no load, which it effectively does. In matters of detail, also, the two differ materially. In the Baker the choking of the current depends on the relative position of the coil and core, such choking increasing as they are drawn together by the increased magnetic pull produced by the accumulated energy of the current, and decreasing as this is otherwise taken up, and the two are forced apart by the counterbalancing weight; while in the General Electric Transformer the relation between the coils and core does not change, but only that of the coils to each other, the function of the core, which remains equally in the magnetic field of both, being simply to increase their influence upon each other. This influence, moreover, being one of repulsion and not of attraction, requires a delicacy of adjustment, because of its weakness, which is not necessary where the many times stronger force of attraction is employed; and its effective range is correspondingly limited. Where, therefore, the Baker regulator is simple and compact, and, with a marked economy of material, is able to cope with the entire situation from no load to full load, the General Electric Transformer has a tank huge in size, and bursting with mechanism, and still only undertakes to regulate up to 72 per cent. of the number of lamps in circuit. Incidentally also it is to be noted that the variable weight, the original purpose of which was merely to serve as a counterpoise to the coils, is at its maximum effect at full load, where it is at its minimum under the same conditions in the Baker, the two thus working functionally to secure diametrically opposite results. Nor at the outstart

was it a matter of design that, as in the Everest patent, where it is given no function, there should be an upward bend to the arm of the lever which carries the adjustable quadrant or sector, on which in the larger sizes of the transformer the weight is hung, the original purpose of this being so that the sector should avoid striking the tank at its lowest position. Not till afterwards, and after it had been made use of by Baker, was it appreciated that in this form it aided the quadrant in varying the leverage of the weight. Without dwelling further upon the subject, it is thus abundantly established that, as already stated, the General Electric Transformer differs radically from the Baker regulator, however much in a general way, they may seem to proceed along similar lines. The problem presented to each was no doubt the same, but it has been worked out in distinctly different ways; nor is this to be obscured by the fact that magnetic and mechanical forces bearing a resemblance to each other have been made use of and correlated in both, the manner of doing so being by no means the same. Accepting the General Electric Constant Current Transformer as the best product of the prior art, the increased range of effectiveness of the Baker regulator, as well as its simplicity of construction in comparison with the great complexity of the other, is proof of itself of the advance to be found in the latter, even if there were nothing else. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; *National Brake Beam Co. v. International Brake Beam Co.*, 106 Fed. 693, 45 C. C. A. 544; *Boyer v. Keller Tool Co.*, 127 Fed. 130, 62 C. C. A. 244.

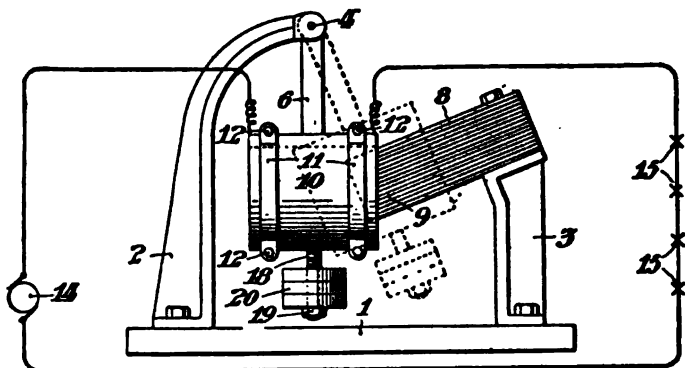
The General Electric Reactive Coil—based in part on the Thomson patent, No. 516,847, *supra*, and in part on the Everest patent, No. 710,050—goes one step further, and adopts as the mechanical force employed a counterbalance lever and variable weight, the reactance device being also in series with the lamps. But the latter consists of two oppositely wound coils, set one above the other, surrounding and movable upon a common core, the repulsion between the coils, the same as in the constant current transformer, being the magnetic force made use of, the core being merely an intermediary between them. But even if this device approached more nearly to the Baker than it does, it adds nothing to the case against it, because it clearly is later in date. The earliest form which it assumed was a small apparatus built for the purpose of experiment, in March or April, 1899, which as late as September of the same year, when the paper of Prof. Robb was read and discussed before the American Institute of Electrical Engineers, had not yet been put into what was considered a successful commercial shape. It is a question just when afterwards this was accomplished, but it is not important to decide; for its first beginnings were admittedly prompted by the coming out of the Baker regulator early in 1899, which the engineers of the General Electric Company endeavored to meet with something of a correspondingly inexpensive character. The visit of Mr. Baker to Hartford at the instance of Mr. Westinghouse, at which time it is claimed that he got his ideas, was prior to this, in November or December, 1898. But even though the conceded purpose of this visit was to inspect the plant of the General Electric Company,



and see how to get around their constant current transformer which was there installed and being displayed, the fact remains that he did so, with a device of his own of distinct character, which, as shown by his letter and sketch to Mr. Westinghouse of December 26, 1898, was almost immediately conceived, and was put into commercial shape, substantially as it now appears, about March 1st following. As the General Electric Reactive Coil was subsequent to and consequent upon this, it needs no further notice here.

There can be no question from this review of the prior art as to the entire novelty and validity of the Baker invention. It is true that the whole field was not open to him, but only an as yet unoccupied and somewhat restricted place in it. There were undoubtedly existing devices of kindred and suggestive character; nor can it be contended that reactance regulation, even as applied to an alternating current for arc lamps in series, and on a continuous as well as a transferred current, was altogether new, nor yet the correlation of mechanical and magnetic forces. What was new, however, was the particular forces selected, taken in conjunction with the way in which they were co-ordinated and combined; and especially in the discovery that a varying gravitational or other like mechanical force could be successfully opposed to the magnetic pull, at different positions of the coil and core of the choking device, and the two so adjusted as to afford with exactness the reactance required to meet changes in the resistance in the circuit, and thus maintain the current constant. This had been only partially and cumbersomely accomplished by others previously, the efforts of the inventor producing that which not only differed in degree of effectiveness but in type. To the extent that he has thus brought about that which is novel and useful he is entitled to the protection of the law, and the only remaining question is whether the defendants infringe.

If the fourth claim on which the complainants rest their case is to be taken as it reads, they certainly do. They clearly make use—in an alternating current circuit, in series with translating devices—of a regulating reactance device, consisting of a coil and core, the coil being suspended at the end of a pivoted arm or pendulum in proximity to the core, which is set above and at an angle to it, the two being so located relatively that the one is calculated to be drawn upward upon the other under the influence of magnetic attraction; the coil or moving part being thus adapted, when moved into different positions by the magnetic pull exerted by the varying energy of the electric current passing through it, to cause varying choking effects, and being itself acted upon in turn by the force of gravity, opposed to the magnetic pull, the one being so adjusted throughout its effective range of operations as to counterbalance the other, when the coil, by the greater or less reactance established by its position on the core, is calculated to produce a constancy of current. This which is exactly descriptive of the defendants' device, is at the same time descriptive also of the invention in suit, as expressed in the claim referred to. Aside, however, from any technical adherence to terms, it requires but little observation to perceive that the inherent principle of the invention has been appropriated by the defendants, with only slightly varying features. That the two are



closely allied is established by one of the defendants' own bulletins, where, after speaking of the Constant Current Transformer, it is said:

"There is still another type of regulator which consists of an impedance coil, in which the impedance is varied automatically by changing its relation to an iron core, this impedance being in series with the lamps. This form of regulator has many things to recommend it. \* \* \* It can be used directly upon the primary circuit without any transformation, if so desired, which would give the system a greater efficiency, and it can be made extremely simple in construction. The Hellos-Upton Company's Regulator is of the last-named type. It consists simply of two coils, which are supported \* \* \* on a pivot above them, so that they can swing up on an inclined U-shaped iron core. These coils are drawn up by their own attraction to such a point that their impedance always keeps the current constant. This is accomplished largely by the weight of the coil as an opposing force, a small weight being used only for adjustment."

Undoubtedly the invention under discussion is to be regarded as residing in a structure of the same general character as that which is described in the specifications, to which the inventor is to be confined. *Diamond Match Co. v. Ruby Match Co.* (C. C.) 127 Fed. 341. But even on the basis that, as the result of this, a lever is a necessary component, this is to be found in the defendants' regulator in the rigid arm on which the coil is hung, the weight of which is practically located between the pivot as a fulcrum and the opposing magnetic and mechanical forces by which it is swung up or down. This makes out a lever of the second class, and it is to be noted with regard to it that it is by the operation of the two forces mentioned upon each other, through it as an intermediary, that the changes in the position of the coil, and its consequent varying reactive effect, is brought about, the same as in the invention in suit. This establishes in both form and function the substantial equivalency of the two. It is only as a critical angle in one arm of the lever is made an essential feature that the defendants are able to escape. This, no doubt, is the form to which prominence is given by the inventor in the specifications, but there is nothing there which of necessity restricts him to it. As was observed with regard to the method patent—although the two stand somewhat differently—all that is shown in the specifications may well be taken as illustrative merely, and not as intended to impose a limitation, other than as just indicated.

Indeed, the inventor expressly declares, speaking on the subject of the force to be made use of to oppose and vary with the magnetic pull between coil and core: "I have discovered that such a force can be applied mechanically in several ways." It is true that he goes on to say: "In the present instance I make use of a compensating lever carrying a weight, \* \* \* and I pivot the said lever at such a point as to form a critical angle between \* \* \* the two parts \* \* \* on opposite sides of the pivot;" and then proceeds to describe at length, by words and diagrams, the method for determining it. But he also states later on: "It is immaterial whether the weight 9 [shown in the drawings, hung from the end of the bent arm], or any other counter-weight or force, is attached to the coil or the core, the relative movement of these two parts being the feature upon which the choking effect depends;" and further adds: "When the compensating lever is attached to the core of the reactance device instead of to the coil (it being assumed that the coil is arranged above the core), the core itself forms part of the mechanical force opposing the magnetic pull of the coil." It is thus not only shown that he had variations to the extent indicated in mind, but that one of these, in which the weight of the core drawn upward by the magnetic pull of the coil above it is utilized as a part of the counter mechanical force employed, approaches very closely, if it does not in fact cover, the defendants' device. It is in the light of this, as well as the rest of the specifications, that the claims must be read; and, the one under consideration having been formulated by the inventor in broad terms, it is not to be cut down to the particular construction in which the critical angle appears, there being enough in the specifications to support it outside of that, especially, also, as that has been made the subject of a separate claim.<sup>a</sup> *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 3 C. C. A. 559; *Smeeth v. Perkins*, 125 Fed. 285, 60 C. C. A. 199; *Boyer v. Keller Tool Co.*, 127 Fed. 130, 62 C. C. A. 244.

It is said, however, that, as shown by the proceedings in the Patent Office, it was only after the amendment of the specifications, by which the method of determining the critical angle was introduced, that the objections of the examiner were removed; and that, having thus been made an element without which the patent would not have been allowed, the invention cannot be carried beyond it. But it is to be observed that while considerable stress was no doubt laid upon this feature in argument there, in response to which the amendment spoken of was introduced, yet this was more for the purpose of making clear the method of fixing the angle on which the inventor relied, which he had referred to as obvious to any one skilled in the art, the examiner evidently not so regarding it. The significant thing is that the claims themselves were not amended to bring in any such limitation, but, after

<sup>a</sup>"2. In an electric circuit, a regulating reactance-coil having a moving part adapted to increase the choking effect in the coil, a number of translating devices in series with the coil, a pivoted lever connected to the moving part, and a weight attached to the lever, the connection between the moving part and the lever being made at a critical angle, whereby the varying effects of the weight and the magnetic pull of the coil cause varying choking effects, which are adapted to maintain the current in the circuit constant."

some intermediate changes involving nothing of this character, were accepted substantially as they were proffered, and without this they are to be taken as they read. *Acme Flexible Clasp Co. v. Carey Mfg. Co.* (C. C.) 96 Fed. 344; *Society Anonyme Usine v. Rehfuß* (C. C.) 75 Fed. 657; *Diamond Drill Co. v. Kelley* (C. C.) 120 Fed. 282; *Boyer v. Keller Tool Co.*, 127 Fed. 130, 62 C. C. A. 244. It was recognized, moreover, by the examiner in his final observations on the case, that the real invention resided in the correlation established between the magnetic and mechanical forces employed and the choking effect of the reactance coil, in a way to produce constant current; and that this was not confined to the method by lever and weight, but was broad enough to extend to a device where a spring was used instead, which hardly comports with the idea that it was only accepted in its special and restricted form.

A point is sought to be made out of the fact, which has already been adverted to, that, while the application was pending for the patent in suit, others were from time to time brought forward covering different forms of similar reactance regulating devices, all being allowed and issued the same day. It is contended that the inventor in this way not only recognized the limited character of the present patent, but himself of necessity set bounds to it, the others being entirely superfluous and redundant if the invention here is of the broad scope claimed. In one of these, the buoyancy of a conical float from which the coil is suspended is made use of, the sides of which curve inwardly in the form of a parabola, and are so graduated as to offer rapidly increasing resistance to the magnetic pull, according to the increased displacement of the liquid into which it is drawn. In another, the opposing force is a specially calibrated spring, on which the coil is directly suspended, or which is attached, in place of a weight, to the other end of an evenly pivoted lever. In a third the counterbalancing weight, in the form of a roller, is attached by a link to the end of a similar lever, and is arranged to slide up and down an incline having a so-called critical curve. In a fourth the weight is suspended on a chain or on links, from the end of a lever, varying effect being thereby given to it, as the other arm is lowered or raised. The fifth has a divided weight, the different parts of which are taken up one by one, as the lever is similarly moved. While in the sixth it is suspended on a sprocket chain, stretched over a pivoted lever, one arm of which is given a critical curve, whereby the effect of the weight is increased or lessened as it is moved up or down. I have gone into these structural details for the purpose of giving full force to the argument, but I am not persuaded that it should prevail. These patents undoubtedly represent different developments of the same inventive idea that is the basis of the one in suit. Not only is this attested by their common purpose and character, but they have identically the same introductory specifications, borrowed from that which we have here. They are to be severally confined of course to that which is portrayed and claimed in each, and do not impinge, therefore, upon the present patent any more than they do upon each other. There is no necessity and no pretense, as seems to be assumed, of so broadening it that they will do so. Confining it, as we admittedly must, to a structure of the same general character as is described and sustained by the

specifications, the defendants, for the reasons already given, are nevertheless found within it, and therefore infringe.

Let a decree be drawn in favor of the complainants in accordance with the views expressed in this opinion, and referring the case to a master to take an account.

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NATIONAL PHONOGRAPH CO. v. AMERICAN GRAPHOPHONE CO.  
(two cases).

(Circuit Court, D. Connecticut. March 17, 1905.)

Nos. 1,076, 1,103.

1. PATENTS—INFRINGEMENT—PROCESS FOR DUPLICATING PHONOGRAPHIC RECORDS.

The Edison patent, No. 713,209, for a method of producing hollow cylindrical phonograms, is limited to the process of making such records by expanding the blank placed within the mold, and is not infringed by a casting process.

2. SAME.

The Edison patent, No. 667,662, for a process of duplicating cylindrical phonographic records, is entitled to only a narrow construction in view of the prior art, and, as so construed, is not infringed by the process of the McDonald patents, Nos. 682,991 and 682,992.

In Equity. Suits for infringement of letters patent No. 667,662, dated February 5, 1901, and No. 713,209, dated November 11, 1902, both granted to Thomas A. Edison for processes for duplicating phonographic records. On final hearing.

Dyer & Dyer and F. H. Betts, for complainant.

Philip Maurc and C. A. L. Massie, for defendant.

PLATT, District Judge. The two patents in suit relate to processes for duplicating phonograph records. The title to them is in the complainant, and it is alleged that they are infringed by the defendant.

In case 1,076 the patent in suit is No. 667,662. This was granted February 5, 1901, but the application therefor was filed May 8, 1900. In case 1,103 the patent in suit is No. 713,209. This was granted November 11, 1902, but the application therefor was filed March 5, 1898. It will be seen that the later patent relates to the earlier application. The alleged infringement arises in both cases from the use by the defendant of the same process of manufacture. The issues in each case are practically the same, and the two patents are so closely related that our burdens will be lessened by considering them together, and when they enter the art to treat the earlier application as the first approach.

It is claimed by complainant that the earlier application resulting in patent in suit 1,103 relates to a broader matter than the later application resulting in patent in suit 1,076. In short, that the "hollow cylindrical phonogram" may, under the process shown in patent in suit 1,103, be formed by casting, dipping, or expanding, while under patent in suit 1,076 it must be formed by casting; one being the genus, the other the species—but this is parenthetical. It is believed that the

most searching analysis will fail to discover any defense which has been neglected by defendant's counsel. The cases undoubtedly invited such treatment, but the court is content to merely suggest some of the considerations which seem to warrant the conclusions finally reached.

And now let us step, as best we can, into the patentee's shoes, and find whether, in the particular branch of the art at which he aimed when he sought these patents, he did, by the exercise of inventive genius, add anything to the then existing common stock of knowledge. The graphophonic art may be said to have fairly begun with the invention of Bell and Taintor, letters patent No. 341,214, dated May 4, 1886. This taught the public how to produce the commercial and transferable sound record. It led at once to an anxious search for a mold and material and method for producing a large quantity of satisfactory duplicate records of unvarying and excellent quality. On the same date Taintor told how records could be duplicated by so using plumbago as to make an electroplated matrix, and then copying the master record by mechanism. The trouble with mechanical duplication, however, is that, after a few copies have been produced, the master record becomes so worn that later duplicates are imperfect, and it was still, therefore, very important to find a way of making an unlimited number of accurate duplicates in a mold. To cast divers kinds of materials in molds was a long understood practice, and it was obvious that, if the ancient art of casting could be made serviceable in the matter of producing good records, the ideal method would be reached. In using molds, when the article to be produced was spherical, it is evident that the mold must be divided; but when the article is not spherical, and if the molten material is of such a character that upon cooling it contracts, then a continuous mold can be used. It will be conceded, I think, that casting waxlike materials in continuous molds to obtain blanks, which, after shrinking, could be withdrawn lengthwise, was not a very difficult matter, and was thoroughly developed long before either patent in suit. Such was the state of affairs when the search for the "ideal" in the matter of duplicating sound records was taken up.

Passing by some slight suggestions which can be found in English and American patents, it is well to come at once to Mr. Edison's patent No. 484,582, dated October 18, 1892, generally known as the "split mold" patent. This confessedly discloses everything which the patent in suit for a casting process discloses, except the longitudinal extraction from a continuous mold. At the date when the application for the 1892 patent was filed—January 5, 1888—it may well be that the waxlike substance with suitable contractile power had not been found; but on October 18, 1892, soap compositions, with low melting point and high coefficient of expansion and contraction, had become well known, and were in general use. Mr. Edison was after a practical process, and confessedly the use of the split mold was not practical, because of the fins or burrs made by the seams; and it is equally clear, since the soapy combination then known would contract sufficiently in cooling, that the continuous mold was a practical thing, except for other troubles.

Lioret's United States patent No. 528,273, October 30, 1894, and Young's British patent No. 1,478, January 23, 1894, are of importance,

because they deal with the duplication of sound records, rather than blanks. Lioret softens a celluloid ring by plunging it in hot water, then forces a mandrel into the ring large enough to push the softened celluloid into all the cavities of a mold, then by plunging the whole into cold water permits the celluloid to harden and at the same time to contract enough so that it can be easily withdrawn from the mold by unscrewing. He also shows that very slight contraction permits the unscrewing. Young, using a continuous mold and a thin strip of celluloid, collapsed the strip after impressing it by expanding, and then withdrew it longitudinally. By using a material then well known in the art, with a higher coefficient of expansion and contraction, it would seem that the necessity for collapsing would have been obviated. Appelt (No. 303,976) describes the casting of rollers in a cylindrical mold and allowing the material to congeal, so that the roller will easily come out of the tube in consequence of the shrinkage "which all compounds composed principally of gelatine and of glycerine undergo." Day (No. 563,572) describes the casting of a printer's roller, and by the introduction of cool air causing it to shrink at the inner surface, and withdraw itself from the outer tube, when it may be removed from the tube. It is true that these are in another art, but they disclose quite as plainly as any of the former citations that, if a proper material is provided, it is easy to cool it to the point where the inevitable contraction permits its longitudinal extraction from a continuous mold. Long prior to the patents in suit it was known that certain waxlike materials had the property of contracting when cooled. Mr. Edison's patent No. 382,417, dated May 8, 1888, specifically refers to that quality. He was then engaged in showing how, by the use of an exceedingly smooth die, a satisfactory blank could be produced, upon which engraving could proceed at once without cutting. There is no way of extracting the finished blank from the solid die, which he offers as one form, except to take advantage of that quality of contraction to which he referred in connection with the effect of cooling upon the wax in the mold.

To understand the entire matter, it is necessary to know the distinction between blanks and sound records. Blanks are made by a process which only differs from that used in making records in one respect. The blank must come out of the mold with a smooth surface upon which to engrave the tiny indentations which assist in repeating vocal or instrumental sounds to the ear, but the record must come out of the mold with those tiny indentations already impressed thereon. The one process would, therefore, seem not only to be analogous to the other, but the two would seem to be so interwoven as to be really a part of the same art. Except for the one difference explained, every step in each process is the same; the molds, the materials, and the product the same; and in each case the product is intended to take, and does take, an exact impression of the mold in which it is formed. Long prior to the application of March 5, 1898, Mr. Edison had put the casting process aside, and was using the expanding process, throwing now and then, it is true, a longing glance at his "ideal method"; but it requires a considerable stretch of the imagination to accept the proposition that

with this application he had suddenly returned to his first love. It is believed that such return is shown in the second application, for that process is plainly a casting process. It makes no difference whether one pours the mixture into the mold from the top or draws it up from the bottom. As a characterization of a process the words "casting" and "dipping" cannot be distinguished.

No. 1,103.

Into an art, then, the condition of which has been somewhat meagerly set forth, comes the patentee with his application of March 5, 1898, which, after long hindrance, emerged from the Patent Office as No. 713,209, dated November 11, 1902. Claims 2 and 3 are in issue:

"(2) The method of producing hollow cylindrical phonograms, which consists in obtaining a mold having a reverse phonogram-record on the inner wall of a cylindrical opening, forming a hollow cylindrical plastic phonogram within said mold, releasing the phonogram from the mold by a radial contraction of the phonogram sufficient to entirely clear the surfaces, and removing the phonogram from the mold by direct longitudinal movement.

"(3) The method of producing hollow cylindrical phonograms which consists in obtaining a mold having a reverse phonogram-record on the inner wall of a cylindrical opening, forming a hollow cylindrical plastic phonogram within said mold, releasing the phonogram from the mold by a reduction in temperature sufficient to entirely clear the surfaces, and removing the phonogram from the mold by direct longitudinal movement."

I can find nothing in the specifications which even hints at the soundness of the proposition that the words found in claims 2 and 3, "forming a hollow cylindrical plastic phonogram," cover the casting process. At the outset, it is admitted that it cannot be found in any other of the 18 claims. Then going to the specifications, the blanks to be used are referred to on the second page, beginning at line 8. They must be thick enough to maintain their shape. The diameter must be, at normal temperature, slightly less than the bore of the mold, so that it can be inserted. At line 18 begins this significant language:

"After the blank has been thus placed within the matrix or mold, both the matrix and the blank contained therein are, or the blank alone is, brought to a higher temperature, whereby the blank will expand and will be brought into intimate contact with the record-surface of the matrix or mold, whereby the negative record thereof will be impressed with absolute accuracy upon the surface of the blank."

Beginning at line 43, he states that he prefers to introduce a tapering mandrel within the blank after the blank has been placed in the mold "and heat applied to the blank." In line 84 he informs us that the degree of heat necessary to properly expand the blank will depend largely upon the material used, and upon the closeness of fit of the blank "when inserted" within the mold. From line 124, and on, he described the specific blank as "preferably provided with a tapered bore," and as "turned down so that it may be inserted" within the mold "with a close fit," and as of a "sufficient thickness to maintain its shape." The history of the application in the Patent Office also leads to the same conclusion. It strikes me as impossible to construe this patent as indicating anything except the



expanding process, and, if this be so, it is conceded that defendant's casting process does not infringe. And this is the alleged broad patent under which the complainant seeks to dominate the art of producing molded duplicates, no matter how they are produced.

No. 1,076.

After the Patent Office had devoted nearly two years of labor toward the parturition of the alleged invention which has just been discussed, another application was filed May 8, 1900, upon which letters patent No. 667,662 were issued, dated February 5, 1901. And claims 1, 2, 4, and 5 are in issue:

"(1) The process of duplicating cylindrical phonographic records, which consists in first making an original record with a spiral record-groove of greater pitch than that desired on the duplicate to be produced, then in making a hollow cylindrical matrix or mold from said original record, carrying the record in negative on its bore, and in finally making duplicate records from the matrix or mold by introducing therein and engaging therewith material maintained in an abnormally high temperature, whereby the cooling of such duplicate will contract the pitch of the record-groove, as and for the purposes set forth.

"(2) The process of duplicating phonographic records, which consists in securing a mold containing the record in negative on its bore, in introducing a molten material in the mold to receive a surface impression from such record, in allowing the molten material to set, in contracting the set material, and in separating the contracted molded material by a longitudinal movement, substantially as set forth."

"(4) The process of duplicating cylindrical phonograph-records, which consists in forming a cylindrical mold with a record in negative on its bore, in introducing a molten material in the mold to form a cylindrical duplicate, in allowing the duplicate to set, in contracting the duplicate, and in removing the contracted duplicate by a direct longitudinal movement, substantially as set forth.

"(5) The process of duplicating cylindrical phonograph-records, which consists in forming a cylindrical mold having the record in negative on its bore, in introducing molten material in the mold around a core, whereby a hollow cylindrical duplicate will be formed, in allowing the molten material to set, in contracting the molten material, and in withdrawing the contracted material from the mold by a direct longitudinal movement, substantially as set forth."

To introduce molten material into a mold; to allow it to congeal therein, thereby taking the impression of the inner surface of the mold; and to then remove it from the mold—is the ancient art of casting, and is the foundation of this patent in suit. If there is any invention here, it must be contained within a very narrow scope. My view of the art, which includes therein the casting of cylinder blanks, narrows the matter still more. For years it had been common to cast the same waxlike material in continuous cylindrical molds, and, after it had been cooled, and thereby sufficiently contracted, to withdraw the product longitudinally from the mold. The complainant is forced by the admitted facts of the prior art to contend that in one respect, at least, an inventive glimmer did shine out, and what will be now discussed applies to both patents in suit. The argument is that it is unimportant how much was known about pulling other products straight out of a continuous mold, because it remains true that no one had taught us how to remove longi-

tudinally a phonogram covered with such an infinitesimal number of exceedingly minute indentations. This is the glorious contribution to the art for which Mr. Edison receives such adulation from expert and counsel. It is suspected that their enthusiasm causes them to lose sight of the admitted fact—that very little radial contraction is required to produce a sufficient separation to permit the straight pull. The necessary contraction is about as infinitesimal as the marks on the mold, and it would seem that a contraction sufficient to remove any casting from any continuous mold would serve to get this casting out of this mold in the way suggested.

Air bubbles in the melted material drove Mr. Edison away from casting for many years, but in this patent he reverts to casting, and avoids air bubbles by introducing the melted wax from the bottom upwardly into a very cold mold, so as to produce an almost instantaneous chilling of the wax. Defendant undertakes to get rid of the air bubbles by superheating the melted wax after it has been poured into the mold at the top, and then proceeds to suddenly chill it down from its high temperature. This is done under letters patent Nos. 682,991 and 682,992, September 17, 1901. Mr. MacDonald discovered that he could do this when molding blanks in 1896. The superheating and sudden chilling produced a very hard surface, not suitable for blanks, but excellent for duplicate records, and this knowledge led directly to the defendant's patents. It is important that the patent in suit was not interposed in interference by the Patent Office. The presumption of novelty in defendant's patents is exceptionally forceful when we consider that men so painstaking as Mr. Edison, and so vigorous as his counsel, must have been in full possession of all the facts, and quite able to impress their views upon the office. Mr. Edison eliminates air bubbles by one process, and the defendant eliminates them by another and distinctively novel process.

The lions in the path at the time of the split mold patent are all, except one, disposed of. The minute indentations were at one time too deep, and for a variety of reasons prevented a practical casting process; but this trouble vanished when Edison invented the curved-edge recorder, which avoids the deep cutting into the record which had been necessary before that time. The defendant has the benefit of the curved-edge recorder patent.

If you have a material, which, after cooling, contracts radially and longitudinally, thus becoming detached and separated from the mold without breaking, it is a simple and obvious act to lift it directly and safely out. Before this can be done, however, you must have the right material, and the indentations imprinted by the mold must be of a certain kind. So it follows that if, after lifting it out, the product is a commercial failure, the fault must be either in the material or in the impressions, and it appears that these difficulties were obviated by other brains than the patentee's.

Only a word about claim 1. It contains a self-adjusting device, which has the peculiar faculty of shifting its position, so as to catch an unwary defendant in its clutches, no matter how much pains he may take to escape. Whatever pitch one desires on the duplicate

will, of its own motion, cause his destruction. The shrinkage rule removes any lingering suggestion of novelty in the claim.

The foregoing is an imperfect sketch, thrown together in the midst of divers harassing problems, raised by a variety of other situations in other matters; but it is believed that it contains at least a faint suggestion of the reasons which have forced me to my conclusions. A considerable portion of the mine remains, from which much value can be extracted to aid the defendant. It has been explored, but I refrain from further exploitation.

Let the bills in both cases be dismissed.

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CHISHOLM et al. v. RANDOLPH CANNING CO.

(Circuit Court, E. D. Wisconsin. December 15, 1904.)

1. PATENTS—ANTICIPATION—METHOD OF HULLING PEAS.

The Chisholm patent, No. 421,244, for a method of hulling peas, *held* valid, as against the claim of anticipation by the Faure French patent of May 15, 1883, and the first certificate of addition thereto—it being shown that the Faure machine is incapable of performing the operation of hulling by impact, which is the method of the Chisholm patent; also, *held* infringed.

In Equity. On final hearing of bill alleging infringement of letters patent No. 421,244, issued to Chisholm & Chisholm February 11, 1890, for a "method of hulling peas."

Gustav Bissing, for complainants.

R. S. Taylor, for defendant.

SEAMAN, District Judge. The patent in suit discloses means and process for hulling peas which have entered into general use, and given great impetus to the pea-canning industry in this country. With its utility and importance as an advance in that art conceded, the validity of the patent is assailed upon the ground of anticipation by the French patent of Mme. Faure, and its "first certificate of addition" (1883); and the majority opinion of the Circuit Court of Appeals in the Johnson Case, 115 Fed. 625, 53 C. C. A. 123, sustains this contention. The fact appeared in the Johnson Case, and is uncontroverted in the present record, that the hulling of green peas for commercial uses had long been attempted by various machines, but none had proved successful prior to the device of the Chisholms, for which letters patent No. 421,244 were granted, so that substantially all hulling in the canning factories was carried on by hand labor. The patented device was for a method of hulling by impact with beaters, moving at a fixed and moderate speed, so arranged that the pods dropping upon the beaters were struck with sufficient force to burst the pods by means of the air contained therein, without injury to the tender berries. This method solved the problem, entered into general use, and the machine performs the labor of many hands with excellent results. In the face of this history, patentable invention can be denied only upon convincing proof

that the patentees were clearly anticipated in their disclosure of this useful conception. But if such anticipation appears, it is unquestionable that no monopoly can be granted for the process thus brought into commercial use.

The decision referred to rests on this deduction in reference to the Faure patent, as stated in the opinion:

"The great fact is that she (Mme. Faure) devised and described a machine for hulling green peas, capable of operating by impact, and incapable of operating (at least, to any considerable extent) in any other way. The organization of the Faure machine, and the speed of its beaters, are such as to render hulling by abrasion practically impossible. In the nature of the case, the operation of the Faure machine is by impact. This is the principle of the apparatus."

If the Faure disclosures are of the effect thus premised, no escape would appear from the conclusion there reached against the validity of the patent. Proofs are furnished, however, in the present record—which were entirely wanting in the Johnson Case—of repeated experiments with a Faure machine, wherein it was practically demonstrated that it was not adapted to perform the patent operation of hulling by impact. While it is true that the resemblance in the general form of the machines is striking, it is obvious from the descriptions given by Mme. Faure that she had no conception of the impact method which was discovered by the Chisholms. As it now appears that her device is incapable of its practical performance, I am of opinion that it constitutes no bar to the claims of invention in the Chisholm patent.

Upon the oral argument I was interested in the question thus involved, and have examined the testimony with care, and the briefs submitted thereupon. My inclination was to review both devices, in an opinion expressing my views as the basis of a decree, but other duties interfered before the final briefs came to hand, and I deem it just to all parties to enter decree in conformity with these conclusions, without further remarks upon the validity of the patent.

The defendant's "viner" machine plainly infringes the patent, upon the construction thus adopted, as I view the testimony, and decree will pass upon the bill accordingly.

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**CHISHOLM et al. v. OANASTOTA CANNING CO.**

(Circuit Court, N. D. New York. February 3, 1905.)

No. 6,940.

**PATENTS—ANTICIPATION—METHOD OF HULLING PEAS.**

The Chisholm patent, No. 421,244, for a method of hulling peas, held not anticipated, valid, and infringed.

In Equity. The bill of complaint herein alleges infringement of United States letters patent No. 421,244, granted February 11, 1890, to Charles P. Chisholm and John A. Chisholm, for improvements in the method of hulling peas.

Gustav Bissing (of counsel), for complainants.  
R. S. Taylor, for defendant.

RAY, District Judge. The main defense relied upon by the defendant is that the patent was anticipated by a French patent to Mme. Faure, and its first certificate of addition in 1883. In the case of *Chisholm et al. v. Johnson*, in the Third Circuit, the question was up, and the Circuit Court found that the patent in question here, granted to Chisholm & Chisholm, was valid, and had not been anticipated, and also found infringement. See *Chisholm v. Johnson*, 106 Fed. 191. The Circuit Court of Appeals reversed that decision, holding that anticipation had been shown. See 115 Fed. 625, 53 C. C. A. 123. In that case, Gray, J., dissented. This court would be inclined to follow the decision in the Johnson Case, Third Circuit, if the decision of this case rested upon the same evidence adduced in the Johnson Case. Such is not the fact. Considerable additional evidence is presented by the record in the case before this court, and the conclusion is inevitable that the decision of the Circuit Court of Appeals in the Johnson Case would have been different, had the additional evidence now produced been before it.

Since that decision was rendered, these same questions have been up in the United States Circuit Court for the Eastern District of Wisconsin (*Chisholm et al. v. The Randolph Canning Co.*, 135 Fed. 815), and also again in the Circuit Court of the United States for the District of Delaware (*Chisholm et al. v. Fleming & Fleming*, 133 Fed. 924). The evidence now before this court was there presented. In the Randolph Canning Co. Case, Judge Seaman has written quite an elaborate opinion, affirming the validity of the patent, finding infringement, and holding no anticipation. In the Fleming Case, above mentioned, Judge Bradford has written an elaborate opinion, quoting largely from the dissenting opinion of Judge Gray; and he sustains the patent in suit, and holds infringement, and also holds that the Faure patent was not an anticipation.

I have examined carefully the opinion of the Circuit Court of Appeals in the Johnson Case, and these later opinions of Judges Seaman and Bradford, also the record before the court in the Johnson Case, and the additional evidence produced in the case at bar, and concur in the recent opinions of Judges Seaman and Bradford. These opinions will undoubtedly be reported, and it is therefore unnecessary for this court to go into details, or give at length reasons for its opinion. This court had the impression on the argument that the Faure patent did not anticipate the patent in suit, and was also of the opinion that infringement was clearly shown. The later examination given the case at different times, and a consideration of the opinions referred to, have confirmed those impressions. The Faure invention was not designed or intended to shell peas by impact. It was not constructed for such a purpose. It was intended to shell peas by abrasion, and did. If any of the peas were shelled by impact, such shelling in that mode was incidental, and we might say accidental. The construction of the machine prevented the shelling by impact of any considerable quantity of the peas put in the machine. It is, of course, true that Mme. Faure was entitled to have her machine considered an invention for the

shelling of peas by impact, if it shelled peas in that mode, even though she did not know the fact, and supposed the shelling was done by abrasion. The truth is that her machine was what she supposed it to be, and was not a machine that operated to shell peas by impact, as does the defendant's. The construction of the two machines is different, the operation is different, the results—that is, the effects upon the pea pods—are different.

I find and hold that the complainants' patent in suit is valid, and was not anticipated. I also find infringement by the defendant. The complainants are entitled to a decree accordingly, with costs.

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COURTNEY v. PRADT et al.

(Circuit Court, E. D. Kentucky. January 19, 1903.)

**FOREIGN EXECUTORS—ACTIONS AGAINST.**

In the absence of statute expressly authorizing suit to be brought against a foreign executor, such an executor, not having taken any steps to collect nonresident assets, cannot be sued in a state other than that wherein he was appointed.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2344.

Citizenship of executors and administrators as affecting jurisdiction of federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 252.]

W. B. Dixon, for plaintiff.  
R. D. Hill, for defendants.

COCHRAN, District Judge. This is a suit by a creditor of a partnership, one of whose two members is dead, against his executor and the surviving partner, seeking to obtain payment of his debt. Both defendants are nonresidents of this state, and were so when the suit was brought. The decedent was likewise a nonresident at the time of his death, and the defendant executor was appointed and qualified as such in the state of decedent's domicile, to wit, the state of Wisconsin. The suit was brought originally in the Powell circuit court, and has been removed to this court by the defendants on the ground of diversity of citizenship. Each defendant was brought before the state court by constructive service of process, and neither entered his appearance to the suit. An attachment was sued out and levied on stock owned by the decedent in a Wisconsin corporation doing business in this state, and an indebtedness on the part of said corporation to him, by serving the writ of attachment upon its agent in this state, designated in accordance with the requirement of section 571, Ky. St. 1903. It was not levied upon any property of the surviving partner, the other defendant. It is therefore a suit to subject the stock in and claim against said foreign corporation to the payment of said indebtedness by means of this attachment.

The defendants move to dismiss the suit because its predecessor, the state court, acquired no jurisdiction, by virtue of the proceed-

ings had therein, of the subject-matter of the suit or the persons of defendants. It is certain that the state court had no jurisdiction so far as William C. Atwater, the surviving partner, was concerned, unless it had jurisdiction of the suit as against the foreign executor of the deceased partner. It is not alleged that William C. Atwater has any property in this state, and the attachment has not been levied upon any property of his, save so far as he may be interested in the property levied on as the property of the deceased partner. The suit should be treated, therefore, as if it were a suit against the foreign executor alone.

It is claimed by defendants that the state court acquired no jurisdiction of the suit so far as said defendant was concerned, upon two grounds. One is that, by reason of the fact that the garnishee is a foreign corporation, the decedent's stock in and claim against it is not subject to attachment and subjection to payment of plaintiff's indebtedness against the partnership in the courts of the state. The case of *N. J. Sheep & Wool Co. v. Traders' Deposit Bank*, 104 Ky. 90, 46 S. W. 677, seems to support defendants' position as to the stock, and the case of *Pittsburg, C., C. & St. L. Ry. Co. v. Bartels*, 21 Ky. Law Rep. 1670, 56 S. W. 152, seems to be against their position as to decedent's claim against the foreign corporation. The case is attempted to be distinguished from this case on the ground that the foreign corporation there had property in this state, and had been served with the writ of attachment in accordance with section 203 of the Civil Code, whereas the foreign corporation here has no property in this state, and was served with the writ of attachment in accordance with section 571, Ky. St. 1903. To say the least, I doubt whether either or both of these considerations are sufficient to differentiate that case from this, and there is room for claiming, irrespective of that case, that, if the state court has jurisdiction of a suit against a foreign corporation on behalf of decedent or his estate, it also has jurisdiction of a suit on behalf of a creditor of decedent seeking to subject decedent's claim against the corporation to payment of his debt, or, in other words, that the fact that the foreign corporation is liable to be sued in this state was sufficient to give its indebtedness a situs in this state for purpose of garnishment in the courts thereof. I do not find it necessary to commit myself further as to this ground upon which it is claimed by defendants the state court had no jurisdiction of this suit.

The other ground is that, because the claim garnished is a decedent's estate, it was not subject to attachment. I confess that at first I was clearly of the opinion that the position was well taken. The argument of counsel for plaintiff, however, has a tendency to bring me to the conclusion that it is not. It is that the statutory provisions requiring a ratable distribution of a decedent's estate amongst his creditors do not have the effect of prohibiting a creditor from suing and obtaining an attachment before judgment and execution after judgment by which he will secure a preference. The only way in which such preference can be prevented is by suit

in equity to settle the estate, and an injunction against the institution or prosecution of such a suit. As to the correctness of the contention of plaintiff's counsel in the particular, I do not find it necessary to commit myself. Likewise as to his contention that without an attachment plaintiff had a right, upon constructive service alone, to subject the foreign corporation's indebtedness to payment of plaintiff's claim. It would seem, however, that, if this is so, the foreign corporation should have been made a defendant. And, as bearing on the question, see Judge Bullitt's note to section 418 of the Civil Code.

The reason why I have not found it necessary to dispose of these contentions of counsel more definitely is that there is one ground upon which it can be claimed, without question, the state court had no jurisdiction of the suit as against the defendant executor, and hence not at all, and that ground is that he is a foreign executor. The law in regard to the right of foreign representatives of decedent's estate to sue and be sued in other jurisdictions than those in which they were appointed is thus stated by Mr. Justice Story in *Vaughan v. Northrup*, 15 Pet. 1, 10 L. Ed. 639:

"It has become an established doctrine that an administrator appointed in one state cannot in his official capacity sue for any debts due to his intestate in the courts of another state, and that he is not liable to be sued in that capacity in the courts of the latter by any creditor for any debts due there by his intestate."

This law has been recognized and applied in this commonwealth. Because of it, it has been held that a foreign personal representative could not sue to recover a debt due the decedent without complying with the terms of sections 3878 and 3879, Ky. St. 1903 (*Marratt v. Babb*, 91 Ky. 88, 15 S. W. 4), and that a foreign personal representative could not sue at all in this state to recover an asset of the estate which did not constitute a debt due the decedent (*Maysville St. R. R. & T. Co. v. Marvin*, 59 Fed. 91, 8 C. C. A. 21; *L. & N. R. R. Co. v. Brantley*, 96 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 291). That a suit cannot be brought in this state against a foreign personal representative is expressly decided in the case of *Baker v. Smith*, 3 Metc. 264. It is true that this suit is against him to subject an asset claimed to have a situs in this state. But that can make no difference. The resident creditors of a nonresident decedent have ample provision made for subjecting assets having a situs in the state to the payment of their debts. They can obtain administration on the decedent's estate in this state, and thereby so subject those assets. And the foreign personal representative cannot sue at all for some, and for those for which he can sue he is required to give bond that will protect local creditors. It is therefore not necessary, in order to protect them, that such a novel proceeding as a suit against the foreign personal representative should be upheld. I am not aware of any authority justifying such a proceeding.

It seems to me, therefore, that the motion to dismiss the suit because of want of jurisdiction in the state court to entertain the suit should be sustained. There is no doubt that, if such want of juris-



diction exists, this court has the power to dismiss the suit. I am not bound to remand the case and let the state court determine the question. By reason of the diversity of citizenship and compliance with the removal statutes, this court has acquired the right to determine that question and to act accordingly.

But it is contended by counsel for plaintiff that the case was not removable within the principles applied in the case of *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804, and should therefore be remanded. He has made motion to that effect upon this idea. But this case does not come within the case of *Cates v. Allen*. That was a suit in a state court of Mississippi, brought by a creditor attaching an alleged fraudulent conveyance of his debtor. He had not obtained a judgment and return of no property found. A statute of Mississippi authorized the suit without such preliminary return. A suit in equity cannot be brought without it. The case was removed to the federal court. It was held by the Supreme Court that the case should be remanded, because it was not a suit in equity within the removal statute, and the state court under the statute had jurisdiction of it. If such a suit as that brought herein is maintainable, it is a suit at law. The mere fact that an attachment is sued out in it does not make it a suit in equity. The early attachment statutes of Kentucky may have provided that the suit should be in equity. But the present attachment statutes do not so provide, and they more frequently find application in actions at law than in suits in equity. And, even if it were a suit in equity, the Case of *Cates v. Allen* is not an authority against the position that the federal court would have jurisdiction in equity in such a case. It would seem to come within the case of *Holland v. Challen*, 110 U. S. 15, 3 Sup. 495, 28 L. Ed. 52, and similar cases.

The motion to remand is therefore overruled.

As the position taken in regard to this being a suit against a foreign executor, and hence not maintainable, has not been considered by counsel for plaintiff in his brief, he will have an opportunity to be heard in regard thereto, if he so desires.

Counsel for plaintiff have availed themselves of the leave granted them in the former opinion to be heard as to the position taken therein that this suit cannot be maintained because it is against a foreign executor, and contend that that position is not well taken. In support of their contention they cite the following decisions of the Court of Appeals of Kentucky, to wit: *Keiningham v. Keiningham*, 71 S. W. 497, and *Davis v. Connelly's Ex'r*, 4 B. Mon. 136; and the following decisions elsewhere, to wit: *Laughlin v. Solomon*, 180 Pa. St. 179, 36 Atl. 704, 57 Am. St. Rep. 633; *Tunstall v. Pollard's Adm'r*, 11 Leigh, 1; *Marcy v. Marcy's Ex'r*, 32 Conn. 308; *Brown v. Knapp*, 79 N. Y. 140; *Lake v. Hardee*, 57 Ga. 467; *Bank of Mobile v. McDonald*, 22 Ala. 476; *Cady v. Bard*, 21 Kan. 667; *Lewis v. Reed*, 11 Ind. 242; *Mitchell's Lessee v. Eyester*, 7 Ohio, 257, pt. 1. The cases of *Mitchell's Lessee v. Eyester*, 7 Ohio, 257, pt. 1, *Cady v. Bard*, 21 Kan. 667, and *Bank of Mobile v. McDonald*, 22 Ala. 476, are not applicable here, because in each instance

there was a statute in the state where the case arose and was decided authorizing a suit against a foreign executor or administrator.

In the Kansas case the statute was in these words:

"An executor or administrator duly appointed in any other state or country may sue or be sued in any court in this state in his capacity of executor or administrator, in like manner and under like restrictions as a nonresident may be sued."

In the Ohio case it was in these words:

"In the case of a debtor residing out of the state the writ of attachment as above provided may issue against his heirs, executors, or administrators."

In the Alabama case it was in these words:

"And in case of the death of any debtor residing out of the limits of this state, having lands or other property therein, the creditors resident within the state shall in like manner be entitled to recover by attachment against the executors and administrators."

The Ohio and Alabama statutes do not as plainly as the Kansas statute authorize a suit against a foreign executor or administrator, but there is no room for question but that those statutes were intended to, and did, authorize suits against foreign executors and administrators. There is no such statute in this state, and it is not contended that there is. Those three cases, therefore, have no application here.

In the case of *Lewis v. Reed*, 11 Ind. 242, a suit was brought against a nonresident of Indiana, who had been appointed administrator in this state, in his individual capacity. In the course of the opinion the court say:

"Another position is taken by counsel in the case, viz., that *Lewis* should have been sued, if at all, as administrator, and not in his individual capacity. A foreign administrator is liable to be proceeded against by attachment, and perhaps the complaint in this case might well be regarded as against *Lewis* in that capacity."

It is evident from this that there was a statute in Indiana authorizing a suit against a foreign administrator by attachment; so that, if that case had involved a suit against a foreign administrator in his capacity as such, it would have to be classed with the three cases just considered, and held to be nonapplicable here.

The case of *Brown v. Knapp*, 79 N. Y. 140, was a suit in New York by a legatee against an executor of a Connecticut testator, who had qualified as such in that state, but who resided in New York, to whom a devise had been made, coupled with an obligation to pay the legacy and interest thereon, to recover the interest. It was held that the executor was individually liable for the legacy and the interest thereon, and the fact that he was sued as executor could be ignored, and the suit treated as against him individually. This case certainly has no applicability here.

The cases of *Lake v. Hardee*, 57 Ga. 467, *Tunstall v. Pollards* Adm'r, 11 Leigh, 1, and *Laughlin v. Solomon*, 180 Pa. 179, 36 Atl. 704, 57 Am. St. Rep. 633, were all cases of suits against foreign executors who had removed to the state where the suits were instituted, and brought with them assets collected in the jurisdiction

where appointed, and were liable for assets so collected. In the Georgia case the executor was also trustee under the will, and was sued as trustee, though he was treated as if sued as executor. There are other decisions to the contrary of this, as, for instance, *Peterson v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298, and *Hedenberg v. Hedenberg*, 46 Conn. 30, 33 Am. Rep. 10.

As to the weight of authority on this proposition, it is stated in *Minor, Conflict of Laws*, 236, that:

"If an administrator, appointed in one state, removes with the assets of the estate into another state, the courts are divided upon the question whether or not the decedent's creditors may sue the administrator in the latter state without a reappointment, the weight of authority seeming to favor the right of the creditors to sue. But if the administrator should only come into the state transiently or temporarily, the better opinion would seem to be that no action will lie against him there without a new appointment."

The ground upon which the right to sue the foreign executor in such a state of the case is based is necessity. As the foreign executor has removed to the state where suit is brought, having wasted the assets collected in the foreign jurisdiction, or brought them with him, if he cannot be sued there, he cannot be sued at all. In the Virginia case Judge Tucker said:

"Upon a full review of the whole subject, I am of the opinion that justice, convenience, and necessity require a recognition of the right to sue an executor who has qualified abroad, if he comes within the jurisdiction bringing the assets with him."

The Kentucky case of *Keiningham v. Keiningham*, 71 S. W. 497, and the other Kentucky cases cited in the opinion in that case, are all cases of the same sort; and Mr. Minor cites the cases of *Atchison v. Lindsey*, 6 B. Mon. 86, 43 Am. Dec. 153, and *Embry v. Millar*, 1 A. K. Marsh, 300, 10 Am. Dec. 732, along with others, as justifying his statement that the weight of authority is in favor of the right to sue in such a case.

If necessity is the ground of suit in such a case, the pendulum of authority might well swing to the other side, if the executor sued is only transiently or temporarily within the state, as Mr. Minor states it has done. And, if such is the ground of the right to sue in such a case, authorities holding that a right to sue exists in such a case are not authorities in support of the contention here, that a foreign executor or administrator may be sued in relation to assets located within the state where the suit is brought. For, in relation to such assets, no such suit is essential in order to reach them.

The only other authority cited by counsel for plaintiff from other jurisdictions than Kentucky, not yet considered, is the case of *Marcy v. Marcy's Ex'r*, 32 Conn. 308. That case was a suit in Connecticut against a Massachusetts executor, who had collected assets in Connecticut and had removed to or lived in that state. The case of *Campbell v. Tousey*, 7 Cow. 64, was a suit in New York against a Pennsylvania executor, who had collected assets in New York and removed there. The two cases were alike in their essential characteristics. It was held in both cases that the foreign executor could be sued. They differed in this, however, that in the New York case it was held that he would be

sued as executor de son tort, whereas in the Connecticut case it was held that he might be sued as executor de jure. In the Connecticut case Judge Butler said:

"Most of the cases in which it has been held that a foreign executor could not be sued were cases where there were no assets in the jurisdiction where the suit was brought, and there was an attempt to charge him in respect to assets situate in the state or county of the domicile. Here there were assets in the state which the defendant had collected, and which the plaintiff, as creditor, was entitled to have appropriated to payment of his debts; and why should he not be suable here, if at all, for that reason, and holden to that extent as executor de jure? He was such, and could not and did not deny it, and not by grant of administration, but by force of the will. He was suable before probate as executor de jure in Massachusetts, as every executor is who does not renounce, and his condition was substantially the same here. He is sued as executor or generally in either case, and why resort to legal fiction and estoppel when it is entirely unnecessary? Grant that it is necessary in respect to a foreign administrator, it is not so in respect to an executor."

In the case of *Hopper v. Hopper*, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237, Judge Finch, in speaking of the law as laid down in the case of *Campbell v. Tousey*, said:

"Before the Code, and before the Revised Statutes, the foreign executor who came into our jurisdiction and intermeddled with assets here could be sued as executor de son tort. The law regarded him not as a foreign executor, but an executor here, having made himself such by his own wrongful conduct."

But as to which position is correct, whether he should be sued as executor de son tort or executor de jure, the ground of suability at all is the fact that he had collected the assets. If he has not collected the assets, these decisions are not authorities that he is suable at all.

This disposes of all the cases cited by counsel for plaintiff, except the Kentucky case of *Davis v. Connelly's Ex'r*, 4 B. Mon. 136. In that case it was simply held that a judgment rendered in Ohio against Kentucky executors, in a suit in which they had voluntarily appeared and made defense, was binding upon said executors, and that they might be sued upon it in Kentucky. There is nothing in the point there decided that has any bearing upon the question involved here.

This consideration of the authorities cited shows that none of them are applicable here, or contravene the position taken in the former opinion, and I do not think that any authorities can be found that do. The general rule as to the suability of foreign executors or administrators is thus stated in 13 A. & E. Enc. of Law (2d Ed.) p. 957:

"An executor or administrator cannot be sued in his representative character, unless he is made liable by statute, either at law or in equity, in the courts of any state or country other than that in which he has received his appointment."

It is thus stated in *Minor on Conflict of Laws*, p. 235:

"It is the general doctrine, both in England and America, that no suit can be brought by or against an executor or administrator in his official capacity in the courts of any country save that from which he has derived his authority to act by virtue of the letters of probate or of administration there granted him."

Instances of statutes making him liable in the courts of another state than that in which he received his appointment are found in the cases cited by plaintiff's counsel, considered above. Those cases show, also,

an exception to the general rule quite generally held in the case of a foreign representative who has collected assets in the jurisdiction where appointed, and wasted them or brought them with him to the jurisdiction where suit is brought and there settled—an exception recognized as a matter of “justice, convenience, and necessity.” They show, also, an exception in the case of a foreign representative coming into the jurisdiction where suit is brought, and, without administering there, collecting assets subject to that jurisdiction. That, apart from the consideration of his having collected assets there, he is not liable to suit in relation to such assets, nor can such assets be reached through a suit brought against him, is clear. Mr. Minor, in his work on *Conflict of Laws*, p. 236, says:

“If a creditor of a decedent wishes to sue in a foreign state to reach assets situated there, he must have letters of administration taken out there before the suit can be instituted. He cannot, in general, sue a domestic administrator in a foreign court or a foreign administrator in a domestic court.”

Story’s *Conflict of Laws* (8th Ed.) p. 715, thus states the law as to this.

“If a creditor wishes suit to be brought in any foreign country in order to reach the effects of a deceased testator or intestate situated therein, it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country is not suable there, and has no positive right or authority over those assets; neither is he responsible therefor.”

It is certain, and conceded by counsel for plaintiff, that a foreign representative of a decedent could not bring suit to recover such assets because of his foreign credentials. It would be strange, such being the case, that he could be sued in relation to such assets, or such assets could be reached in a suit against him, simply because of the existence of such foreign credentials, without more.

The ground upon which a foreign representative cannot sue or be sued in another jurisdiction is thus stated by Judge Finch in the case of *Hopper v. Hopper*, supra:

“By the phrase ‘foreign executor,’ the court means the foreign origin of the representative character. That is the sole product of the foreign law, and, depending upon it for existence, cannot pass beyond the jurisdiction of its origin. The individual may come here and acquire rights or incur liabilities, since we recognize in him no representative character. The foreign executor may make a contract here which our courts will compel him to perform because it is his contract; but, where it is the testator’s only, he cannot sue or be sued upon it, since the right or the liability is purely representative, and exists only by force of his official character, and so cannot pass beyond the jurisdiction which gave it.”

This being so, there is no room for holding that this suit is maintainable against the defendant executor. There is no statute in this state rendering a foreign executor or administrator suable therein. Section 3878 and 3879, Ky. St. 1903, provide for his suing herein upon taking certain steps. If he takes such steps, he cannot only sue therein, but is liable to be sued therein even by a nonresident creditor, as was held in New York in the case of *Hopper v. Hopper*, supra. Sections 3898, 3899, and 3900, Ky. St. 1903, provide for administration

upon the assets of a nonresident decedent located in this state. By either procedure creditors of a nonresident decedent can subject assets located in this state to the payment of their debts. This procedure is ample to secure them in their debts. But whether so or not, there is none other. The Legislature of Kentucky has not seen fit to provide that suits may be brought against foreign executors or administrators and attachments obtained against the estates of their decedents located in the state, as has been done in the states of Kansas, Ohio, Alabama, Indiana, and perhaps in other states. In the absence of such a statute, no such suit can be brought in this state. And I think the case of *Baker v. Smith*, 3 Metc. 264, cited in former opinion, is directly in point here. The facts of the case are meagerly stated in the opinion. But it cites the extract from Story quoted above in support of the decision there made and the reasonable inference is that it was a suit against a foreign representative to subject assets in this state, or to render him liable on account of assets therein. And, whether so or not, it expressly lays down the only condition upon which a foreign representative can be sued in this state, and this case does not come within that requirement. Judge Duvall said:

"An administrator or executor who is appointed, who qualifies in another state, and there receives assets into his hands, may be sued in the tribunals in this state by the person or persons entitled to such assets, if he shall have removed to and settled in this state. Such seems to be the well-settled doctrine. But the right to sue a foreign administrator has never been extended further."

If, then, it be conceded that the liability of the nonresident corporation doing business in this state to the decedent, Atwater, is an asset located in this state, and that it is allowable for a creditor of decedent to sue out an attachment against his property in a suit against his personal representative—the latter of which two conditions, at least, I very seriously doubt—still this suit cannot be maintained, because it is a suit against a foreign executor who has never collected said asset, and has never complied with sections 3878 and 3879, Ky. St. 1903, so as to be authorized to sue for it, and there is no statute in this state authorizing such a suit. I must therefore adhere to my former opinion.

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#### THE EAGLE WING.

(District Court, E. D. Virginia. February 23, 1905.)

1. COLLISION—DETERMINING FAULT—CHARACTER OF WITNESSES IN CONFLICT.

Where the testimony on behalf of one of two vessels in collision as to what was done on such vessel is clear and positive, or is given by men who are intelligent, experienced, and apparently reliable, while that on behalf of the other as to what was done thereon is conflicting or is given by witnesses who are ignorant or inexperienced and manifestly unreliable, such facts must be taken into account in weighing the testimony and determining which vessel was in fault.

2. SAME—PRESUMPTION FROM VIOLATION OF STATUTE.

Where the navigation of one of two vessels in collision was at the time in charge of an unlicensed mate, in violation of the positive provisions of Rev. St. § 4428, as amended by Act Dec. 21, 1898, c. 29, 30 Stat.

764 [U. S. Comp. St. 1901, p. 3034], there is a presumption that such fact caused or contributed to the collision, and the vessel has the burden of showing that it could not have done so.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 257.]

3. SAME.

While there is a presumption that the privileged one of two meeting vessels, which came into collision, obeyed the law and kept her course, yet, when such presumption is overthrown, and her fault is clearly established, and is in itself sufficient to account for the collision, she can only avoid full liability by proving the fault of the other vessel beyond reasonable doubt.

4. SAME—SAILING VESSELS MEETING.

A collision at sea in the night between two meeting schooners held, on conflicting testimony of their respective officers and crews, to have been solely due to the fault of the privileged vessel in changing her course just previous to the collision.

In Admiralty. Suit for collision.

Hughes & Little and James D. Dewell, Jr., for libellant.  
Carver & Blodgett and R. G. Bickford, for respondent.

WADDILL, District Judge. The schooner Hargraves and the schooner Eagle Wing were in collision in the Atlantic Ocean on the morning of the 19th of February, 1903, about 1:30 o'clock, at a point off the Jersey coast between Absecon Light and Tucker's Beach Light, some eight miles out from Absecon Light, from which the Hargraves received such injuries that she sunk very soon thereafter, and proved a total loss. The Hargraves was a four-masted schooner, 696 tons net register, 173 feet long, 39 feet beam, 18 feet 6 inches depth of hold, and at the time of the collision was en route from Port Norfolk, Va., to Providence, R. I., with a cargo of 1,203 tons of bituminous coal. The Eagle Wing was a four-masted schooner, 1,079 tons net register, 209 feet 7 inches long, 40 feet 1 inch beam, and at the time of collision was en route from the port of Boston, Mass., to the port of Newport News, Va., light, for orders. On the night of the collision the wind was blowing strong from the northwestward, and at times shortly after midnight the weather was squally, puffy, with occasional flurries of snow, but about the time of the collision was clear, with the moon shining brightly, and good weather for seeing lights. The Hargraves was proceeding up the coast, as claimed by her, on the proper course of N. N. E., with jib, staysail, foresail, and single-reefed spanker, with the mizzen fast, and the wind free, or very nearly so, on the port tack, when the lookout discovered a red light on the port bow, some distance away, which was also seen by the mate and by the man at the wheel. Shortly thereafter the light appeared to brighten, its bearing apparently not changing, when the Hargraves mate ordered the wheel put up, to keep off and give the approaching vessel more room, which was done; and thereafter, as the vessels proceeded, the approaching vessel, which proved to be the Eagle Wing, suddenly changed her course, opened up her green light, and almost immediately thereafter came into violent collision with the Hargraves, striking her bows on, on her port quarter, at the mizzen chain

plates, causing the injuries sued for. Whereas, the Eagle Wing's contention is that as she was proceeding down the coast on a course about S. W. to S. W.  $\frac{1}{2}$  W., by compass, closehailed on the starboard tack, with the spanker taken in and reefed, and her foresail reefed, and proceeding with her lower and three head sails, the wind at the time blowing heavily from the W. N. W., her lookout reported a vessel head on, a little on the starboard bow, which proved to be the Hargraves, sailing on the port tack, with the wind free, and that her mate, finding these facts to be true, and knowing it was the duty of such vessel to keep clear of him, returned to the quarterdeck; that soon after the approaching vessel was seen to change her course, showing her red light, and going directly across the bow of the schooner Eagle Wing, which at all times held her course; the two vessels being then so near together that it was impossible for those on the Eagle Wing to do anything to prevent the collision, which occurred about 1:30 a. m.; the Hargraves striking the Eagle Wing a glancing blow on her port side; the port bow of the Eagle Wing striking the port side of the Hargraves abaft amidships.

The question to be determined is, the theory of which vessel shall be accepted, as manifestly no collision would have taken place if the vessels approached each other as claimed by them, unless one of them kept off, and crossed the course of the other. In other words, the Hargraves' contention is that the vessels were meeting with their lights red to red, and that the Eagle Wing suddenly shut in her red and exposed her green light, and got across her course; and the Eagle Wing says they were approaching green to green, and the Hargraves suddenly shut in her green and exposed her red, and crossed under her bows. It is conceded that, under the theory of either vessel (article 17a, Rules of Navigation, c. 4, 30 Stat. 100 [U. S. Comp. St. 1901, p. 2869]), the Eagle Wing, sailing closehailed, and the Hargraves with the wind free, was the favored vessel, charged with the duty of keeping her course, and that the duty was imposed on the Hargraves of keeping out of her way; and it may likewise be said that the presumptions are favorable to the view that the favored vessel, as distinguished from the one upon whom the burden of keeping out of the way rested, did not change her course.

While, however, the Eagle Wing is thus favored, with the presumption of having maintained her course, it does not follow necessarily that she did not change the same, or that she should not be held responsible for the collision because it would have been a foolish thing for her to have done so. Just what, as a matter of fact, was done, is the crucial question to be ascertained, and this can only be determined from a full review and consideration of all the facts of the case.

The evidence is quite voluminous, most of which was taken orally before the court, and considerable by deposition in advance of the trial. Still, the witnesses who saw and observed the collision are not many; and while, as to them, as, indeed, to all the witnesses examined, the examination and cross-examination was un-



usually long, the essential features of the evidence are within a comparatively narrow compass. The collision having occurred in the dead hour of the night on the high seas, with no other shipping near by, only the crews engaged in the navigation of the two vessels can give any accurate account of the actual occurrences at the moment of and immediately preceding the collision. The collision took place during the mates' watches on the respective vessels, with the mates of each in control of the navigation, and with a lookout on each vessel; the *Eagle Wing* having two seamen at her wheel, and the *Hargraves* one. No other persons were on the decks of either vessel. The mates and lookouts of each vessel give detailed accounts of what they saw and observed. The wheelsman of the *Hargraves* was not examined, and the wheelsmen of the *Eagle Wing*, while examined, only testified as to the movements of the helm of their vessel; not having seen and observed the *Hargraves* until the two vessels were in collision. The masters of both vessels were below, and each came on deck on account of the possible danger of collision, from what they heard in the cabin. The *Hargraves* master got out in time to see the collision, and the course and lights of the respective vessels before coming together, whereas the *Eagle Wing's* master did not reach the deck of his ship until after the moment of impact. It will thus be seen that we have chiefly to rely upon the evidence of the master, the mate, and the lookout on the *Hargraves*, and the mate and lookout on the *Eagle Wing*, as the persons who saw the movement of the vessels before and at the moment of collision.

After most mature and careful consideration of the evidence of these witnesses, as well as that of all the others examined, and in the light of all the circumstances of the case, aided by opinions of experts, the exhibition of diagrams, and the elaborate argument of accomplished proctors, the court's conclusion is that the *Eagle Wing* was the guilty vessel, and the collision was the result solely of her not keeping her course, but, on the contrary, changing the same, and running across the course of, and into collision with, the *Hargraves*, at a time when it was too late for the latter vessel to avoid the collision, and after she had been led by the movements of the *Eagle Wing* to suppose that she would keep on her course. The law imposed upon the *Eagle Wing* to keep her course, and the *Hargraves* had the right to suppose that she would do so, and for the collision arising from such failure she is clearly liable; and the mere fact of the improbability of her not changing her course, because she should not have done so, will not suffice to relieve her. *The Mary Buhne* (D. C.) 95 Fed. 1002, affirmed 118 Fed. 1000, 55 C. C. A. 494. The authorities are abundant to show that vessels have been held liable for making substantially the same maneuver as was made by the *Eagle Wing* on this occasion.

*The Elizabeth Jones*, 112 U. S. 519, 5 Sup. Ct. 468, 28 L. Ed. 812. was a case very similar to the one before the court, where a schooner, the *Willis*, sailing free, heading E. by N., and the *Elizabeth Jones*, a bark, heading S. by W.  $\frac{1}{2}$  W., wind  $\frac{1}{2}$  S., the *Willis*, having seen the green light of the *Jones* about half a point on her starboard bow, put

her wheel to starboard and swung off, bringing the vessels green to green, and the Jones, instead of holding her course as required by the rules, ported and ran into the Willis, striking her on the starboard side. The court held the Jones solely in fault for changing her course by putting her wheel to port, following the Willis up, and baffling her efforts to get out of the way.

In this case the Hargraves observed the red light of the Eagle Wing a point or a point and a half on her weather bow, from three-quarters to a mile away, and at once ported her wheel to go off and keep further away from the Eagle Wing; the latter continuing to show her red light under a starboard helm until nearly abreast of the Hargraves' bow, when she suddenly shut in her red light, showed the green for a few seconds, and ran into the Hargraves, striking her at the mizzen chain plates. Had the Eagle Wing continued on her course, there would have been no collision, and any change in the same should have been to have ported, and gone further from, and not nearer to, the Hargraves.

In the case of *The Catherine v. Dickerson*, 17 How. 170, 15 L. Ed. 233, the Supreme Court held that, with two vessels meeting, one close-hauled, and the other having the wind free, it was the duty of the former to hold her course, and that to have luffed in the wind was an improper maneuver.

In *Spencer on Marine Collisions*, § 60, p. 154, the author says:

"The duties imposed upon vessels are of a mutual character, and, where the statute directs one to give way to the other, a change of course upon its part is as unlawful as it is for the other vessel to refuse to yield the right of way."

*Henry on Admiralty*, § 83, p. 283, in considering the rule in regard to the duty of a vessel to hold its course, says:

"On the other hand, where the duty of a steamship, or of a sailing vessel having the wind free, to avoid another, is shown to exist, or a sailing vessel bound to keep her course fails to do so, in respect to an approaching vessel, the presumption of fault arises, and such vessel is bound to satisfy the court that such collision was not occasioned by such breach of the sailing rules."

*The Ella Warner* (D. C.) 30 Fed. 203; *Lawson and Others v. Myrtle* (D. C.) 44 Fed. 779; *The Mary Manning*, 98 Fed. 1000, 39 C. C. A. 377.

All of the probabilities and circumstances of the case strongly point to the Eagle Wing's negligence and to the Hargraves freedom from fault. The navigation of the latter vessel was in charge of a competent mate, the master being present; both seamen of intelligence, of long experience in coastwise navigation; with an able seaman on the lookout, and another at the wheel; and was proceeding with a valuable cargo on board, on the proper and usual track for vessels proceeding up the coast, the wind free, at reasonable speed, under port helm; and, upon sighting the red light ahead on her weather bow, put her wheel hard up, and kept that way with a view of giving the favored vessel on her port side more room. This was manifestly the proper maneuver for her to have made, and the evidence that the two vessels did approach each other red to red strongly preponderates in favor of the Hargraves. It is true that the mate of the Eagle Wing testifies to the contrary, as does her lookout, though the evidence of the latter, in some of its

important features, corroborates that of the Hargraves crew; and they each seek to place the responsibility for the collision on the latter. Still the evidence of neither of them, or of both combined, should serve to outweigh that of the Hargraves' navigators. In the judgment of the court, neither the mate nor lookout on the Eagle Wing can be said to be reliable as navigators or as witnesses, and in many important particulars their evidence is entirely in conflict one with the other. Neither of them was competent for the position he held. The lookout was a boy 18 years old, and did not ship as an able seaman. He had been in the Eagle Wing for some 6 months, and had previously worked on an ocean steamer as mess boy. He was a member of the master's watch, described as a pet of the latter, and who for some unexplained reason appears to have been lookout in the mate's watch at the time of collision, though the mate himself testifies that his lookout was one of two Portuguese in his watch, who could not speak English, and that he could not understand him when he sighted and reported a vessel ahead, and had himself to go forward on that account. The mate was an unlicensed man, and apparently a roaming individual, seeking different kinds of work; and, while he had spent most of his time at sea, and frequently acted as mate of different vessels, he seems never to have previously been placed in control of navigation of, or selected as mate upon, a vessel of the size of the Eagle Wing. On this voyage he was employed to take the place of a drunken mate, and had not been seen by the master before shipping, though it seems that the latter knew him, as he had worked for him several months previously. The mate knew none of the crew, and they were composed of the boy and five Portuguese, at least one of whom was on his first trip on the Eagle Wing, and two of them on their second voyage thereon. The mate, after the collision, upon reaching Newport News, remained with the ship for several days, and suddenly disappeared, and wandered for months from place to place in different states, working part of the time on vessels of different kinds, and was only caught up with several weeks before the trial. Upon his examination he was disinclined to go into details of his mysterious disappearance and movements, but upon being pressed for an answer as to why he left the ship, he said:

"I felt bad enough about this collision. It is the first collision I have ever had in all my going to sea, and I have not wanted to see anybody connected with it since it happened. I have done them injury enough, I suppose. I did not want anybody to come to me and say, 'Why did you do this?' and 'Why didn't you do that?' I have heard enough of that."

If this statement from the Eagle Wing's mate is not to be treated as in effect an admission from him that he considered himself responsible for bringing about the collision, it at least shows, together with his general character and conduct, that there ought to be little difficulty in ascertaining the cause of the collision, with such an individual in charge of navigation of a large oceangoing vessel, especially when to his own unfitness and inefficiency is added that of an inexperienced boy, or a Portuguese whose language he could not understand, as his lookout.

Where the testimony in behalf of vessels in collision is conflicting and uncertain as to what was done upon one vessel, and the testimony

on behalf of the other vessel as to what was done is clear and positive, or where the testimony of one of the vessels comes from intelligent, experienced, and apparently reliable witnesses, and that of the other from ignorant, inexperienced, shiftless, and manifestly unreliable persons, the court in admiralty, as in all other classes of litigation, must take into account the existence of such conditions in fixing the responsibility for the collision. In the case of *The Genevieve* and *The Vulcan* (D. C.) 96 Fed. 859, affirmed 106 Fed. 989, 46 C. C. A. 87, it was said, in determining a conflict of testimony as to which of two vessels was in fault for a collision, that the probabilities and presumptions based upon skill, knowledge, and ability of the crews of the respective vessels, which was the best man, and the least likely to make a mistake, should be taken into consideration by the court. *The Alabama* (D. C.) 17 Fed. 847; *The Mary Manning*, 98 Fed. 1000, 39 C. C. A. 377; *The Livingstone*, 113 Fed. 879, 51 C. C. A. 560; *The Hartford* (D. C.) 125 Fed. 559.

The faults on the part of the *Eagle Wing* consist not only in error and negligence on the part of her navigators in the management and control of the vessel, but there was an initial fault, serious in its character, in that an important statutory requirement was violated in the selection of the vessel's mate. He was an unlicensed mate, employed contrary to section 4438 of the Revised Statutes, as amended by act of December 21, 1898, c. 29, 30 Stat. 764 [U. S. Comp. St. 1901, p. 3034]; and, moreover, he was a person that it is highly probable would never have been licensed. The duty to observe this statute is imperative, and all must respect it, whether they approve of its wisdom or not; but that it is founded upon the highest considerations of the laws of humanity, looking to the safety of life and limb and the preservation of property, goes without saying. The failure to comply with statutory requirements and regulations has frequently received the severest condemnation of the courts, and, when such an omission is clearly established, the presumption is that it did contribute to the collision, unless the contrary is obviously apparent, and this presumption attends every fault connected with the occurrence; and a further obligation is imposed to show not only that it probably did not so contribute, but that it could not have done so. *Pennsylvania v. Troop*, 19 Wall. 125, 22 L. Ed. 148; *Martello v. Willey*, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637; *The Bernicia* (D. C.) 122 Fed. 886; *The Alabama*, 126 Fed. 332, 61 C. C. A. 238.

While the doctrine is well recognized that, until overthrown by sufficient evidence, the presumptions are that the *Eagle Wing*, the favored vessel, held her course, and that suggestions that she did just the reverse are not looked upon with favor (*Haney v. Baltimore Steam Packet Co.*, 23 How. 291, 16 L. Ed. 562, and cases following), still, when such presumption is overthrown, and her fault clearly established, and such fault is within itself sufficient to account for the collision, then she cannot escape liability by raising a doubt in regard to the navigation of the *Hargraves*, and the latter vessel should have the benefit of any reasonable doubt with regard to the propriety of her management. *The Ludvig Holberg*, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620; *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; *The*

Livingstone, 113 Fed. 879, 51 C. C. A. 560; The Mary Buhne, 118 Fed. 1000, 55 C. C. A. 494, supra.

It follows from what has been said that, in the opinion of the court, the collision occurred by the negligence of the Eagle Wing, and a decree may be entered so declaring.

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SPERRY & HUTCHINSON CO. v. MECHANICS' CLOTHING CO.

(Circuit Court, D. Rhode Island. November 29, 1904.)

No. 2,651.

**1. TRADING STAMPS—ADVERTISING—INTERFERENCE WITH COMPLAINANT'S BUSINESS.**

The bill alleged that complainant issued trading stamps for advertising purposes, which it sold to merchants under a contract providing that when the stamps were so issued they should be redeemed by complainant in goods; that complainant's income was derived solely from the sale of the stamps to merchants who issued the stamps; that the only promise made to the public by complainant was that it would redeem stamps procured from merchants authorized by complainant to issue them; that defendants obtained large quantities of such stamps by means of collectors, etc., and reissued them to defendants' customers in such quantities as they chose, without having any contract with complainant. On demurrers to bill, *held*, that complainant had the right to restrict the use of the stamps by contract, and the stamps, having been once issued by a merchant, were *functus officio*, except for redemption, and, though transferable for that purpose, defendants' use thereof was an improper interference with complainant's business, which complainant was entitled to restrain.

In Equity. Defendants' demurrers to portions of the bill of complaint.

See 128 Fed. 800.

W. Benton Crisp, John S. Murdock, and Tillinghast & Murdock, for complainant.

Edward D. Bassett and Wilbur A. Scott, for defendants.

BROWN, District Judge. By demurrers to portions of the bill, the defendants seek to raise the question of their right to buy and to reissue trading stamps in substantially the same manner in which they are issued by merchants who by special contract with the Sperry & Hutchinson Company are authorized to issue the stamps. Passing objections to the form of the demurrers we may consider the substantial question.

Upon consideration of the allegations of the bill as to the nature of the trading stamps, it is apparent that the only purpose for which they are issued to collectors is for redemption; that the only promise made by the Sperry & Hutchinson Company to the public in relation to these stamps is that it will redeem them if procured from authorized merchants; and that the collector acquires only such rights as are expressly or by fair implication promised him by the company.

We may assume, since counsel for the complainant concede it, that a collector of trading stamps may transfer them to others for the same purpose for which they were originally issued, namely,

for redemption. We may assume that the defendants have the right to purchase trading stamps from collectors who have acquired them from authorized merchants, and, as the assignees of the collectors' rights, to present them for redemption. Does it follow that they may reissue them anew as cash discounts, or as premiums for cash purchases, according to the general method of merchants authorized by the company to issue such stamps?

Ordinarily one who has a right to transfer property may do so upon such terms and conditions as he pleases, and may, if he likes, give it as a bonus for a sale of other property. In the opinion on the petition for a preliminary injunction (*Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* [C. C.] 128 Fed. 800, 803), this court said:

"As any merchant may give to customers premiums in the form of goods or car tickets, it is difficult to see how he can be restrained from giving also these stamps, though they were issued by the complainant."

This difficulty disappears, I think, upon a fuller consideration of the case.

- A trading stamp is not ordinary property. It is *sui generis*. It represents a somewhat complicated transaction, and, from its nature, I think there are necessary limitations upon the modes in which it may be transferred. By extensive advertising, by promises to the public, by the exhibition of goods, by the circulating of books, like Exhibit C, giving a general description of the business, the *Sperry & Hutchinson Company* creates a demand for the trading stamp. By contract between the complainant and the merchant, the title to the stamp does not vest in the merchant who issues it, but remains in the company until it has been issued in regular course to a customer of the merchant. The customer is expressly offered only the right to redeem the stamp, and impliedly the right to transfer it for redemption. A stamp is not merely a token of the company's obligation to redeem it, and of the right of the holder to redemption, but it is also a token or an instrument of another transaction in which the trading stamp company has an interest, and from which it derives its entire profit and its recompense for its outlay in establishing the business. The trading stamp company, having created a demand, in effect, sells to the merchant the right to supply this demand, and to issue to his customers stamps which are at the time of the issue the property of the *Sperry & Hutchinson Company*. The merchant, in a certain sense, is the agent of the company in issuing the stamps to the public. The merchant gets such trade advantage as results from his distribution of the stamps. He pays the trading stamp company for this in proportion to the use that he makes of the trading stamps, paying so much a hundred for the use of the stamps. In the transaction between the company and the merchant, the stamp, once issued, represents so much advertising furnished and paid for. Once issued by the merchant, it is *functus officio* as a token of the sale and use of so much advertising.

The trading stamp, when issued, represents a closed transaction between the merchant and the company, as well as an outstanding obligation to redeem the stamp. As a token or voucher of the sale

and use of so much advertising, the trading stamp is necessarily a consumable article—an article designed for a single use in an advertising scheme. What the defendants wish to do is to procure for themselves a trade advantage as distributors of trading stamps. Although the stamps have been issued to collectors for a limited purpose, the defendants desire to use them for a purpose for which obviously they were not intended in the hands of a collector. The number of trading stamps ordinarily issued to a purchaser of merchandise hardly could be sufficient for advertising purposes. The defendants have devised the scheme of procuring from individual collectors a very large number of the stamps, and, by uniting in a single hand what ordinarily would be distributed in many hands, they secure a supply sufficient for advertising purposes. In other words, as transferees of the rights of persons who did not acquire these stamps for advertising purposes, they secure for themselves the ability to do what it was not intended that a collector of the stamps should do. The trading stamp company has made large expenditures to create a demand, and, although its sole source of profit is in the sale of rights to supply this demand, the defendants, who have not paid the trading stamp company for this right, assert that they have acquired it equally with those merchants who have paid for it. By reusing the stamp as an advertisement, they seek to get for nothing what others are required to pay for, and to institute a destructive competition with authorized merchants, which tends to destroy the value of the stamp and to injure the complainant's business.

The trading stamp is an artificial creation. The company, having created it and having created a value for it, may dispose of it on such terms as it sees fit. It may in the first instance restrict the right to issue it for advertising purposes to such persons as it may select, and to such persons as are willing to pay for it. The public is entitled to receive it upon the terms offered, namely, that it is exchangeable for goods. But, it is asked, why, if the right of a customer to transfer it is conceded, may he not transfer it in any mode he pleases, and give it as an advertisement if he sees fit? A sensible answer to this question, I think, is this: Because he thereby appropriates to himself the trading stamp company's legitimate share of the transaction. In the trading stamp scheme or plan, as explained in the books, there are designed to be three parties—the customer, the merchant, and the trading stamp company. The customer is to acquire, as his benefit, a redeemable stamp; the merchant is to acquire, as his benefit, a trade advantage resulting from issuing the stamps at his shop; the trading stamp company's benefit is the money paid to it by merchants for the privilege of issuing the stamps. While the full details of the contract between the merchant and the trading stamp company are not explained to the public, they are sufficiently explained, according to the allegations of the bill, and as appears from Exhibit C, made a part of the bill, to show that the trading stamp scheme is a three-cornered transaction, in which the rights of three parties are involved.

The defendants' counsel argues the case on the theory that we

may disregard entirely the rights of the trading stamp company and merchant, and that, although both of these parties have expended their money in the expectation of a benefit, this benefit may be destroyed by the defendants. By the explanation to the public contained in the trading stamp book, Exhibit C, the collector is told what he is to have and what the merchant is to have; and, being thus informed, it is contrary to equity that he should appropriate what he is told is the merchant's benefit in the transaction. A reason why the defendants should not be permitted to reissue these stamps as cash discounts or premiums is that, according to the allegations of the bill, they knew that they were issued to customers for a certain purpose—that is, for redemption; that they could acquire no greater right in the stamps than the customers had; and that, if they did reissue them, they were appropriating for themselves, and without consideration, what fairly belonged to the merchant and to the trading stamp company. I accept the following statement from the complainant's brief:

"When once given out by a merchant, they have served the advertising purpose for which they were intended, and to permit the collector of the stamps to again advertise with them would be to go beyond what was the clear intention of the parties, and would be destructive of the rights of the complainant."

While a transfer of ordinary property by the owner upon any terms usually deprives other persons of no rights, this is not always the case with the trading stamp. While it may be transferred in any way which confines its use within the purpose for which it was issued, it may not be transferred in such a way as to destroy its value as an instrument of special trade advantage or advertising, or as to deprive the company which created the value of the stamp, and which has assumed the obligation to redeem it, of its right to compensation for expenditures and for redeeming the stamps.

In my opinion, the bill states a case for full relief against the defendants. It charges positive fraud and misrepresentation in conjunction with the collection and reissue of these stamps. As these matters are dealt with in the opinion on the petition for a preliminary injunction, it is not necessary to repeat. Upon such a bill a court of equity may give full relief, and the complainant, in my opinion, is entitled, upon the allegations of the bill, not only to restrain fraudulent misrepresentations, but also to restrain the diversion of the trading stamp from the purpose for which it was issued, and the appropriation by the defendants of what they have not paid the complainant for, and what they did not receive as assignees of the rights of the original collectors of the stamps.

In *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805, the Circuit Court of Appeals for the Seventh Circuit said:

"In short, the law being clearly inadequate to that purpose, equity should see to it that the one who is served and the one who serves each gets what the engagement between them calls for, and that neither, to the injury of the other, shall appropriate more."



While the circumstances of that case are somewhat different from those of the case before us, I am of the opinion that the principles upon which the court acted in that case are applicable to the present case.

Demurrers overruled.

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INDIAN MOUNTAIN JELLICO COAL CO. V. ASHEVILLE ICE & COAL CO.

(Circuit Court, W. D. North Carolina. March 1, 1905.)

**1. REMOVAL OF CAUSES—COUNTERCLAIM—CHANGE OF PARTIES—LOCAL PREJUDICE.**

Where, after judgment in favor of a nonresident plaintiff was affirmed as to the original cause of action, but was reversed as to a counterclaim, defendant obtained leave to amend the counterclaim by increasing the amount demanded, such amended counterclaim did not change the status of the parties so that the defendant became the plaintiff in the action and the plaintiff became the defendant, and entitle plaintiff to remove the cause to the federal courts, under Act Cong. 1887-88 (Act March 3, 1887, c. 873, § 1, 24 Stat. 553; Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509]), authorizing removal by non-resident defendants on the ground of prejudice or local influence.

[Ed. Note.—Prejudice or local influence ground for removal of cause to federal court, see note to *P. Schwenk & Co. v. Strang*, 8 O. C. A. 95.]

**2. SAME—CONCURRENT JURISDICTION.**

Where an action containing a counterclaim had been tried in a state court, and a judgment in favor of plaintiff on the main cause of action affirmed, but reversed as to a counterclaim, the state court having assumed and exercised jurisdiction to try a part of the action, it could not thereafter be removed to the federal courts for retrial of the counterclaim.

Motion to Remand.

Merrimon & Merrimon, for remandant.

Moore & Rollins, opposed.

PRITCHARD, Circuit Judge. This is a motion to remand. The plaintiff instituted a suit against the defendant in the state court for the recovery of the sum of \$361.34 for coal sold and delivered to the defendant. The defendant filed an answer in which the two first paragraphs of the plaintiff's complaint are admitted. Among other things, the defendant set up a counterclaim growing out of the contract between the parties on which the suit was brought, and alleged that the plaintiff was due the defendant on said counterclaim the sum of \$1,000. The case was tried at the May term, 1903, and resulted in a verdict and judgment in favor of the plaintiff for the sum of \$361.34. It was also adjudged that the plaintiff was indebted to the defendant in the sum of \$150 on the counterclaim. The case was heard in the Supreme Court of the State on appeal, and the judgment of the court, in so far as plaintiff's claim is concerned, was affirmed, but it was remanded for a new trial as to the issues raised by the counterclaim. 47 S. E. 116. At the June

term, 1904, the defendant obtained leave to amend the counterclaim by increasing the amount demanded from \$1,000 to \$3,861.34. On the 22d of August, 1904, the case was removed from the state to the circuit court. The application for the removal was based on the ground of diverse citizenship, and also prejudice and local influence, under the act of 1887-88 (Act March 3, 1887, c. 373, § 1, 24 Stat. 553; Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509]).

It is contended by the parties seeking to remand that this case does not come within the class of cases wherein removal is contemplated by the statute. It is also contended that the allegations in the petition of prejudice and local influence are not sufficient, and that the petition on which the case was removed was not properly verified. It is further contended that the evidence upon which petitioner relied for removal was not sufficient to justify same.

The court does not deem it necessary to pass upon the sufficiency of the allegations of the petition, inasmuch as a determination of the case depends upon other questions involved. It is insisted by the petitioner that the filing of the amended counterclaim by the defendant changed the status of the parties, and that the defendant thereby became plaintiff in the action, and that, as a natural sequence, the plaintiff became a defendant; that, inasmuch as the plaintiff in the original action had secured judgment upon his demand, nothing remains to be tried save the issues raised by the counterclaim which was filed by the defendant; and that therefore the case stands as though a new action had been instituted in the state court by the defendant, and against the plaintiff, in which the sum of more than \$2,000 was involved. The act under which this case was removed to this court relates solely to the right of non-resident defendants to have their cases removed when it can be shown that prejudice or local influence exists against any defendant in the communities in which suits may be brought, and in the contiguous counties to which suits may be removed for trial by the state courts. The act also provides that such cases shall be removed to this court at any time before trial. In this case the plaintiff, of its own volition, selected the state court as the forum in which to prosecute its cause of action. In doing so, it was cognizant of the fact that the defendant, under the provisions of the Code of North Carolina, would be entitled to set up by way of counterclaim any defensive matter growing out of the transaction which it might deem proper to allege. It would be an anomalous proceeding to permit the plaintiff, after having selected the state court as a tribunal in which to enforce its rights, and having obtained judgment, to quietly withdraw from the scene of conflict, in so far as the rights of defendant are concerned, and proclaim that, as respects such matters, it was not a citizen of the state, and ask that the untried portion of the case be transferred to the federal courts upon the ground that it cannot secure a fair and impartial trial in the court where it had already obtained judgment against the defendant for the full amount alleged to be due in its complaint.

In considering the law applicable to counterclaims, this court will be governed by the provisions of the Code of the state where the suit is instituted, as construed by the highest court of such state.

The defendant in this case set up as a counterclaim certain matters arising out of the contract on which the plaintiff based its cause of action. In such cases a counterclaim is treated as a cross-action, and, when properly pleaded, the defendant assumes the burden of affirmatively establishing the truth of the matters therein alleged, and to that extent is an actor. Under such circumstances, the plaintiff does not have the right to take a nonsuit without the consent of the defendant, and all matters involved in the issues raised by the pleadings must be determined in the suit in the court where the action was originally begun, and neither party can withdraw until the final determination thereof without the consent of the other.

In the case of *Whedbee v. Leggett*, 92 N. C. 470, Judge Ashe, in discussing this question, said:

"The defendant alleged error in the court in granting the motion of the plaintiffs to enter a nonsuit as to their cause of action. In this there was error. A counterclaim is in effect a cross-action, and, when well pleaded, the defendant becomes an actor, and there are two simultaneous actions depending in the same proceeding between the same parties; and each has the right to have all the matters put in issue by the pleadings adjudicated, and neither has the right to go out of court before a complete determination of all the matters in controversy, without the consent of the other. This was held to be the rule of practice in the case of *Francis v. Edwards*, 77 N. C. 271, and the decision there is decisive of this case. The court there held that, when a counterclaim is duly pleaded, neither party has the right to go out of court before a complete determination of all the matters in controversy, without or against the consent of the other, and, when the court below permitted the plaintiff to take a nonsuit, it was error. *Purnell v. Vaughan*, 80 N. C. 46. There is a distinction in counterclaims set up as a defense under section 244 of the Code, which has not been taken or adverted to in the decisions upon that subject heretofore made, that we think should be observed. The first subdivision under that section is 'a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action'; and, second, 'In an action arising on contract any other cause of action arising also on contract, and existing at the commencement of the action.' The distinction is this: When a counterclaim such as is authorized by the first subdivision is set up, then we think the plaintiff should not be permitted to enter a nonsuit without the consent of the defendant, for the reason that, as it is a connected transaction and cause of action, the whole matter in controversy between the parties should be determined by the one action."

In view of these authorities, it is manifest that where a defendant sets up a counterclaim which grows out of the transaction on which plaintiff brings his action, and the same is properly pleaded, it is in the nature of a cross-action, and does not change the status of the parties, and there can be no process of reasoning by which it can be made to appear that under such circumstances the plaintiff becomes a defendant in the sense contemplated by the removal act. It was the intention of Congress, in the passage of the removal act, to provide a remedy for any nonresident defendant who might be sued in the state court, in cases wherein such defendant could show by legal evidence that prejudice and local influence ex-

isted against him in the community in which he might be sued, provided he brought himself within the purview of the statute. The act is plain and explicit, and contains no exceptions. Everything relating to the question of removal by nonresident defendants was before Congress at the time of the enactment of the section under which this case was removed. It was within its power to have provided that in cases like the one under consideration the plaintiff should be treated as a defendant, for the purpose of removal; and the fact that no provision was made clearly indicates that it was its intention to restrict removals from the state to the federal courts to cases where defendants are nonresidents at the time of the commencement of the action, and the jurisdictional amount is involved.

In *West v. Aurora City*, 6 Wall. 139, 18 L. Ed. 819, the Chief Justice, in discussing this question, said:

"We think that the Circuit Court was clearly right in its action. The filing of the additional paragraphs did not make a new suit, within the meaning of the judicial act. They were in the nature of defensive pleas, coupled with a prayer for injunction and general relief. This, if allowed by the Code of Indiana, might give them, in some sense, the character of an original suit, but not such as could be removed from the jurisdiction of the state court. The right of removal is given only to a defendant who has not submitted himself to that jurisdiction—not an original plaintiff in a state court, who, by resorting to that jurisdiction, has become liable, under the state laws, to a cross-action. And it is given only to a defendant who promptly avails himself of the right at the time of appearance, by declining to plead and filing his petition for removal. In the case before us, *West and Torrance*, citizens of Ohio, voluntarily resorted, as plaintiffs, to the state court of Indiana. They were bound to know of what rights the defendants to their suit might avail themselves under the Code. Submitting themselves to the jurisdiction, they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants to a suit removable, on their application, to the Circuit Court of the United States."

*Waco Hdw. Co. v. Mich. Stove Co.*, 91 Fed. 291, 33 C. C. A. 511; *La Montagne v. Lumber Co.* (C. C.) 44 Fed. 645; 18 Ency. Plead. & Prac. 274; *Ward v. Congress Const. Co.*, 99 Fed. 598, 39 C. C. A. 669.

If a removal of this case could be properly had, it would necessarily bring the entire case from the state court. *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514; *Brooks v. Clark*, 119 U. S. 511, 7 Sup. Ct. 301, 30 L. Ed. 482. This court would not be inclined to try the remnant of an action which was pending in another jurisdiction, and, if the entire case should be brought here, the court would be powerless to deal with that portion of it in which the plaintiff has secured judgment against the defendant. There is no statutory provision which authorizes this court to enforce the collection of a judgment of a state court by execution or other process, and this is sufficient to show the fallacy of attempting to remove the case in its present condition. If it were removed as it now stands, we would have a case pending in this court wherein there could be no mutual adjustment of the rights of the parties, inasmuch as the state court has already assumed jurisdiction of the subject-matter, and proceeded to final judgment, in so far as the demands of the plaintiff are concerned.

This court has concurrent jurisdiction of all cases wherein the defendant is a nonresident, and the sum involved is \$2,000, exclusive of interest and costs, and where prejudice and local influence exist, until the machinery of the state court for the trial of causes is put in motion. But here we have a case wherein the suit in the state court has been actually tried, and judgment has been rendered for the plaintiff, and the same affirmed by the Supreme Court of the state. Therefore this court no longer has jurisdiction over any of the matters in controversy, and it would be absurd to undertake to remove fragments of the case, the major portion of which has been finally settled in a court which had unquestioned jurisdiction to hear and determine the matters in controversy.

The court does not consider it essential to discuss the question as to whether petitioner was entitled to have this case removed on the ground of diverse citizenship, inasmuch as the reasons already assigned clearly show that the case could not have been properly removed upon such ground.

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ENCYCLOPÆDIA BRITANNICA CO. v. WERNER CO. et al.

(Circuit Court, D. New Jersey. March 10, 1905.)

**COPYRIGHTS—INTERIM COPYRIGHT ACT—CONSTRUCTION.**

The interim copyright act (Act Cong. Jan. 7, 1904, 33 Stat. 4, c. 2), passed for the protection of exhibitors of foreign literature at the Louisiana Purchase Exposition, provides that copyright protection shall be extended to books, etc., published abroad, copies of which are intended for exhibition at the Louisiana Purchase Exposition; that one copy of any book copyrighted under the provisions of the act shall be delivered at the copyright office of the Library of Congress, with a statement duly subscribed in writing that the book is intended for such exhibition; and that the author, on complying with the act, shall have the sole liberty of printing, reprinting, publishing, and vending the same within the limits of the United States for the term of two years, and if during such time two copies of the original text of the book, or of a translation in the English language, printed from type set within the United States, or from plates made therefrom, are deposited in the copyright office, etc., such deposit shall extend the copyright for the full terms provided for by Rev. St. tit. 60, c. 3 [U. S. Comp. St. 1901, p. 3405]. *Held*, that such act did not apply to a foreign publisher of a book previously published in English, and sold by American publishers in the United States.

In Equity. On application for preliminary injunction.

Samuel J. Elder, Edmund A. Whitman, Carl H. C. Bumpus, and Frederic R. Kellogg, for complainant.

Rollin M. Morgan, Augustus T. Gurlitz, George W. Sieber, and James Buchanan, for defendants.

LANNING, District Judge. The complainant bases its right to a preliminary injunction in this case upon the provisions of the interim copyright act of January 7, 1904, 33 Stat. 4, c. 2. A copy of that act

(excepting section 4, which relates to the recording fees, and section 7, which relates to copyright protection of paintings, statuary, etc.) is set forth in the margin.<sup>1</sup> If there be substantial doubt as to whether the act can be construed so as to support the right claimed, that doubt is fatal to the application. *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *Hagerty v. Lee*, 45 N. J. Eq. 255, 17 Atl. 826;

<sup>1</sup>An act to afford protection to exhibitors of foreign literary, artistic, or musical works at the Louisiana Purchase Exposition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the author of any book, map, chart, dramatic composition, musical composition, engraving, cut, print, chromo, lithograph, or photograph published abroad prior to November thirtieth, nineteen hundred and four, but not registered for copyright protection in the United States copyright office, or the heirs and assigns of such author, shall have in the case of any such book, map, chart, dramatic composition, musical composition, engraving, cut, print, chromo, lithograph, or photograph intended for exhibition at the Louisiana Purchase Exposition the sole liberty of printing, reprinting, publishing, copying, and vending the same within the limits of the United States for the term herein provided for upon complying with the provisions of this act.

Sec. 2. That one copy of such book, map, chart, dramatic composition, musical composition, engraving, cut, print, chromo, lithograph, or photograph to be exhibited as herein provided shall be delivered at the copyright office, Library of Congress, at Washington, District of Columbia, with a statement duly subscribed to in writing that the book or other article is intended for such exhibition and that the copyright protection herein provided for is desired by the copyright proprietor, whose full name and legal residence is to be stated in the application.

Sec. 3. That the register of copyrights shall record the title of each volume of any such book or other article herein provided for, or if the article lacks a title, shall record a brief description of it sufficient to identify it, in a special series of record books to be designated the "Interim Copyright Record Books," and shall furnish to the copyright claimant a copy of record under seal of such recorded title or description, and the said title or description is to be included in the catalogue of title entries provided for in section four of the act of March third, eighteen hundred and ninety-one.

Sec. 5. That the copyright protection herein provided for shall be for the term of two years from the date of the receipt of the book or other article in the copyright office.

Sec. 6. That if at any time during the term of the copyright protection herein provided for, two copies of the original text of any such book, or of a translation of it in the English language, printed from type set within the limits of the United States or from plates made therefrom, or two copies of any such photograph, chromo, or lithograph printed from negatives or drawings on stone made within the limits of the United States or from transfers made therefrom, are deposited in the copyright office, Library of Congress, at Washington, District of Columbia, such deposit shall be held to extend the term of copyright protection to such book, photograph, chromo, or lithograph for the full terms provided for in title sixty, chapter three, of the Revised Statutes of the United States, computed from the date of the receipt of the book, photograph, chromo, or lithograph and the registration of the title or description as herein provided for.

Sec. 8. That, except in so far as this act authorizes and provides for temporary copyright protection during the period and for the purposes herein provided for, it shall not be construed or held to in any manner affect or repeal any of the provisions of the Revised Statutes relating to copyrights and the acts amendatory thereof. That no registration under this act shall be made after the thirtieth day of November, nineteen hundred and four.

83 Stat. 4, 5, c. 2.

Home Insurance Co. v. Nobles (C. C.) 63 Fed. 642; Paine v. United States Playing Card Co. (C. C.) 90 Fed. 543.

The hearing has been had upon bill, answers, and affidavits. The material facts are these: About 1875 the firm of A. & C. Black, of Edinburgh, Scotland, being the owners and publishers of the Encyclopædia Britannica, began the publication at Edinburgh of a new edition of that work, consisting of 25 volumes, entitled "Encyclopædia Britannica, Ninth Edition." They completed its publication in 1889; having, it is claimed, acquired the literary property of the authors of all the articles contained in the work. Mr. Henry T. Thomas, in an affidavit filed by the complainant, says the work was imported into this country and sold here between 1878 and 1891, by agreements first between Samuel L. Hall and A. & C. Black, and afterwards between Charles Scribner's Sons and A. & C. Black. Messrs. Adam Black and William Walker Callender, members of the firm of A. & C. Black, in an affidavit also filed by the complainant, say that upwards of 50,000 sets were sold in the United States previous to 1897 by Little, Brown & Co., Charles Scribner's Sons, and Samuel L. Hall, and that these sets were all printed from the same plates as the volumes published and sold in the United Kingdom. And in their brief the counsel for the complainant say:

"The Scribners, as in fact all other American importers, purchased the Britannica, bound or in sheets, and sold it at their own risk and upon their own responsibility. We do not controvert the general distribution of the Britannica in the United States."

In another place in their brief they say:

"Boiled down, all this tautology [referring to the averments in the answer] amounts to the single allegation that the Britannica had been widely distributed throughout the United States prior to the passage of the interim act. That we do not deny."

In July, 1903, the right, title, and interest of A. & C. Black in the Encyclopædia Britannica was assigned to the Encyclopædia Britannica Company, the complainant in this case. On July 22, 1904, the complainant deposited in the copyright office, Library of Congress, one copy of each of the 25 volumes of its work, each of which copies, according to the certificates of the Librarian of Congress filed by the complainant, was declared to be "intended for exhibition at the Louisiana Purchase Exposition at St. Louis in 1904," and the copyright of each of which, it was further declared, the complainant "claims as proprietor for two years from this date (July 22, 1904), in conformity with the provisions of the act of Congress of January 7, 1904, entitled 'An act to afford protection to exhibitors of foreign literary, artistic or musical works at the Louisiana Purchase Exposition.'" The affidavit of P. K. Fitzhugh, also filed by the complainant, shows that the 25 volumes of the complainant's work had been on public exhibition at the Louisiana Purchase Exposition from August 25, 1904, until the date of the affidavit, which was September 21, 1904. It appears by the affidavit of Daniel M. MacLellan, filed by the defendants, that the defendants and their predecessors have been publishing an American edition of the encyclopædia for at least a dozen years, and that it is the further publication of this edition that the complainant now seeks to have enjoined.

Previous to 1891 the protection of our copyright laws was extended only to citizens and residents of the United States. Section 4971 of the Revised Statutes expressly provided that nothing in the copyright law should be "construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving or photograph, written, composed or made by any person not a citizen of the United States nor resident therein." On March 3, 1891 (26 Stat. 1106, c. 565 [U. S. Comp. St. 1901, p. 3417]), the law was amended by extending to any foreign author or proprietor of any book, and the executors, administrators, or assigns of such author or proprietor, the privileges of our copyright law, provided that on or before the day of publication in this or any foreign country he should deliver at the office of the Librarian of Congress, or deposit in the mail within the United States addressed to the Librarian of Congress, a printed copy of the title of his book, and also two copies of the copyright book, printed from type set within the limits of the United States or from plates made therefrom. See sections 4952 and 4956 of the Revised Statutes, as amended by the act of March 3, 1891, c. 565, 26 Stat. 1106, 1107 [U. S. Comp. St. 1901, pp. 3406, 3407]. Obviously the amendment of 1891 did not extend the privileges of our copyright law to foreign authors, or proprietors of books that had been published or sold in this country previous to 1891. Unless the interim copyright act of 1904 so changed the law as to confer upon a foreign author, or his heirs or assigns, the privileges of our copyright law in a case where his book had been sold in this country previous to 1904, the complainant in this case has no standing. Did that act effect such an alteration of the law?

Counsel for the complainant insists that the language of the first section of the act is so broad that it confers upon the complainant, as the assignee of A. & C. Black, and through that firm of the authors of the articles contained in the *Encyclopædia*, the right to have the *Encyclopædia* copyrighted, notwithstanding it was sold in this country for many years previous to 1904, and even previous to 1891. They say in their brief that:

"The act is unlimited in scope as to the time within which such prior publication may have taken place, and is entirely silent upon the extent of such publication, and whether the book has been republished in this country or not. It does not refer to books which have or have not been copyrighted where they were first published, nor to the effect of the expiration of such copyright in a foreign country, if any such ever existed."

If this be the effect of the statute, the change made in our copyright law was indeed a most radical one. Previous to January 7, 1904, any publisher in the United States could republish in this country the Blacks' edition of the *Encyclopædia Britannica*, excepting the articles therein written by American authors and duly copyrighted, without violating any provision of our copyright law. *Black v. Henry G. Allen Co.* (C. C.) 42 Fed. 618, 9 L. R. A. 433; *Black v. Ehrich* (C. C.) 44 Fed. 793. If the rule for which the complainant's counsel contend be correct, the heirs or assigns of Herbert Spencer, who died a month before the interim act was passed, and whose works for a quarter of a century before 1891 were published and



widely distributed in this country, by complying with the provisions of the interim act at any time before November 30, 1904, might have obtained a copyright upon those works, and secured, in the language of the first section of the act, "the sole liberty of printing, reprinting, publishing, copying and vending the same within the limits of the United States" for the term of 2 years, together with the privilege of extending the term to 28 and possibly 42 years. The same thing would, of course, be true concerning Dickens' novels, Jarman on Wills, and a multitude of other works of foreign authors which have been republished in this country by American publishers. Nevertheless, if the Congress has clearly expressed its purpose of making this radical change, it is the duty of the court to give effect to that purpose.

The title of the act declares that it is intended to afford protection to exhibitors of foreign literary, artistic, or musical works "at the Louisiana Purchase Exposition." The first section provides that copyright protection shall be extended to books, maps, etc., published abroad, copies of which are "intended for exhibition at the Louisiana Purchase Exposition." The second section provides that one copy of any book copyrighted under the provisions of the act shall be delivered at the copyright office in the Library of Congress, "with a statement, duly subscribed to in writing, that the book \* \* \* is intended for such exhibition." The evident purpose of the act was to induce foreign authors, and the heirs and assigns of foreign authors, to exhibit their books at the Louisiana Purchase Exposition, to the end that the knowledge of the contents of those books might be brought to the attention of American scholars and readers. Foreign authors whose books had never been published in this country would probably have hesitated to exhibit their books at the Exposition without some protection against having them republished in this country, with possible disadvantages to them. It appears in the proofs that, a year before the interim act was passed, an association of German publishers adopted a resolution declining to make any exhibition of books at St. Louis. The interim act offered to foreign authors, and their heirs and assigns, if they should exhibit their books at the Exposition, copyright protection for at least two years, and also provided that if, within the two years, two copies of the original text of any book so temporarily protected, or of a translation of it in the English language, printed from type set within the United States, or from plates made therefrom, should be deposited in the copyright office in the Library of Congress, copyright protection therefor should be continued for the full terms provided for in our general copyright law; being terms of 28 years and 14 years. Section 8 of the interim act (33 Stat. 5, c. 2) expressly declares that:

"Except in so far as this act authorizes and provides for temporary copyright protection during the period and for the purposes herein provided for, it shall not be construed or held to in any manner affect or repeal any of the provisions of the Revised Statutes relating to copyrights and the acts amendatory thereof."

As already stated, the purpose of the act was to secure the exhibition at St. Louis of foreign literary productions that had been pub-

lished abroad. By such exhibition the American public might acquire valuable information not otherwise available. And in consideration of such exhibition, and the advantages that might accrue therefrom to the American public, the exhibitors of such productions were offered the copyright protection of the act. No such consideration could exist in the case of a book by a foreign author which had been previously published in this country. Clearer language than that contained in the interim copyright act is needed to justify the conclusion that Congress intended to grant to any foreign author, or to the heirs or assigns of any such author, a copyright monopoly of a book of which American publishers might have large quantities on hand for the American market, and which, by the grant of the monopoly, such publishers would be prohibited from selling.

My conclusion is that the interim copyright act cannot receive the construction necessary to the complainant's success, and I might on that ground deny the application for a preliminary injunction. But each of the defendants has, in its answer, prayed the benefit of a demurrer to the bill. In my view, the bill is without equity, and should be dismissed. If a final decree be entered sustaining the demurrer and dismissing the bill, an appeal may be taken without delay. If, on the other hand, an interlocutory order be entered denying the preliminary injunction, no appeal can be had until final decree shall have been rendered on the pleadings and proofs. *Edison Electric Light Co. v. Buckeye Electric Co.* (C. C.) 64 Fed. 225. It seems to me that the administration of justice may be facilitated by entering a final decree sustaining the demurrer and dismissing the bill, especially in view of the fact that the complainant's copyright, if valid, will not continue beyond two years from its date, unless within that period the complainant incur the great expense of setting up within the United States the type of the 25 volumes composing the *Encyclopædia Britannica*, and deposit in the copyright office two copies of each of the volumes printed from such type.

I will therefore, on notice, settle the question as to whether there shall be entered a final decree dismissing the bill, or merely an interlocutory order denying the preliminary injunction.

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**MAGONE v. COLORADO SMELTING & MINING CO. et al.**

(Circuit Court, D. Montana. February 14, 1905.)

No. 2,228.

**1. WITNESSES—DEPOSITIONS—DEDIMUS.**

An affidavit that witnesses live more than 100 miles from the place of the trial of the action, without proof of a well-grounded apprehension of a failure or delay of justice, is insufficient for the issuance of a *dedimus* under Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], providing that, in any case where it is necessary in order to prevent a failure or delay of justice, United States courts may grant a *dedimus potestatem* to take depositions according to common usage, etc.

**2. SAME—STATUTES.**

Act Cong. March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], providing that, in addition to the mode of taking depositions in the

federal courts, depositions may be taken in the mode prescribed by the laws of the state in which the courts are held, merely relates to the manner of taking depositions, and neither enlarges nor restricts the grounds for taking them prescribed by Rev. St. §§ 863, 866 [U. S. Comp. St. 1901, pp. 661, 663].

**3. SAME.**

Rev. St. § 863 [U. S. Comp. St. 1901, p. 661], authorizes the taking of testimony of any witness in a civil case pending in a federal district or circuit court by depositions *de bene esse*, when the witness lives a greater distance from the place of trial than 100 miles, etc.; and Act Cong. March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], provides that, in addition to the taking of depositions in a federal court, depositions may be taken as prescribed by the laws of the state in which such courts are held. *Held* that, where a party to a suit in the federal court applied to take a deposition on the ground that the witness resided more than 100 miles from the place of trial, he was not limited by the act of 1892 to the mode of taking the deposition orally before an authority named in the notice, but was entitled to take the deposition in the mode prescribed by the laws of the state in which the court was held.

**4. SAME—NOTICE—ORAL EVIDENCE.**

Equity rule 67, as amended by the rule adopted May 15, 1893, provides that either party may give notice that he desires the evidence to be adduced in the case to be taken orally, and thereupon all the witnesses to be examined shall be examined by one of the examiners of the court, or by an examiner to be specially appointed by the court, and that on due notice the court may, in its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing. *Held*, that where complainant gave notice that he desired the testimony to be adduced orally on final hearing, and the court thereupon ordered that the parties might adduce such portion of the testimony orally on the final hearing as they desired, such order was not in conflict with and did not prevent a subsequent order for the taking of testimony by depositions.

**5. SAME—SPECIAL EXAMINERS OUTSIDE THE DISTRICT—APPOINTMENT.**

The mere fact that it is generally advantageous to examine experts orally is not a sufficient reason to justify an order appointing a special examiner to take their testimony orally outside the district.

**Order Overruling Objections to Complainant's Motion that Commissions Issue.**

John A. Shelton, for complainant.

Forbis & Evans, for defendant Butte & Boston Consol. Min. Co.

Forbis & Evans, A. J. Shores, and C. F. Kelly, for defendant Parrot Silver & Copper Co.

A. J. Shores, C. F. Kelly, and Forbis & Evans, for defendants Anaconda Copper Min. Co. and Colorado Smelting & Mining Co.

Geo. F. Shelton and W. M. Bickford, for defendant Colusa Parrot Min. & S. Co.

J. J. McHatton, for defendant Montana Ore Purchasing Co.

**HUNT, District Judge.** In equity. On motion of the complainant for a commission to take the testimony of witnesses who live outside of the district of Montana.

If the complainant were seeking to procure a *dedimus*, as specified in section 866, Rev. St. U. S. [U. S. Comp. St. 1901, p. 663], it would be necessary that he make a showing of the necessity for taking such deposition to prevent the failure or delay of justice. I

believe it to be essential, in order for one to avail himself of the right to a *dedimus* under this statute, that there should be a well-grounded apprehension of a failure or delay of justice, and that it is the duty of the court to require a sufficient showing of good faith on the part of the applicant, and of the grounds upon which he bases his request; hence, if the complainant relied upon this section, a mere statement in the affidavit that the witnesses live more than 100 miles from the place of the trial of the action would be insufficient, and the *dedimus* should not be awarded. *Zych v. American Car & Foundry Co.* (C. C.) 127 Fed. 723.

But complainant is not asking a *dedimus potestatem* under section 866. He makes his application "to take the deposition by reason of the right so to do conferred by section 863, but according to the method prescribed by the state laws." The point to be determined, therefore, is not whether a *dedimus potestatem* may issue under section 866, Rev. St. U. S., but whether, upon a showing by affidavit that the witnesses whose testimony he would take live at a greater distance from the place of trial than 100 miles, a commission will issue to take their testimony by deposition in the mode prescribed by the laws of the state in which the court is held. I agree with the position of counsel for respondents that were it not for the act of March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], a deposition taken under section 863 [U. S. Comp. St. 1901, p. 661]—that is, a deposition *de bene esse*—should be one taken orally before an authority named in the order, and not one taken upon motion or under a *dedimus potestatem*, as provided for in section 866, Rev. St. U. S. [U. S. Comp. St. 1901, p. 663]. Foster's Federal Practice, vol. 1, p. 634. But by the act of March 9, 1892, it was provided that, in addition to the mode of taking depositions in the federal courts, depositions might be taken in the mode prescribed by the laws of the state in which the courts are held. It is undoubtedly correct that the statute of 1892 does not enlarge the instances in which depositions may be taken, or in which answers may be obtained upon interrogatories, for use as appearance in federal courts. The statute adopts the state practice as to the manner of taking depositions—in no way enlarging or restricting, however, the grounds for taking depositions as prescribed by the federal statutes (sections 863 and 866). It may be termed a statute of simplification of practice, or, as Judge Thayer expresses it, one "relating merely to the mode of taking testimony, adopting in that respect the provisions of the laws of the various states relative to the method of taking depositions, without altering the conditions prescribed by sections 863 and 866 of the Revised Statutes of the United States, in which depositions for use in the federal courts may be taken." *Zych v. American Car & Foundry Co.*, *supra*; *National Cash Register Co. v. Leland* (C. C.) 77 Fed. 242; *Shellabarger v. Oliver* (C. C.) 64 Fed. 306.

Now, the instances in which a deposition may be had under section 863 are when the witness lives at a greater distance from the place of trial than 100 miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which

the cause is to be tried, and to a greater distance than 100 miles from the place of trial, or when he is ancient or infirm. As said, there could be no construction of the act of March 9, 1892, which in any respect alters the conditions prescribed by section 863; but if a complainant presents a case of an instance authorized by section 863, in which a deposition may be taken *de bene esse*, the act of 1892 does not limit him to the mode of taking the deposition orally before an authority named in the notice, but provides an additional mode, by pointing out whereby it shall be lawful to take the deposition of such witness in the mode prescribed by the laws of the state in which the court is held. I do not see how allowing the complainant to proceed in the mode prescribed by the statutes of the state of Montana to take his testimony can be said to enlarge an instance in which a deposition may be taken, or to embrace a clause not already included, provided complainant states as the reason for taking the deposition the existence of a condition included in section 863. In this matter he has brought himself within the provisions of section 863 by showing that the witnesses whose depositions he wishes to take live at a greater distance than 100 miles from the place of trial. *McLennan v. Kansas City, J. & C. B. R. Co.* (C. C.) 22 Fed. 198; *Flint v. Crawford County*, Fed. Cas. No. 4,871. My conclusion is, therefore, that, when the position of the complainant is stated, it is clear that he is not seeking a *dedimus potestatem* under section 866, but makes his application under section 863, and that therefore he has the right to avail himself of the mode of procuring the deposition granted by the act of March 9, 1892. *Hanks Dental Association v. Tooth Crown Co.*, 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989.

The respondents suggest that complainant, having given notice that he desires the testimony in the case to be taken orally, should not be allowed to take a part of the testimony upon written interrogatories. Notice was given under equity rule 67, providing that either party may give notice to the other than he desires the evidence to be adduced in the case to be taken orally, and thereupon all the witnesses to be examined shall be examined by one of the examiners of the court, or by an examiner to be especially appointed by the court. As amended by the rule of May 15, 1893, it is required that, "upon due notice given as prescribed by previous order, the court may at its discretion permit the whole or any specific part of the evidence to be adduced orally in open court upon final hearing." Complainant did not give notice merely that he desired the evidence to be adduced orally, but his notice was that he desired the testimony to be adduced orally upon the final hearing, and thereupon the court made an order to the effect that the parties might adduce such portion of the testimony orally upon the final hearing as they desired. In view of this order of the court, the application for an order to take the depositions of the witnesses named does not conflict with the order previously made, and ought not to be construed to prevent the taking of depositions. I believe that it would be within the power of the court to direct that the

testimony of the witnesses living more than 100 miles away should be taken before an examiner especially appointed, although the power of the Circuit Court to make such an order has, it appears, been questioned. But the appointment of special examiners beyond the district in which the court is held necessarily involves unusual and great expense, in requiring the attendance of counsel, payment of examiners' fees, and other costs incidental to such procedure. I have read that Judge Blatchford, of New York, invariably declined to grant any order appointing a special examiner outside of the district of New York if counsel objected; and I think that, in the present instance, it does not appear necessary or best to make such an order. It is true that it may be generally advantageous to examine experts orally, but that is not a sufficient reason to justify the court in making the unusual order.

The objections to the issuance of the commissions to take the testimony of L. H. Pammel, A. A. Bennett, and Samuel Avery are therefore overruled, and the petition of the complainant that commissions issue is granted.

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**In re BAY CITY IRRIGATION CO.**

(District Court, S. D. Texas. February 1, 1905.)

No. 1,073.

**1. BANKRUPTCY—PETITION—HEARING—RECEIVERS—JURISDICTION.**

Where a receiver was appointed by a state court for an alleged bankrupt corporation, the court of bankruptcy, on an involuntary petition against the corporation, had no jurisdiction of the receiver prior to the corporation being adjudged a bankrupt, no relief being sought as against him.

**2. SAME—CORPORATIONS SUBJECT TO BANKRUPTCY—IRRIGATION COMPANIES.**

An irrigation corporation, organized to furnish water for the irrigation of rice fields, was not a corporation engaged in "trading or in manufacturing or mercantile pursuits," and therefore not subject to be adjudged an involuntary bankrupt, under Bankr. Act 1898, c. 3, § 4b (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), providing that any natural person, except a wage earner, or a person engaged chiefly in farming or the tilling of the soil, and any corporation engaged principally in manufacturing, trading, etc., may be adjudged a bankrupt.

[Ed. Note.—What persons are subject to bankruptcy laws, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 O. C. A. 4.]

**3. SAME—QUASI PUBLIC CORPORATIONS.**

A quasi public corporation, engaged in furnishing water for irrigation purposes, clothed with the right of eminent domain, and subject to statutory restrictions on such power, is not amenable to the federal bankruptcy act, on the ground of public policy.

**In Bankruptcy.**

The following is the report of the referee in bankruptcy:

To the Honorable Waller T. Burns, Judge of the District Court of the United States for the Southern District of Texas: This proceeding, involuntary in its nature, was instituted October 14, 1904, by P. E. Parker, E. H. Sweeny, and B. F. Sweeny, all of Bay City, Matagorda county, Texas, against the Bay City Irrigation Company, also of said city and county, by petition duly sworn to and filed with the clerk of this court, in which petition it is alleged that

the petitioners are creditors of the said Bay City Irrigation Company, having provable claims against it to an amount, in the aggregate, in excess of securities held by them, of \$3,000 and over; that the said defendant company is engaged principally in manufacturing, trading, or mercantile pursuits, within the meaning of the bankrupt law, and in furnishing and selling water to irrigate land for the growing of rice, and the raising and selling of rice in Matagorda county, Texas; that the said Bay City Irrigation Company is insolvent, and within four months next preceding the filing of this their petition has committed an act of bankruptcy, in this, because of insolvency, to wit, on the 15th day of August, 1904, a receiver was put in charge of its properties, under the laws of the state of Texas, by the Honorable Wells Thompson, Judge of the Twenty-Third Judicial District of Texas, Matagorda county, the name of which receiver is N. M. Vogelsang, of Bay City, Texas, and who has qualified and is acting as such officer. The prayer of said petition is for service of said petition and subpoena upon said defendant company and upon said N. M. Vogelsang, as receiver of said company, and that the said defendant company may be adjudged bankrupt, within the purview of the acts of Congress relating to bankruptcy. To this petition the defendant company filed a general demurrer, in its nature speaking, and also a document designated by it as a "plea to the jurisdiction." The receiver, N. M. Vogelsang, also filed a plea to the jurisdiction of this court, for the reason that he was an officer of the state court, and not answerable to this court, because no relief was sought against him as such officer, and the defendant company had not yet been adjudicated bankrupt. To the pleas of the defendant company and the receiver the petitioning creditors filed a general replication. And in pursuance of an order of your honor made in the above cause, and bearing date October 12, 1904, whereby the undersigned was authorized and directed, as referee of this honorable court, to consider the petition and answer in the above-named cause, and hear all matters of law and fact arising thereunder, and to make report thereupon at as early a date as practicable, and that "all parties shall attend before said referee at such time and place as the said referee may designate," I, S. W. Jones, referee as aforesaid, do report that, having duly extended notices to the said Bay City Irrigation Company, and to all others in interest, through their respective attorneys of record, of the time and place for the hearing before me of the matters so referred, to wit, at 10 o'clock a. m. on the \_\_\_\_\_ day of \_\_\_\_\_, 1904, at the United States courtroom in the city of Galveston, Texas, I did at the time and place aforesaid proceed to consider the pleadings in said cause, and to hear the contests raised by the pleadings filed therein, and to take such further action therein as required by the acts of Congress relating to bankruptcy; and having been attended by Mr. McRae, of the law firm of Bryan, Tod & McRae, and Sterling Myer, of the law firm of Hunt & Myer, attorneys for the petitioning creditors, by Gaines & Corbett, attorneys for the defendant, and Lane & Higgins, attorneys for the receiver, and having heard read the pleadings and the agreed statement of the facts in the case, which agreement is in writing, signed by counsel for the respective parties to this proceeding, and which accompanies this report, and having heard the arguments of counsel, and having duly and carefully considered the same, and having carefully examined and inquired into the matters so referred, I do find and report as follows:

From the agreed statement of facts before me, which was introduced in evidence, I find that the defendant, the Bay City Irrigation Company, was incorporated under the general incorporation act of Texas on the 14th day of December, 1900, with the authority to, and for the purpose of, "the construction, maintenance, and operation of dams, reservoirs, lakes, wells, canals, flumes, laterals, and other necessary appurtenances for the purpose of irrigation, navigation, milling, mining, stock raising, and city waterworks; to cause such examination and survey for its proposed canal to be made as might be necessary to the selection of the most advantageous, and, for such purpose, by its officers, agents, or servants, to enter upon lands or waters of any persons; to take and hold such voluntary grant of real or other property as shall be made to it in the construction and maintenance of its canals, ditches, and sluices; to construct its canals across, along, or upon any stream of water; to furnish water for irrigation at such rates as such organization or corpo-

ration may, by its by-laws and regulations, prescribe; to borrow such sums of money as may be necessary for the completing and furnishing or operating its canals; to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporated property and franchise to secure the payment of any debt contracted for the purpose aforesaid, provided that damages for any property appropriated by such corporation shall be assessed and paid for as is provided for in case of railroads; to enter upon, condemn, and appropriate any lands of any person or corporation that may be necessary for the uses and purposes of said company, the damages for any property thus appropriated to be assessed and paid for in the same manner as is provided by law in the case of railroads, and to make contracts for the sale of permanent water rights, and have the same secured by a lien on the lands or otherwise; and to lease, rent, or otherwise dispose of the water controlled by such corporation for such time as may be agreed upon."

From the agreed statement of facts on file, I further find that the defendant company, the Bay City Irrigation Company, was on the 1st day of September, 1904, and still is, insolvent; that N. M. Vogelsang was on the 15th day of August, 1904, appointed receiver of the properties of said company by the Judge of the District Court of the state of Texas, in and for Brazoria county, Texas, Twenty-Third Judicial District, in a suit brought by Robt. Parker, trustee, against said defendant company, to foreclose a mortgage executed by it upon all of its properties, in which said suit the said company admitted the indebtedness claimed, as well as another indebtedness claimed against it, and which is secured by a mortgage claim upon its properties; that the said N. M. Vogelsang has duly qualified as such receiver, and is now in possession of the properties and assets of the said Bay City Irrigation Company, managing and operating the same under the direction of the said District Court of Matagorda county, Texas.

I further find that said Bay City Irrigation Company owns and operates a pumping plant and irrigation canal in Matagorda county, Texas; that said canal is a surface canal, and consists of a main canal and lateral canals extending from the main canal, and that by means of said pumping plant water is raised from the Colorado river, one of the public water ways of the state of Texas, and pumped into said main canal, and thus raised to a higher level than the adjacent lands, and through said main canal and laterals said water is furnished for irrigation purposes to the lands adjacent thereto, and paid for by parties using the same by such parties delivering to said defendant company a portion of the crop irrigated.

I further find that said defendant company, since its organization, has been engaged in conducting its business as follows: It has maintained and operated its pumping plant and canal, and through its main canal and lateral canals it has furnished water to parties adjacent to its canal during the pumping season of every year since its organization, furnishing said water to said parties at such times and in such quantities as was necessary for the irrigation of their lands upon which rice was grown—rice being the only crop for which it furnished for irrigation purposes—for which said water said company charged and received from said parties a portion of the rice crop grown by them, which portion so paid and delivered to said company was by it sold in the open market as its own property, either in the rough or the mill state. I further find that said defendant company, in the operation and maintenance of its said pumping plant and canal, employed and expended its money for labor in running its machinery, and in the maintenance, care, and operation of its said pumping plant, canal, flumes, and laterals, and in collecting, caring for, and selling its said rice, which it had received as water rent, and for such portion of this rice as it sells in the clean state it pays to ricemills, in money, their customary charges for milling rice. I further find that the defendant company has maintained a bank account, and has also maintained running accounts with various merchants, from whom it purchased machinery, implements, oil, fuel, and other supplies which were necessary in the maintenance of its pumping plant and canals; that the said defendant company has borrowed money, and has executed its notes in evidence thereof, and its mortgages to secure the same, and also assigned its water contracts for the same purpose, and has issued and sold its bonds for the purpose of rais-



ing money, and has purchased and now owns a portion of its own capital stock as treasury stock. I further find that the said defendant company, in the transaction of its business as above stated, entered into written contracts with the parties to whom it furnished water, of a uniform character, during the years of 1903 and 1904, and similar contracts were entered into for the years 1901 and 1902; that the said water so furnished by said defendant company to adjacent landowners and leaseholders, after passing through the main canal and laterals of said company from its pumping plant, flowed through water gates in said main canal and laterals built, constructed, and maintained by said company, and located upon its said land owned as right of way; that said water was so furnished for a period of about one hundred days, during the spring and summer of each year, at such time and in such quantities as might be necessary to properly irrigate said lands, the quantity of water furnished depending upon the character of the land and the number of acres to be irrigated; that the period of one hundred days, during the spring and summer, while water is being furnished by said company, is termed the "flooding season," and during each year, from the 1st day of January to the beginning of the flooding season, said company was engaged in maintaining its pumping plant, canal, and laterals, repairing the same, and preparing to furnish water during the flooding seasons, and after the flooding season was over, and up to the 31st of December of each year, said company was engaged in receiving, caring for, and disposing of its share of the crop of rice paid to it as and for water rental, and in maintaining and caring for its pumping plant, canal, and laterals, and during the flooding season said company was engaged each year in operating its pumping plant furnishing water as above stated. I further find that the said defendant company purchased and now owns the machinery, pumping plant, and the lands upon which said plant is situated, and also lands over which its said main canal and laterals are situated.

The referee sustained the receiver's plea to the jurisdiction of this court as to him, but overruled the defendant company's general demurrer to the creditors' petition, and also its plea to the jurisdiction; treating the matter as a defense or answer to the merits of the case, rather than as a plea to the jurisdiction, by reason of the averments contained therein.

The bankrupt act of 1898, c. 3, § 4b (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), provides as follows: "Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt [to which by the amendment of February 5, 1903, was added mining corporations] upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

In this case two questions are presented for consideration: (1) Do the facts as found justify the conclusion that the defendant company is engaged in business either as a manufacturer, a trader, or a merchant, within the meaning of the bankrupt act? (2) Was it the intention of Congress, in framing the bankrupt law, to hold amenable to its provisions a quasi public corporation clothed with the powers of eminent domain, and subject to the same restrictions and penalties in their exercise, as railway companies, and whose business, pursuant to its chartered rights, is to furnish, for remuneration, water for irrigating the lands contiguous to its main canal and laterals, for raising rice and other like farm products?

As to the first question: There is no evidence whatever to support the contention that the defendant company is engaged in manufacturing or in mercantile pursuits, but there is some semblance of evidence, under the facts as detailed, that it is engaged in trading, if the water which it furnishes to growers of rice and other products, and receives compensation therefor, can be called trading, as that word is employed in the statute under discussion. The word "trader" or "trading" is of very broad significance, as defined by the different lexicographers; but it would seem that the framers of the law

intended its meaning in a more narrow sense, and that the true signification or the definition of that word, as employed in the statute, should be, "One who is engaged in buying and selling something for the sake of profit." In the case at bar the defendant company cannot be called a trader. It buys nothing which it sells to others, but only charges a reasonable compensation for its labor, skill, and time in furnishing water to others for irrigation purposes, for which compensation is paid in rice, and that rice is afterwards by the company converted into money. And if I am right, I conclude that the first question should be answered in the negative.

As to the second question: The defendant company is a quasi public corporation chartered under the laws of this state, and clothed with the right to exercise the power of eminent domain, and subject to the same restrictions and penalties as the right to exercise that power imposes. It traverses a large scope of territory devoted to rice culture, and is therefore a public necessity, and it would be against public policy to hold such a corporation amenable to the acts of Congress relating to bankruptcy. Nor can the fact that corporations like the one at bar are not mentioned amongst those expressly mentioned therein as exempted, indicate that it was the intention to hold them amenable thereto, for the courts have held that the law maxim, "*Expressio unius est exclusio alterius*," does not apply in the construction of the bankruptcy acts. I therefore conclude that the second question should also be answered in the negative.

The premises considered, I conclude that the defendant, the Bay City Irrigation Company, is not amenable to the acts of Congress relating to bankruptcy, and that the creditors' petition in this case should be dismissed, with the costs of this proceeding taxed against the petitioning creditors; and I therefore respectfully, so recommend.

Bryan, Tod & McRae, for petitioning creditors.

Gaines & Corbett, for Bay City Irrigation Co.

Lane & Higgins, for receivers.

BURNS, District Judge. On this day came on to be heard the report of S. W. Jones, referee, upon the hearing before him of the petition by creditors seeking to have the above-named company adjudicated bankrupt. And the court having now duly considered the said report of the said referee, and being fully advised, it is ordered that the said report be, and the same is hereby, approved, and in all things confirmed. It is further considered by the court, and so ordered, adjudged, and decreed, in accordance with the recommendation of the said referee, that the creditors' petition in this case be, and the same is hereby, dismissed, and all costs incurred herein adjudged against the petitioning creditors. It is further considered and ordered by the court that execution issue in favor of the respondent, the Bay City Irrigation Company, and against P. E. Parker, E. H. Sweeny, and B. F. Sweeny, petitioning creditors, for all costs herein incurred, and have execution therefor.

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#### THE GEORGETOWN. THE SALISBURY. THE BARGE NO. 8.

(District Court, E. D. Virginia. February 23, 1906.)

##### 1. COLLISION—STEAM VESSELS MEETING—BURDEN OF PROOF.

The burdened vessel, having been found chargeable with faults sufficient in themselves to account for a collision, has the burden of proving that they could not have caused or contributed to it, and every reasonable doubt is to be resolved in favor of the other vessel.

**2. SAME—BURDENED VESSEL—STEAMSHIP AND TUG WITH TOW.**

A steamship meeting a tug incumbered with a tow is under the duty of keeping out of the way and avoiding any risk of collision.

**3. SAME—EVIDENCE CONSIDERED.**

A steamship, which, having met and passed a tug with a barge in tow, on a line, in the Elizabeth river, at a distance of 300 feet, immediately stopped and reversed, throwing her stem around across the course of the barge, resulting in a collision, *held* solely in fault therefor, not only because the evidence failed to sustain her contention that the movement was justified by a sheering of the barge toward her, rendering it necessary, but also because she failed to give notice by signal, as required by article 18, rule 3, and article 23, of the inland navigation rules (Act June 7, 1897, c. 4, 80 Stat. 100, 102 [U. S. Comp. St. 1901, pp. 2882, 2884]); it further appearing that there was ample room in the channel for her to have kept further away.

**4. SAME—FAILURE TO CALL WITNESSES.**

Where the evidence in favor of one of two vessels in collision largely preponderates, including the testimony of disinterested witnesses, the failure of the other to call members of her own crew who were in a position to know the facts is a circumstance entitled to be considered against her.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 253.]

**5. SAME—INITIATING PASSING AGREEMENT.**

The fact that a tug with a tow, on meeting a steamer, gave the first passing signal, does not make the steamer the privileged vessel.

In Admiralty. Cross-libels for collision.

Thomas H. Willcox and Floyd Hughes, for tug Salisbury and Barge No. 5.

Hughes & Little and Butler, Notman, Joline & Mynderse (Archibald G. Thacher, of counsel), for the Georgetown.

WADDILL, District Judge. These are cross-libels filed by the New York, Philadelphia & Norfolk Railroad Company, owners of the steam tug Salisbury and Barge No. 5, against the steamship Georgetown, owned by the Atlantic Coast Steamship Company, and the last-named company against the said tug and barge.

On the morning of the 22d of September, 1903, about 7 o'clock, the tug and barge—the latter loaded with freight cars—en route from Port Norfolk to Cape Charles, Va., came into collision in the Elizabeth river, at a point about opposite the Norfolk & Western Railroad Company's coal piers, with the Georgetown, an ocean steamship proceeding to said piers for the purpose of coaling. The tug and barge, upon coming out of the channel leading from Port Norfolk into the main channel of Elizabeth river, and shaping their course down the river, sighted the steamship coming up the river below the piers, near Black Buoy No. 11; and thereupon the Salisbury gave two blasts of her whistle, to which the Georgetown replied with two blasts of her whistle, indicating to each other that the vessels would pass starboard to starboard. They did pass under this signal, the Salisbury and Georgetown passing each other about 300 feet apart. The navigators of the Georgetown observed, as they claim, that, as the Salisbury's bow was abreast of their starboard beam, a sudden sheer was made by the barge to eastward, which tended to take it across the Georgetown's course, whereupon the Georgetown stopped and reversed her engines, the effect of which was

to throw her bow to starboard, immediately across the course of the barge, and in that way came in collision with the barge; the apron on the starboard corner of the barge striking the port bow of the Georgetown, causing her serious injury; and the barge was also damaged, but to a much less extent. The Georgetown insists that the maneuver made by her was the proper one to avoid a collision, whereas the barge denies that there was any sheer or change in her course; insists that she was following straight in the wake of the tug, and that the collision was solely the result of mistake on the part of the Georgetown's navigators in failing to keep her course, and out of the way of the barge, and in going to starboard, thus throwing her directly across the course of the barge.

The case turns entirely upon what is the correct statement of facts relative to the navigation of the two vessels at the moments indicated—that is to say, the version of which navigator is to be accepted; there being between the witnesses who saw and observed the collision a positive conflict as to what occurred. If there was no sheer on the part of the barge, confessedly the maneuver of the Georgetown was wrong, since she put herself immediately across the barge's bow; and, if there was such sheer on the part of the barge, the Georgetown should not have made this maneuver unless it was the only chance of escape, and in that event it should have given proper reversing signals, as required by statute. Her proper course was to have kept out of the way of the barge, by starboarding and going further away from her, instead of reversing her engines, which threw her nearer to the barge, and across her course, instead of away from it; and if it resorted to the maneuver that it made, it should only have done so upon being satisfied that an avoidance of the collision otherwise was impracticable.

An unusually large number of witnesses were examined before the court in this case, particularly in behalf of the tug and tow; and, without reviewing the evidence at great length, or attempting to reconcile the conflict therein, further than to say that the same has been fully considered, the conclusion reached by the court is that the collision was brought about solely by the negligence of the navigators of the Georgetown. The tug and tow, by an overwhelming preponderance of evidence, established that the barge did not make the sheer ascribed to it by the Georgetown's navigators, but, on the contrary, that it followed straight in the wake of the tug. The witnesses on behalf of the tug and tow consisted of the officers and crews of the two vessels, the officers and crews of vessels near by and of persons on the piers of the Norfolk & Western Railroad Company, all in full view of, and who observed the collision. They with one accord sustain the contention of the tug and tow; and against it was only the evidence of the Georgetown's master and mate, and the master of the tug Katie, then lying near by the Georgetown for the purpose of docking her. Moreover, the circumstances of the collision strongly support the contention that the barge did not sheer as claimed. There was nothing to cause it to do so at the time, either in the condition of the tide or wind, or the length of the hawser; and the lick of the collision—the apron of the starboard of the barge coming into collision with the port bow of the steamship—would clearly indicate that there was no sheer, and that

the barge at least was not heading to the eastward of the channel at the moment of collision, as would have been the case, had such sheer taken place. However much the navigator of the barge, after observing the danger of the collision, may have put his helm to starboard, with a view of lightening the blow, it could not have materially affected, within the time allowed, the course of the barge, if the same was taking the rank sheer indicated by the navigator of the Georgetown. There was no claim of fault on the part of the navigator of the tug, the same having passed the Georgetown upon proper signals, and at a safe distance; and the sole negligence attributed is the sudden sheering of the barge, as above indicated. This defense savors too much of that generally made against the vessel having the right of way, namely, that she failed to remain in a place of safety, and threw herself immediately into danger, which is always improbable. It is further contended, as an act of negligence, that the hawser of the barge was too long. The preponderance of the evidence is that the barge was on a hawser about 100 fathoms, which, in the opinion of the court, was unnecessarily long for the navigation of the waters within the harbor of Norfolk and in the Elizabeth river; but the same in no manner contributed to this accident, and should not serve to relieve the Georgetown from responsibility. The Georgetown on the occasion in question was the vessel on whom the burden rested to avoid the collision; and, she having been found guilty of faults sufficient in themselves to account for the collision, the burden is upon her to show that her negligence not only did not probably produce, but could not have contributed to, the collision, and, under these circumstances, cannot escape liability by the suggestion of possible negligence on the part of the tug and tow. All reasonable doubts as to the vessel at fault must be resolved in favor of the tug and tow, and they held not contributing to the collision, unless their negligence is clearly established. *City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; *The Oregon*, 158 U. S. 186, 197, 15 Sup. Ct. 804, 39 L. Ed. 943; *The Victory & Plymouthian*, 168 U. S. 410, 423, 18 Sup. Ct. 149, 42 L. Ed. 519; *Foster, Master, v. Merchants' & M. T. Co.* (D. C.) 134 Fed. 964.

Counsel for the steamship contends that there was no fault in her navigation, and that what she did at the time was the only safe and proper thing to do, and that it would have been entirely unreasonable to suppose that she would have so acted unless the same had been her only means of escape from impending danger arising from the barge's sheer. The question of reasonableness of the steamship's maneuver is at last a difference of opinion. Doubtless the master thought it was the proper one to make, but the evidence and circumstances strongly establish the fact that his mind was on docking his vessel for coal (the tug *Teaser*, having shortly theretofore passed immediately around the Georgetown's bow, between her and the *Salisbury*, was then on his starboard side, with a view of taking his ship into the dock), and that his purpose in stopping his steamer and going to starboard was rather with the view of being backed in to the coal piers by the tug, than from the necessity of escaping this collision. Certain it is, what he did was consistent with the act of docking, instead of escaping the collision. The channel at the point of collision was about 800 yards wide, and,

while the preponderance of the evidence is that the point of collision was to the westward of mid-channel, it was certainly about the middle of the channel, and, if not to the westward, little if any to the eastward thereof, so that the Georgetown, having passed the Salisbury while the vessels were 300 feet apart, had the entire eastward portion of the channel to navigate, if she had proceeded on her course, keeping in view the obligation to keep out of the way of the tug and barge, an incumbered vessel; and there was no good reason, upon their passing the Salisbury, 300 feet away, when the master of the Georgetown says he observed the sheer in the course of the barge, why he should not have put her wheel hard astarboard, and kept out of the way of the barge. The tug and tow were incumbered vessels; and the duty was imposed upon the steamship, having full control of its own movements, to keep out of their way, and, if needs be, in order to avoid collision, to slacken speed, stop, or reverse her engines. *The Syracuse*, 9 Wall. 672 (5) 19 L. Ed. 783; *The Alabama*, 114 Fed. 214, 217, and cases cited; and same case, 61 C. C. A. 238, 126 Fed. 336. The Georgetown should have done more than that—she should have avoided the risk of collision; and, if 300 feet was too close to have passed to the Salisbury, taking into account the tow attached, with the incident risk of navigation, she should have kept further away, and, under the circumstances, not have proceeded in such close proximity to the tow that she could not escape collision with the same, arising from sudden, unforeseen, and unanticipated whims of navigation, as claimed by her—particularly when there was ample room, and no weather conditions or other cause to prevent her from so doing. The avoidance of the risk of collision was the duty imposed upon the Georgetown, and this it has clearly failed to meet. *The New York*, 175 U. S. 187, 201, 207, 20 Sup. Ct. 67, 44 L. Ed. 126; *Steamship Co. v. Low*, 112 Fed. 161, 162, 172, 50 C. C. A. 473; *The Richmond* (D. C.) 114 Fed. 208.

Another theory that strongly supports the contention of the tug and tow that the Georgetown's maneuver was with a view of backing into the coal piers, rather than seeking to avoid immediate collision with the tow, is the fact that the Georgetown utterly failed to give the danger signals required of her by article 18, rule 3, and article 28, of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 100, 102 [U. S. Comp. St. 1901, pp. 2882, 2884]), if her purpose was to stop and reverse in order to escape this collision. Of course, if she slowed down, and came to a standstill, with the view of being taken in to the dock, she would not have given these signals. Her failure so to do in the emergency is strongly indicative of the circumstances under which she stopped, and goes to sustain the tug and tow's theory. This rule in reference to danger signals in case of reversal of steam vessels is an important one to be observed, and it cannot be said that it may not have entered into the causes of this collision, while the other faults were the real causes; non constat that the tug, in its effort to control its tow, and those in charge of the navigation of the barge, would have adopted a different course, had they supposed that the steamship thought there was an emergency arising from the fault of the barge, taking the sheer ascribed to it. The enforcement of this rule is imperative where steam vessels reverse their engines and move backwards, even with a view of avoid-

ing a collision. *The Dexter*, 23 Wall. 69, 23 L. Ed. 84; *Belden v. Chase*, 150 U. S. 674, 699, 14 Sup. Ct. 264, 37 L. Ed. 1218; *The Straits of Dover*, 120 Fed. 900, 58 C. C. A. 86.

Considerable discussion was had as to the character of the witnesses who testified for the respective vessels, and the *Georgetown* was sharply criticised for only producing out of her crew, consisting of over 20 members, her master, mate, and chief engineer, and the omission to call the lookout or wheelman. Confessedly, the witnesses in charge of navigation of the respective vessels, by reason of their position and experience, are best enabled to explain what took place at the time on their vessels, and their evidence is entitled to great weight. *The Hope* (D. C.) 4 Fed. 93; *The Empire State*, 1 Ben. 60, Fed. Cas. No. 17,586; *Gypsum Prince*, 67 Fed. 612, 14 C. C. A. 573; *The Richmond* (D. C.) 114 Fed. 208, 211. But when they are in direct conflict, or there is a greater preponderance of the evidence of those on the vessels on one side than on the other, and, in addition, either side has the support of disinterested witnesses, in a position to observe and see all that occurred, the fact that the evidence of those engaged in the navigation of the vessel in collision preponderates strongly as to the cause of the collision, and is likewise supported by large numbers of disinterested witnesses, is of peculiar significance and strength; and, under such circumstances, the failure of the ship against which the weight of evidence exists to produce all of the persons, at least among its own officers and crew, likely to know of the circumstances of the collision, necessarily weakens its case. The failure to produce witnesses under such circumstances may be the result of mishap or misfortune, but these cannot suffice to take the place of absent witnesses who should have been produced. *Clifton v. U. S.*, 4 How. 242-246, 11 L. Ed. 957; *The New York*, 175 U. S. 204, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Freddie L. Porter* (C. C.) 8 Fed. 170; *The Fred M. Laurence* (D. C.) 15 Fed. 635; *The Alpin* (D. C.) 23 Fed. 815; *The Bombay* (D. C.) 46 Fed. 665.

Counsel for the *Georgetown* suggests that, the tug having initiated the movement of the vessels on this occasion by giving the first passing signals, thereby the greater responsibility of carrying out the same rested upon her; citing *The George L. Garlick* (D. C.) 91 Fed. 920. Whatever there may be in this contention, it should not prevail in this case, to relieve the *Georgetown* from responsibility, since the *Salisbury* and *Georgetown* passed each other with entire safety, and at a reasonable distance apart; and to carry this doctrine to the extent of relieving the *Georgetown* from responsibility in this case would, in effect, be to place it in the position of being the favored vessel, as distinguished from the tug and tow occupying such position by reason of its incumbered condition, merely because the tug and tow first gave the passing signal.

It follows from what has been said that, in the opinion of the court, the collision occurred solely because of the fault of the *Georgetown*, and a decree may be entered so determining.

**PARK et al. v. STANDARD SPINNING CO.****(Circuit Court, E. D. Pennsylvania. February 24, 1905.)****No. 75.****PLEADING—STATEMENT OF CLAIM—MOTION TO MAKE MORE SPECIFIC.**

The rule is, under the Pennsylvania practice, that a statement of claim must set forth concisely the plaintiff's claim with sufficient particularity to enable defendant to plead understandingly and with full knowledge of every claim that can be made or question that can be raised under it at the trial; and, in an action to recover a balance of advances made by plaintiffs against goods consigned to them for sale on commission, the statement should set out the account between the parties showing the sales made by plaintiffs and the prices received.

**At Law. On rule for more specific statement of claim.**

**R. Stuart Smith, for plaintiffs.**

**J. W. Bayard and John G. Johnson, for defendant.**

**HOLLAND, District Judge.** The plaintiffs were engaged in the business of selling cotton yarns on commission in the state of New York. The defendant is a corporation engaged in the manufacture of cotton yarns at Chester, Pa. The cause of action alleged in the statement is for a balance due the plaintiffs for advancements on certain cotton yarns shipped to them by the defendant and sold on commission; in other words, the plaintiffs advanced \$7,401.52, according to their claim, over and above the amount of merchandise sold by them for the defendant, and now claim this balance, without stating the items of sales made and the prices received for the same.

There is nothing in this statement notifying the defendant of the price at which the goods were sold, and nothing but a lump sum claimed against them. The rule is for a more specific statement, and we think they are entitled to have it. The defendant, of course, can ascertain from its books the amount of merchandise shipped to plaintiffs, but it is unable to tell whether it has credit for the entire amount of merchandise sold at a fair market price, and unless it is in possession of this information it cannot answer this claim.

The rule is, under the Pennsylvania practice, that a statement must set forth concisely the plaintiffs' claim sufficiently specific to enable the defendant to plead understandingly and with full knowledge of every claim that can be made or question which can be raised under it at the trial.

The cases cited in the plaintiffs' paper book establish their right to sue for a balance due for advances on consigned goods sold on commission, but there is nothing in those cases to relieve the plaintiffs upon a suit for a balance due for advances from furnishing a statement of the account between the parties. The statement no doubt sets forth a good cause of action. The plaintiffs are entitled to recover a balance due them for the reasons herein set forth, but when they attempt to recover in a suit they are required to state



their case with sufficient particularity to notify the defendant as to how the amount is made up, in order that it may plead intelligently.

Rule absolute.

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In re TAPLIN.

(District Court, N. D. Iowa, Cedar Rapids Division. February 25, 1905.)

No. 899.

**1. BANKRUPTCY—DISCHARGE—OBJECTIONS.**

A specification of objections to a bankrupt's discharge, that at the time of filing his petition he was the owner of a stock of drugs and general merchandise, no part of which was ever delivered to the trustee in bankruptcy, and that the bankrupt now has possession thereof, was insufficient, in the absence of an allegation that he concealed the same, or in any manner prevented the trustee from taking possession thereof.

**2. SAME—CONCEALMENT OF ASSETS—FALSE OATH.**

Bankr. Act July 1, 1898, c. 541, § 14 (1), 30 Stat. 550 [U. S. Comp. St. 1901, p. 8428], provides that the application for discharge shall be granted unless the bankrupt has committed an offense punishable by imprisonment as therein provided; and section 29b, 30 Stat. 554 [U. S. Comp. St. 1901, p. 8433], declares that a person shall be punished by imprisonment on conviction of having knowingly and fraudulently concealed, while a bankrupt or after his discharge, from his trustee, any property belonging to his estate in bankruptcy, or made a false oath or account in, or in relation to, any bankruptcy proceedings. *Held*, that the doing of such acts "knowingly and fraudulently" was an essential element of the offense, so that a specification alleging that at the time of filing his petition a bankrupt owned and possessed property, which he fraudulently concealed and fraudulently failed to inventory, was insufficient.

**3. SAME.**

An objection to a bankrupt's discharge not set forth in the specifications filed cannot be considered.

In Bankruptcy. On petition for discharge, and specifications of objections thereto.

Theo. F. Bradford, for the bankrupt.

Struble & Stiger and S. C. Huber, for objecting creditors.

REED, District Judge. The specifications of objections in opposition to the petition for discharge are (1) that the bankrupt, at the time of filing his petition herein, owned and possessed a large amount of property which he fraudulently concealed, and fraudulently failed to inventory as a part of the estate in bankruptcy; (2) that at the time of filing his petition in bankruptcy he was the owner of a stock of drugs and general merchandise, and that no part of the same has ever been delivered to the trustee in bankruptcy, and that the bankrupt now has possession thereof; (3) that, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, he destroyed and mutilated his books of account, etc.

There is no evidence to support the third ground of the specifications, and it is withdrawn by the objecting creditors.

The second specification is not a ground for denying the discharge. If the bankrupt has such goods in his possession, it is not alleged that he concealed the same, or in any manner prevented the trustee from taking possession of them.

The first specification is therefore the only one that need be considered. This is apparently based upon section 14 (1) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), which provides that the application for discharge shall be granted unless the bankrupt has committed an offense punishable by imprisonment as herein provided. The offenses so punishable are specified in section 29b of the act, and are as follows:

"A person shall be punished by imprisonment \* \* \* upon conviction of the offense of having knowingly, and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any property belonging to his estate in bankruptcy, or (2) made a false oath or account in or in relation to any proceedings in bankruptcy. \* \* \*" 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433].

The doing of the act knowingly and fraudulently is an essential ingredient of the offense. This specification fails to allege that the act charged was knowingly done, or that a false oath was knowingly and fraudulently made by the bankrupt to his schedules, or in relation to any proceedings in bankruptcy. The specifications of objections to a discharge, when based upon the ground of having committed an offense punishable by imprisonment, should state the offense so committed with substantially the same particularity and exactness as would be required in an indictment for such an offense. In *re Hirsch* (D. C.) 96 Fed. 468; In *re Levey* (D. C.) 133 Fed. 572; In *re Mudd* (D. C.) 105 Fed. 348; In *re Patterson* (D. C.) 121 Fed. 921. It is plain that an indictment in the language of the first specification would charge no offense under the bankruptcy act, and it presents, therefore, no ground for withholding the discharge. If, however, the testimony was to be considered, it fails to show that the bankrupt knowingly and fraudulently omitted from his schedules any property owned by him at the time of filing the same.

The objecting creditors contend in argument that a bill of sale of a stock of drugs and merchandise made by the bankrupt and one Milligan, as co-partners, to the father of the bankrupt, on April 16, 1903, was fraudulent as to creditors, and that this is sufficient to defeat a discharge, under section 14 (4) of the bankruptcy act. The specifications do not allege this as a ground for withholding a discharge, and for this reason alone such an objection cannot be considered.

There is not, therefore, such a showing as will warrant a denial of the discharge, and it will be granted. It is so ordered.

## MORAN v. MERRITT &amp; CHAPMAN DERRICK &amp; WRECKING CO.

(District Court, S. D. New York. February 27, 1905.)

## SHIPPING—LINE IN TUG'S SCREW—NEGLIGENCE.

Libellant's tug was injured in the East river, in the night, by reason of a line becoming entangled in its screw. On the same night a line used by respondent in raising a sunken vessel, which had been securely made fast to a pier and weighted to the bottom, in some unknown manner became loosened from the pier. *Held* that, assuming that such line was the one which caused the injury, of which there was no direct proof, it did not appear that there was any negligence on the part of respondent, which alone could render it liable for the injury.

In Admiralty. Suit to recover for injury to tug.

James J. Macklin, for libellant.

Avery F. Cushman, for respondent.

ADAMS, District Judge. This action was brought by Michael Moran, the owner of the steamtug William J. Sewell, to recover from the Merritt & Chapman Derrick & Wrecking Company, the damages caused to the tug by a line belonging to the steam dredge Monarch, owned by that company, getting into her screw in the vicinity of pier 3, East River.

The libellant's allegations were that the respondent was engaged in raising a sunken vessel abreast of said pier on the evening of the 13th of October, 1899, and ran the line in question from the vessel to pier 3, without a light or notice of any kind, creating a menace and danger to navigation. The respondent, in its answer, denied the libellant's allegations.

The testimony shows that the respondent was at the time engaged in raising a vessel sunk some 500 or 600 feet off the South Ferry Slip and in the operation had run a line from her to the pier known as 2, between that slip and the adjoining one on the north, used by the 39th Street Ferry to South Brooklyn. The dredge Monarch was not engaged at the time, but another vessel, the derick Reliance, owned by the respondent, was doing the work. This vessel was removed at night on account of the scow being so situated that vessels working about her would constitute an obstruction to navigation. The line so used on the night in question became in some way broken and detached from pier 2.

It is rather a remarkable coincidence if it was not the line doing the damage to the tug, that it should have become broken that night and it is singular also how it could get where the tug was at pier 3, the tide having been ebb at the time the tug alleges the accident occurred, about 7 o'clock P. M. The libellant contends it was not the line but if it were not, I see no connection between the accident and the respondent. Assuming it was the line, and that is the most favorable aspect of the matter for the libellant, still the case lacks evidence of negligence. Even if it were incumbent upon the respondent to account for the line, it seems to have done so by showing it was securely fastened to pier 2 and so weighted as to be carried, between some spiles, immediately to the bottom of the

river, some 15 feet, without apparent liability to become loosened or in any way to endanger light draught vessels, such as the tug was.

The respondent could only be held liable upon the theory of *res ipsa loquitur*, but that maxim can not, in my judgment, be extended to cover a case where proper precautions have been taken to weight a line and make it fast and there is nothing to show, or from which inferences may be drawn, that there was any negligence on the owner's part in its becoming loosened. It is not like a case of the fall of an elevator, where it may be presumed that the fall, in connection with proved circumstances, tends to show absence of care and justifies a jury in applying the doctrine. *Griffen v. Manice*, 166 N. Y. 188, 192-197, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630. There was no special relation between these parties, which required the exhibition of care, but merely a duty to the public not to create a nuisance in the way of an obstruction to navigation. There was no intention here on the respondent's part to create such an obstruction and the one that existed was manifestly by reason of some negligence or malice. There is nothing in the circumstances here to connect the respondent with the loosening of the line. The mischief which occurred could not reasonably have been foreseen when the line was made fast and I find nothing in the evidence to legally connect the respondent with the injury to the libellant.

Libel dismissed.

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DENISON v. SHAWMUT MIN. CO.

(Circuit Court, W. D. New York. January 30, 1905.)

DAMAGES—EVIDENCE—OPINION OF EXPERTS—CONSIDERATION BY JURY.

Where the evidence of damages consists of the opinions of experts, the jury may give such evidence credence, or may apply their own experience or knowledge of the situation to the subject submitted to them as indicated by the facts; and while, if they take the range of the expert testimony alone, without applying their own knowledge or judgment, they may not go higher than the highest nor lower than the lowest figure of the experts, yet they may ignore such testimony altogether, and award no damages, or only nominal damages, or such as are, in their judgment, proper.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2395-2398.]

Chas. J. Bissell, Louis L. Babcock, and George C. Miller, for plaintiff.

Frank Sullivan Smith (Martin Carey and James McC. Mitchell, of counsel), for defendant.

HAZEL, District Judge. This is a motion by the plaintiff after trial to set aside the verdict of the jury because of inadequacy of damages. The testimony of the witnesses on the question of market value of the coal at the mine may be, I think, properly termed opinion evidence, and hence the jury was not absolutely bound thereby. It was entirely within the domain of the jury to give such evidence credence, or to apply their own experience or knowledge of the situ-

ation to the subject submitted to them as indicated by the facts. *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; *Eor-syth v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. 408, 30 L. Ed. 586; *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028, and cases cited. The instructions of the court authorized the jury to weigh the evidence of the expert witnesses on the question of market value, and to accept it as a guide, although they were free to exercise an independent judgment. Counsel for complainant at the conclusion of the charge stated that, as he understood the same, the damages must be within the range given by the expert witnesses as to the market value. "The jury could judge, but they could go no lower than the lowest nor higher than the highest." To this interpretation of the instructions the court assented. The charge upon the subject to which reference is made is as follows:

"The damages cannot exceed the amount proven. The market values given are not uniform. They vary in different periods. The evidence of the witness Roberts, when the values stated by him are reduced to the average price for the entire period, tend to show the plaintiff's damages to be \$100,725.25; that of Ward, on the average, tends to show \$86,558.58; and that of McMahon, when reduced to an average for the entire period, is \$91,558.58. This summary I have taken from the figures submitted to me by plaintiff's counsel. You will verify them, or make your own computation. \* \* \* According to the stipulation of the parties, the production during the period of the breach was 50,000 tons, the amount of coal delivered to the plaintiff on his orders prior to the breach was 20,165 tons. The prices to be paid under the contract, as we have seen, were \$1 for fifty thousand tons, and \$1.15 for any excess. You are not bound absolutely by the values stated, but they should be considered by you as a guide towards ascertaining the actual damage sustained by the plaintiff. \* \* \* You may conclude, if, in your judgment, the proofs so warrant, that the plaintiff has not suffered or sustained any damage but only a nominal amount."

The assent of the court to the statement of counsel at the conclusion of the charge must be taken in connection with the portions of the instructions quoted. If the jury took the range of the expert testimony alone, without applying their own knowledge or judgment, then they could not go higher than the highest nor lower than the lowest figure of the experts, but they had the right, as indicated in the instructions, to ignore such testimony, and award no damages, or only a nominal amount or such an amount as in their judgment was proper.

It is contended by the defendant that the verdict was sufficiently justified on other grounds. Such problematical propositions, however, in view of the wide latitude allowed the jury in cases where the damages are predicated upon the special qualifications of witnesses called upon that question, and where the question of insufficiency of damages in the light of the facts may be doubted, need not be considered or discussed.

Motion denied.

**PHILADELPHIA TRUST, ETC., CO., et al. v. McCOACH, Collector**  
(two cases).

**NORRIS et al. v. McCOACH, Collector.**

(Circuit Court, E. D. Pennsylvania. March 1, 1905.)

Nos. 86, 69, and 32.

**INTERNAL REVENUE—LEGACY TAXES—EFFECT OF REPEAL OF STATUTE.**

Legacy taxes under the war revenue act of June 13, 1898, c. 448, § 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, § 10, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2307], which by section 30 are made due and payable one year after the death of the testator, are not collectible on the estates of persons who died within one year prior to July 1, 1902, at which time the repeal of said section 29 took effect [U. S. Comp. St. Supp. 1903, p. 279].

Suits to recover legacy taxes paid. On demurrers to statements of claim.

See 127 Fed. 386.

H. Gordon McCouch, for plaintiffs.

Jasper Y. Brinton and J. Whitaker Thompson, for defendants.

J. B. McPHERSON, District Judge. These suits, which are alike in their essential facts, are brought to recover taxes upon legacies which were imposed under sections 29 and 30 of the war revenue act of June 13, 1898, c. 448, 30 Stat. 464, 465, as amended by the act of March 2, 1901, c. 806, §§ 10, 11, 31 Stat. 946, 948 [U. S. Comp. St. 1901, pp. 2307, 2308], and were paid to the collector under protest. The controlling question in each case has recently been decided by the Circuit Court of Appeals for the Second Circuit in *Eidman, Collector, v. Tilghman et al.*, 136 Fed. 141, and I shall follow that ruling without discussion. The point decided there was that the sections referred to did not impose the tax until the end of a year after the death of the testator, because the act of 1901 declared that the tax should then be due and payable, and should be a lien and charge upon the property of the decedent; and therefore that legacies passing by the will of a testator who died October 13, 1901, could not be taxed, because section 29 of the act of 1898 was repealed by the act of April 12, 1902 [U. S. Comp. St. Supp. 1903, p. 279], and no tax was saved by section 8 of that statute unless it had become due and payable, and had thus been already imposed, before July 1, 1902, the date when the repealing act took effect.

In the first of the cases now under consideration, the decedent died May 24, 1902; in the second, April 14, 1902; and in the third, November 18, 1901—in each case after July 1, 1901, and within the year fixed by law as the period which must elapse before the tax should become due and payable.

Accordingly, judgment may be entered on the demurrer in each case in favor of the plaintiffs for the amount of the tax, with interest thereon.

In re HAESELER-KOHLHOFF CARBON CO.  
(District Court, E. D. Pennsylvania. March 2, 1905.)

No. 1,991.

**BANKRUPTCY—DISMISSAL OF INVOLUNTARY PETITION—COSTS.**

Costs will be allowed to an alleged bankrupt on dismissal of an involuntary petition against him only after the filing of his bill of costs with the clerk and notice to the petitioning creditors.

In Bankruptcy. On motion for allowance of costs.

Ernest L. Tustin, for alleged bankrupt.

Joseph Hill Brinton, for petitioning creditors.

HOLLAND, District Judge. In this case an involuntary petition in bankruptcy was filed against this company for certain reasons alleged therein, and the matter was referred to a referee for the purpose of ascertaining the facts and to make report thereon. The referee found against the petitioning creditors, and recommended that the petition be dismissed, at the cost of the petitioners; and further states in his report that costs to the amount of \$28.10 were paid by the alleged bankrupt. Counsel for the alleged bankrupt now asks this court to make an order directing the petitioning creditors to pay these costs and an additional sum of \$20 counsel fee.

Before the alleged bankrupt is entitled to this order it is necessary, under the practice as heretofore followed, that he should file his bill of costs with the clerk, and give the petitioning creditors notice of the filing of the same and the amount thereof, who will be entitled to a hearing on the question of their liability for the amount claimed, or any part thereof.

This petition to direct the payment of costs is therefore refused for the present.

THE REED BROS. DREDGE NO. 1.

(District Court, S. D. New York. March 2, 1905.)

**MARITIME LIENS—REPAIRS MADE ON ORDER OF OWNER.**

There is no lien on a vessel for repairs made in a foreign port on the order of the owner, not the master, in the absence of an agreement therefor, even though the person making them relied on the credit of the vessel.

\* [Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, § 46.]

In Admiralty. Suit in rem to enforce lien for repairs.

Powell & Cady, for libellant.

Henry W. Baird and Martin A. Ryan, for claimant.

ADAMS, District Judge. This action was brought by the Coulter & McKenzie Machine Company against the Reed Brothers' Dredge No. 1, to recover the balance of an amount incurred for repairs at Bridgeport, Connecticut, in March and April, 1903. There is no question about the work having been done. The action is defended upon the ground that there was no lien.

It appears that the dredge belonging in New York was being used in the harbor of Bridgeport and was repaired by the libellant to the extent of \$441.28 in that harbor at the instance of the owners. In April, 1903, a payment of \$50 was made and in April of 1904, a further payment of \$150, leaving due the sum of \$241.28, for which a lien on the dredge is now claimed. The arrangements for the work were made between the Vice President and Treasurer of the libellant and Reed Brothers, who were in Bridgeport in advance of the arrival of the dredge, but nothing was said about a lien.

The work was done in a foreign port, and if it had been contracted for by the master of the vessel, would have made a prima facie case of a lien but the libellant's difficulty is, that it contracted with the owners, without making any arrangement for a lien and the fact that no lien was contemplated is shown, to some extent, by the two payments made by the owners as appears above. No lien can be sustained under the circumstances of this case. It would not matter if the libellant intended to rely upon the credit of the dredge, of which the charge in their books is but slight evidence. *The Samuel Marshall*, 54 Fed. 396, 403, 4 C. C. A. 385; *The Iris*, 100 Fed. 104, 40 C. C. A. 301; *Prince v. Ogdensburg Transit Company* (C. C.) 107 Fed. 978. It has been said by the Circuit Court of Appeals for this circuit on the question of lien, in *The George Farwell*, 103 Fed. 882, 883, 43 C. C. A. 373:

"(5) Where supplies and repairs are ordered in a foreign port, not by the master, but by the owner, there must be some affirmative evidence to show that the credit of the ship was pledged as security for payment."

Libel dismissed.

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In re MILLER & BROWN (1).

(District Court, M. D. Pennsylvania. March 14, 1905.)

No. 549.

**BANKRUPTCY—RECOVERY OF GOODS—SALES ON CONDITION.**

Where claimant sold certain goods to a bankrupt firm, who were entitled to sell the goods at their discretion, their only obligation being to pay the price on sales made, or return the goods, the transaction amounted to nothing more than a contract of "sale and return," and the claimant was not entitled to recover the goods unsold as against the firm's trustee in bankruptcy.

In Bankruptcy. Sur petition of the Magee Carpet Company for order on trustee to turn over property.

Philip B. Linn, for petitioners.

Andrew A. Leiser and W. R. Follmer, for trustee.

ARCHBALD, District Judge. In cases of this character the local law governs, the title of the trustee being determined by the question whether the arrangement with regard to the property is good as against creditors. If it is, the property may be reclaimed; but, if not, it cannot be. *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; *In re Butterwick*, 12 Am. Bankr. R. 536, 131 Fed. 371. The decisions upon the subject in Pennsylvania are numerous,



but they uniformly and consistently hold that, where goods are found in the possession of a debtor, to whom they have been duly transferred by negotiation with the owner, they are liable to creditors, unless a trust or bailment can be shown. A sale upon condition is not enough. It will be sufficient to refer for this to *Ott v. Sweatman*, 166 Pa. 217, 31 Atl. 102, where the cases are collated and reviewed. In the present instance the bankrupt firm, desiring to obtain an assortment of carpets and rugs or art squares in anticipation of the opening of the fall term of Bucknell University at Lewisburg, Pa., where they were engaged in business, Mr. Brown, one of the members, on September 14, 1904, called at the mill of the Magee Carpet Company, the present petitioners, at Bloomsburg, Pa., where he met Mr. Magee, the manager, and stated his errand. There had been previous dealings between the parties, and a balance of account against the firm of \$161.64 had been standing unpaid since May previous. Mr. Magee called attention to this fact, and said that they did not care to increase it by any further credit; but he was assured by Mr. Brown that, according to the instructions of his partner, who looked after that end of the business, a check would be forthcoming the next week—a promise which, it may be noted in passing, was kept. Mr. Brown further explained that the university would open shortly, and that they always had calls from the students who were fitting up their rooms for a certain grade of carpets and art squares; and after selecting two rolls of carpet Mr. Magee agreed to make a further assortment of carpets and squares and ship them to him, upon the understanding that what the firm sold should be paid for, and what they did not could be returned. The goods to the amount of \$319.68 were sent in a few days, and it is for the unsold portion of this consignment that claim is now made. The question is whether, under the circumstances, title passed as against creditors.

The petitioners contend, and Mr. Magee so testifies, that the goods were sent strictly on memorandum or approval, and not sold, the title to remain in them except as sales were made; and in confirmation of this the daily scratchbook, in which the order was entered, is produced, where the word "Mem." appears at the head of the bill. There is nothing, however, in the salesbook or the ledger to characterize the transaction as other than a straight sale, and in the invoice which was sent to Miller & Brown along with the goods they were charged at the regular prices, the same as they would have been if that was the case. This is not, of course, conclusive (*Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. Ed. 214; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093), although not without a certain weight (*Chapman v. Kerr*, 80 Mo. 158). Neither was anything said at the time as to the prices at which the goods should be sold by the bankrupts to their customers, the only condition asserted or relied upon being that such of them as were should be paid for, and the rest returned. According to Mr. Magee, the return was to be at the expense of the carpet company; but this is a mere assumption, for he admits that nothing was said. Mr. Brown, on the other hand, testifies—and I accept his statement—that the firm were to pay the freight in case of a return, and that, in order to entitle them to do so, the property was to be in good condition; and the privilege, according to his recollection, was to be exercised with-

in 30 days. The shipment was received at the store September 18th, and the goods were at once put into the carpet department, along with the other stock on hand, and sales were made from time to time therefrom to the extent, at invoice prices, of \$19.80, of which, however, no separate account was kept. The matter ran along in this way until October 21st, when the store was closed by the sheriff upon execution, and on October 27th a voluntary petition in bankruptcy was filed.

It is not clear from the evidence whether the arrangement on which the petitioners rely extended to the carpets as well as the art squares; Mr. Brown testifying that he bought two rolls of the former before it was suggested by Mr. Magee that he would make up an assortment of rugs or art squares, from which selections could be made by the students, and the balance be returned. Neither does it altogether appear that the transaction took on this form for the benefit of the carpet company, so that they might be protected in parting with their goods, any more than to relieve Miller & Brown from loading up with and carrying unneeded stock. The advantage to himself was probably in the mind of each party. But, however that may be, and assuming that the condition extended to the whole order, carpets as well as rugs, the result must be the same. It constituted nothing more than what is known in the law as a contract of "sale or return," in which the title passes to the party to whom the goods are delivered, subject to the exercise of the option to return them if he so desires. *Moss v. Sweet*, 16 Q. B. 493; *Hunt v. Wyman*, 100 Mass. 198; *Hickman v. Shimp*, 109 Pa. 16. This, it is true, is not the case where the party has the option of returning the goods if they prove unsuitable or unsatisfactory, of which he is necessarily the judge, the consignee there holding as bailee for the time within which he is called upon to declare his purpose with regard to them, which, if unspecified, must not exceed what is reasonable. *Butler v. School District*, 149 Pa. 351, 24 Atl. 308. But where the right to return does not depend upon any such consideration, but upon the mere will of the consignee, however moved, the transaction is a sale, and the title vests (24 Am. & Eng. Encycl. Law [2d Ed.] 1024); and that is the situation here. It is not like the case of *McCullough v. Porter*, 4 Watts & S. 177, 39 Am. Dec. 68, where the goods were to be sold on account of the party consigning them, for not less than the invoice prices, and the proceeds remitted to the extent of these prices, the party to whom they were consigned retaining all above that as his commission. Such an arrangement clearly created the relation of principal and factor, and constituted a bailment, the title to the goods remaining in the consignor until they were sold, and the money received being his, less the commissions earned by the other party. This was nothing more nor less than the case of one person putting his property into the hands of another for the purpose of sale. Neither is there any similarity to the case of the *Keystone Watch Co. v. Bank*, 194 Pa. 535, 45 Atl. 328, where the transaction was hedged about with the very stringent provisions that the goods consigned should only be sold at certain scheduled prices, and the proceeds at once remitted, and that all sales should be made by the consignees as agents, and so billed on special billheads, the owner also reserving the right to terminate the arrangement at any time and take back the goods. In the present in-

stance, however, the property passed into the hands of the bankrupts to be disposed of in whatever way, at whatever prices, and upon whatever terms they chose. It was mingled with their other store stock without distinction, and without any right of direction or control from the carpet company, whose only claim was to be paid the prices at which it had been shipped. This made it to all intents and purposes a sale (*Braunn v. Keally*, 146 Pa. 519, 23 Atl. 389, 28 Am. St. Rep. 811), which is not affected by the provision that whatever was not sold was to be returned. Whether we regard this as a privilege in favor of the bankrupts or a condition on which the property was parted with, it passed title for the time being, and before advantage had been taken of it the rights of creditors had supervened.

The petition is dismissed, with costs.

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IN RE MILLER & BROWN (2).

(District Court, M. D. Pennsylvania. March 14, 1905.)

No. 549.

**BANKRUPTCY—SALE OF GOODS—BAILMENT—RECLAMATION.**

Claimant's salesman applied to a bankrupt firm for an order for ribbons, and, the buyer being absent, the other member of the firm gave a small order, subject to the approval of the buying member after the goods were received. The goods shipped were considerably more than was ordered, and on receipt of them the buying member of the firm picked out those he wished to retain, which were separated from the others, and placed in stock, the balance being left in the original packages, set by themselves, and marked on the bills as "to be returned"; but before anything was done with them, and within a little more than a week after they were received, the stock, including the ribbons, was levied on by the sheriff and turned over to the firm's trustee in bankruptcy shortly thereafter. *Held*, that the transaction as to the ribbons to be returned was a bailment, and not a "sale and return," and that the seller was therefore entitled to recover the same from the firm's trustee.

In Bankruptcy. Sur petition of Pollock & Caskel for order on trustee to turn over property.

Philip B. Linn, for petitioners.

Andrew A. Leiser and W. R. Follmer, for trustee.

ARCHBALD, District Judge. The general principles which govern in cases of this character have been discussed in disposing of the petition of the Magee Carpet Co., 135 Fed. 868, and do not need to be repeated here. The facts upon which the case turns are not disputed. About October 1, 1904, in the absence of Mr. Brown, the member of the firm who did the buying, Mr. Pollock, one of the petitioners, called at the store of the bankrupts in Lewisburg, Pa., and solicited an order for ribbons. Mr. Miller, the other member of the firm, who was present, authorized the young lady in charge of that department to make out a list of the things which she thought were needed, which she did, and it was agreed between Mr. Miller and Mr. Pollock that these should be sent, subject to the

approval of Mr. Brown after they had been received. The goods were shipped in two parcels, one of \$125.50 October 10 and the other of \$48.69 a day or two later, and they were billed to the firm as payable 10 days after December 1 with 6 per cent. off if paid at that time. Considerably more were sent than had been listed, and upon their receipt Mr. Brown went over them, and picked out those which he wished to retain, which were separated from the others, and put with the stock of millinery goods which were already on hand. The rest were left in the original packages, and set by themselves on one side of the store, and were marked on the bills as to be returned. Before anything further was done with them, however, on October 21 they were levied on by the sheriff along with the other stock in the store, and, the firm having gone into bankruptcy a few days later, they were turned over to the trustee.

No claim is made here to the goods which were accepted and marked for sale. But it is contended by the petitioners, as to those which were not so treated, that, having been sent upon approval, no title passed unless they were found satisfactory and taken, and that, as they were not, they continued to remain their own. In my judgment, this position must be sustained. This is not like what is known in the law as a "sale and return." *Hunt v. Wyman*, 100 Mass. 198; *Hickman v. Shimp*, 109 Pa. 16; *Reber v. Schitler*, 141 Pa. 640, 21 Atl. 736. The bankrupts did not buy, in other words, with the right to return such part as they concluded not to retain. That was the case which was presented on the petition of the Maggee Carpet Company, already referred to, where a discussion of the distinction will be found. From the goods sent, Mr. Brown, acting for the firm, was to make such selection as he saw fit, and this was promptly done. For those which were not accepted in this way, the bankrupts were not liable, and, if not liable, neither did they take title to them, and they may therefore be reclaimed as is now sought. It is true that the goods not approved were not in fact returned, nor was any notice given. But they were unmistakably separated from the others, and set by themselves, in the original cartons in which they came, in a different part of the store. These acts on the part of the bankrupts were sufficiently distinctive to indicate their intention with regard to them, of which they would have had the right to avail themselves if an effort was made to hold them for the price; and, as the matter is reciprocal, the petitioners are entitled to rely upon the same here. Nor is this affected by the circumstance that notice of this action was not given. The time within which the bankrupts were called upon to express their approval had certainly not been exhausted in the few days before the goods were seized by the sheriff, and the fact that they had not yet communicated the extent of it does not detract from the selection which they had actually and undoubtedly made.

It is said, however, that the invoices on which the goods were shipped were in the form of bills as for intended sales upon definite terms of credit given. But, however persuasive this may be at times in connection with other circumstances, it is not conclusive (*Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093), and

must give way before the evidence as to the character of the transaction with regard to which in the present instance there can be no doubt.

The petition is sustained, and the goods which were marked to be returned, amounting to \$72.02 at invoice prices, are directed to be given up to the petitioners by the trustee.

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In re SLOAN.

(District Court, E. D. Pennsylvania. March 13, 1905.)

No. 1,967.

**1. BANKRUPTCY—SALE OF ASSETS—PROCEEDINGS—EXEMPTION.**

Where a bankrupt's property was sold by a receiver under order of court appointed the day after the petition was filed, and prior to the filing of the bankrupt's schedule, and he notified the receiver at the sale that he claimed his exemption and specified the property from which he desired it allotted, he was entitled to claim his exemption from the proceeds of the sale of such property.

**2. SAME—ASSIGNMENT OF EXEMPTION—WAIVER.**

A bankrupt's exemption, as authorized by Act Pa. 1849 (P. L. 533), being personal to him, is nonassignable, so that an assignment thereof operated as an abandonment of his right.

**3. LEASES—WAIVER OF EXEMPTIONS—CLAIM FOR RENT—PRIORITY—RESTRAINT.**

Where a lease to a bankrupt contained a waiver of exemptions, and the landlord proved his claim for rent before the referee, he was entitled to receive such rent as a prior claim out of the proceeds of property from which the bankrupt claimed his exemption, which was subject to distress for rent, though the landlord made no levy either before or after the filing of the bankruptcy petition.

**4. SAME—CLAIMS—RIGHT OF CONTEST.**

Where both a bankrupt and his assignee of exemptions claimed an interest in a fund derived from the sale of certain of his assets, they were entitled to contest the allowance of the claim against it.

In Bankruptcy. On certificate from referee.

Charles Lehr, for trustee.

Herman W. Rennert, for landlord.

Edmund W. Kirby, for bankrupt.

HOLLAND, District Judge. On June 13, 1904, an involuntary petition in bankruptcy was filed, and on the 14th of the same month a receiver was appointed and authorized to sell the bankrupt's assets, and the sale of his liquor license for \$1,900 and bar fixtures for \$300 took place on June 30, 1904, as advertised, and the sale was confirmed without objection. A notice dated June 21, 1904, was served on counsel for the receiver by the bankrupt, at the auction room, on the day of sale, but before the sale began, wherein he claimed the bar fixtures of the retail license saloon at 108 North Sixth street, Philadelphia, for his exemption, under and in accordance with the laws of Pennsylvania, and at the same time he agreed that the receiver might sell the fixtures upon condition that he be paid \$300 in cash out of the proceeds. The license and fixtures

were sold separately, and the auctioneer stated that this was done in consequence of a notice received to so sell them.

At the time of filing the petition in bankruptcy there was rent due to the landlord amounting to \$75, under his lease with the bankrupt, in which there was a waiver of exemption in favor of the landlord; and on August 31, 1904, the landlord filed a proof of his claim of \$75 for rent due under his lease, and claimed that he was entitled to be paid out of the proceeds of the sale of the fixtures as a debt which has priority under the bankrupt law, although he had not distrained for the fixtures before or after the bankruptcy proceedings were commenced. Sloan was not adjudicated a bankrupt until July 5, 1904, and on the 18th of the same month he filed his schedules, and in them claimed his exemption, and specified the bar fixtures of the retail license saloon, 108 North Sixth street, Philadelphia. On October 29, 1904, the bankrupt, in writing, assigned and transferred his exemption to Robert J. Byron, who was not a creditor of the estate, and for a consideration that Byron would secure his discharge, at his own expense, if objections thereto were made, although at that time there were no objections to the bankrupt's discharge, but since the assignment objections to his discharge have been filed.

The questions certified are:

"(1) Did the assignment and sale made by the bankrupt of his right to exemption effect an abandonment of it and leave the same in the general fund, to be distributed among those legally entitled to it?

"(2) Is the landlord entitled to payment of rent of seventy-five dollars as a priority out of the sum of three hundred dollars, realized as the proceeds of the sale by the receiver of the chattels of the bankrupt upon the premises at the time of the commencement of the bankruptcy proceedings, the lease containing a clause waiving the benefit of the exemption laws?

"(3) Have the bankrupt and his assignee of the exemption any standing to object to the payment of said claim of seventy-five dollars for rent as a priority, there being no other fund than said three hundred dollars proceeds of the sale out of which the rent can be paid as a priority?"

1. As the bankrupt's property in this case was sold by order of court, by a receiver appointed the day after the petition in bankruptcy was filed, and prior to the filing of the schedule by the bankrupt, and in view of the fact that he notified the receiver that he claimed his exemption, and specified the property at the day of sale, he would be entitled to claim his exemption from the proceeds (*In re Le Vay* [D. C.] 125 Fed. 990; *In re Stein* [D. C.] 130 Fed. 629); but instead of insisting upon his claim he subsequently assigned it to another, who was not a creditor of his estate. A claim of exemption under the act of 1849 (P. L. 533) was meant only for the insolvent debtor to keep a shelter and the means of living for himself and his family (*Bowyer's Appeal*, 21 Pa. 210), and it is therefore not a vendible or assignable thing (*Eberhart's Appeal*, 39 Pa. 513, 80 Am. Dec. 536). What he does not claim for himself and his family he leaves in the general fund and under the control of the court for distribution. *Bowyer's Appeal*, *supra*. It would seem, therefore, that the bankrupt in this case abandoned his right to claim the exemption by the execution of the assignment to Byron,

and the only effect of the attempted transfer is to leave the proceeds of the sale of the articles he claimed in the general fund for distribution. A debtor cannot waive his right to the \$300 in favor of a junior creditor or assign it to a third person. *Bowyer's Appeal*, supra.

2. As these articles were such property as could have been taken by the landlord upon a distress for rent under his lease with the waiver of exemption, he is entitled to receive his rent as a prior claim out of the proceeds of the fixtures, notwithstanding his failure to have made a levy either before or after the filing of the petition in bankruptcy, he having proved his claim before the referee. *In re Hayward* (D. C.) 130 Fed. 720; *In re Duple* (D. C.) 117 Fed. 795; *Barnes' Appeal*, 76 Pa. 50; *Wickey v. Eyster*, 58 Pa. 501; *Moss' Appeal*, 35 Pa. 162.

3. Both the bankrupt and his assignee of the exemption have a right to contest any claim upon a fund in which either claim to have an interest which may be affected by the allowance of the claim. They may not successfully contest it, but they cannot be deprived of hearing.

There was a separate certificate of the referee on the question of the right of the bankrupt to claim his exemption out of the proceeds of the sale, and as to whether he had abandoned his exemption by assigning it to a third party. The referee held that the assignment to Byron was a waiver or an abandonment of the right to exemption, and the fund remained to the general creditors. The petition of the bankrupt for an allowance of exemption of \$300 out of the proceeds of the bar fixtures was dismissed by him.

For the reasons stated in this opinion, both orders of the referee are approved.

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RANDOLPH v. WHITE et al.

(Circuit Court, W. D. Texas, Waco Division. March 3, 1905.)

No. 261.

1. **HOMESTEAD—EXEMPTION—RIGHTS OF CHILDREN.**

Under Rev. St. Tex. 1895, art. 2046, providing that it shall be the duty of the court to set apart for the use and benefit of the widow, minor children, and unmarried daughters remaining with the family of the deceased all such property as may be exempt from execution by the Constitution and laws of the state, with the exception of an exemption of one year's supply of provisions, on the death of a person leaving three unmarried daughters surviving, living with him at the time as a part of his family, the homestead which he then occupied descended to and vested in such daughters and the other surviving children, free from the father's debts.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 272.]

2. **SAME—ADMINISTRATION—NECESSITY.**

Such homestead being exempt from forced sale to satisfy the father's debts, no administration was necessary to render the exemption effectual.

3. **SAME—STATUTES—VALIDITY.**

Rev. St. Tex. 1895, art. 2046, authorizing the probate court to set aside property exempt from forced sale to the widow, minor children, and unmarried daughters remaining with deceased's family, is not repugnant

to Const. art. 16, § 52, declaring that on the death of husband or wife or both the homestead shall descend and vest as other real property, but shall not be partitioned among the heirs during the life of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or as the guardian of the minor children of the deceased may be permitted, under order of the proper court having jurisdiction, to occupy the same.

### In Equity.

The complainant filed a bill in this cause to subject a tract of real estate to the payment of a judgment which he had recovered in the United States Circuit Court for the Northern District of Texas against Sam White, Sr. The cause has been submitted to the court on the pleadings and the following stipulation of counsel: "For the purpose of submitting this cause for determination upon bill and answer it is agreed that the following facts are to be considered in the record: (1) The complainant had a valid and subsisting judgment against Sam White, Sr., at the time of his death, rendered in the Circuit Court of the United States for the Northern District of Texas, at Dallas, Texas, and more than \$25,000 of said judgment is still unsatisfied. (2) That Sam White, Sr., died intestate and insolvent about May 8, 1894, leaving as his children and heirs at law the defendants in this cause, to wit, Fannie Watson, now a married woman, Sam White, Jr., Paris White, Willie Sullivan, now a married woman, and Edna White, an unmarried woman; all of said children being of age at the date of the death of Sam White, Sr., who, for the purposes of this suit in equity, it is admitted died seised and possessed of no real property except his homestead and an immaterial amount of personal property exempt from execution. (3) The property involved in this suit was the homestead of Sam White, Sr., and his children for many years prior to the date of his death. The wife of Sam White, Sr., died many years prior to the date of his death, and at the time of his death the homestead was occupied by himself and his three daughters above mentioned, who were all then unmarried. (4) Executions were issued upon said judgment and the land in controversy was sold under the same prior to the death of Sam White, Sr., and subsequent to the death of Sam White, Sr. (5) No guardianship proceedings were ever taken as to the estate of any of said children, and no administration has ever been had upon the estate of Sam White, Sr. (6) Since the death of Sam White, Sr., the property in question has been occupied by said daughters until they married, and is now occupied by Edna White, the sole unmarried daughter. (7) The sole question to be determined in this cause is whether or not the said property descended to any or all of the heirs of Sam White, Sr., charged with the debt in question, or whether, because of the occupancy of the same by unmarried daughters after the death of Sam White, Sr., the property is free from claim of complainant as a creditor of Sam White, Sr."

Boynton & Boynton, for complainant.

Clark & Bolinger, for defendants.

MAXEY, District Judge (after stating the facts). After a careful examination of the decisions of the Supreme Court of this state, the court has reached the following conclusions, based upon the proof as embodied in the stipulation of counsel:

1. Upon the death of Sam White, Sr., there being three unmarried daughters at that time living with him as a part of the family, the homestead, then occupied by the father and three unmarried daughters, descended to and vested in such daughters and other surviving children of the deceased father. Rev. St. Tex. 1895, art. 2046; Childers v. Henderson, 76 Tex. 664, 13 S. W. 481; Zwernemann v. Von Rosenberg, 76 Tex. 522, 13 S. W. 485. See, also, Roots v. Robertson, 93 Tex. 365, 55 S. W. 308.



2. Under the facts of this case the children of the deceased father inherited the property mentioned free from the ancestor's debts. See authorities above.

3. The homestead being exempt from forced sale to satisfy the ancestor's debts, there was no necessity for administration to render the exemption effectual. *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481.

4. Article 2046 of the Texas Revised Statutes of 1895, which authorizes the probate court to set aside property exempt from forced sale, etc., to the widow, minor children, and unmarried daughters remaining with the family of the deceased, is not repugnant to article 16, § 52, of the Constitution of the state, which is in the following words:

"On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the life time of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same."

The fact that the statute goes a step further than the Constitution in directing the probate court to set aside the exempt property to unmarried daughters, who are not named in article 16, § 52, of the Constitution, does not render the statute obnoxious to the objection that it is repugnant to that instrument. In deciding the case of *Childers v. Henderson*, supra, the Supreme Court of Texas necessarily held the statute to be constitutional, and that ruling is binding upon this court. See, also, *Zwernemann v. Von Rosenberg*, supra. It may be stated in this connection that there is nothing inconsistent with this view in the later case of *Roots v. Robertson*, supra. Indeed, in that case—93 Tex., at pages 372, 373, 55 S. W., at page 310—it is expressly held that "the constituents of a family who are entitled to the homestead and other exempted property upon the death of the head are named in the law and the Constitution."

The answer, therefore, to the question propounded by counsel in the agreed statement of facts is, and must be, under the decisions of the Supreme Court of Texas, that upon the death of Sam White, Sr., the homestead property in question descended to his children free from the claim of the complainant as a creditor of the deceased.

A decree will accordingly be entered dismissing the bill for want of equity, at the cost of the complainant.

## In re LEBRECHT.

(District Court, W. D. Texas, Waco Division. March 14, 1905.)

No. 452.

**BANKRUPTCY—RECOVERY OF FUNDS—TITLE.**

Where, in a proceeding by a bankrupt's trustee to recover money from the manager of one of the bankrupt's stores, the answer, admitted to be true, alleged that prior to the bankruptcy there were mutual accounts between defendant and the bankrupt, and that defendant applied to the payment of the balance due him by the bankrupt for salary the sum of \$425.52, which he was authorized to do in accordance with his custom, and under an agreement with the bankrupt when he undertook the management of the business, the money so applied did not belong to the bankrupt's estate at the time the petition was filed, and could not, therefore, be recovered in such proceeding.

In Bankruptcy.

Rice & Bartlett, for bankrupt.

T. F. Bryan, for trustee.

MAXEY, District Judge. On October 8, 1904, the receiver in this case filed his application, alleging that Jerry Knowles, who was found in charge of the store of Lebrecht, the bankrupt, had collected and refused to surrender certain property of the bankrupt, consisting of about \$500 in money and notes and mortgages, not specifically enumerated; and he prayed an order requiring Knowles to appear and show cause why he should not be compelled to turn over the property to him, as receiver. Knowles duly appeared, and, in reply to the rule to show cause, averred, in brief, that he was the manager of Lebrecht's store which was located at Chilton, Falls county, Tex., and had authority from Lebrecht to conduct and manage the business, including the authority to employ and pay employés. It was further averred that there were mutual accounts between him and Lebrecht, and that on October 3, 1904, he applied to the payment of the balance due himself by Lebrecht as salary the sum of \$425.52, leaving a balance due the bankrupt's estate of \$8.93, which he admits should be surrendered to the receiver. He further averred that he had taken from L. Livingston, a customer of the store, a duebill for \$7.15, and from Boy Landrum a duebill for \$59.30, and tendered the same to the receiver as the property of the bankrupt's estate. The answer of Knowles further averred that he settled his account with Lebrecht prior to the filing of the petition in bankruptcy, and that his application of the moneys as above stated in payment of his salary was made in accordance with his custom as manager of the store, and pursuant to the agreement entered into between him and Lebrecht when he undertook the management of the business. The averments of Knowles' answer were admitted by the receiver to be true, with the exception of a small item of money, not necessary to be noticed. The petition on the part of creditors to have Lebrecht adjudged bankrupt was filed October 5, 1904, and, as has been shown, the settlement of accounts between Lebrecht and Knowles was made October 8d, two days prior to the

filing of the petition. The referee, upon the facts as set out in Knowles' answer, entered an order requiring him to pay over to the receiver "the sum of \$404.52, the amount of money as shown by his answer to have been received by him on account of the bankrupt herein on October 3d and 4th, and, further, two duebills—one of L. Livingston, for \$7.15, and one of Boy Landrum, for \$59.30—within 5 days from this date." The question to decide is whether the order of the referee was one proper to be made.

In passing upon the question, the case as actually made by the application of the receiver and the answer of Knowles must be kept steadily in view. What is that case? It is not a proceeding to set aside a preference, nor one to avoid a transfer for fraud. But its purpose is to require the surrender by Knowles of money and duebills belonging to the bankrupt's estate. The answer of Knowles—admitted to be true—shows that prior to the filing of the petition in bankruptcy he had settled his account with Lebrecht, and therefore the title to the money had passed from Lebrecht to himself. Hence the money did not belong to the estate of the bankrupt at the date the petition in bankruptcy was filed, and, under the allegations of the receiver's application, it could not be recovered. Whether its recovery could be effected by a proceeding to set aside a preference or avoid a transfer for fraud need not now be decided, since the question is not here involved. The only question at present determined is that the proof fails to support the case made by the receiver in his application.

The order of the referee, therefore, so far as it requires the payment by Knowles to the receiver of \$404.52, should be reversed, except as to the sum of \$8.93, and as to the latter sum the order should be affirmed; and the order should also be affirmed in so far as it requires Knowles to surrender to the receiver the duebill of L. Livingston for \$7.15, and that of Boy Landrum for \$59.30. It is accordingly so ordered.

## THE CITY OF SAN ANTONIO.

(District Court, E. D. Virginia. February 23, 1905.)

### 1. SHIPPING—INJURIES TO LONGSHOREMAN—NEGLIGENCE—FELLOW SERVANTS.

Plaintiff, a longshoreman, was engaged in the hold of a barge, loading stone buckets, which, when loaded, were hoisted from the hold at a signal from a gangwayman by the operator of a steam winch. Libellant, with his partner, had loaded the bucket, and was in readiness to steady it so that it would clear the hatchway, and so informed the gangwayman, when the winchman negligently applied a full head of steam, suddenly snatching the bucket from its location upward against the starboard side of the hatch, where it hung under the coaming of the hatch, and then swung back to the port side, when the rope broke, and the bucket fell on libellant, causing his injuries. *Held*, that the injury was the result of the negligence of the winchman, who was not libellant's fellow servant.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 492.]

### 2. SAME—DAMAGES.

Libellant, a longshoreman, 56 years of age, of robust health, good character and habits, and an excellent workman, having been in the service of

his employers at the time of his injury for 10 years, and earning from \$2 to \$3 a day, was injured by the negligence of a barge winchman, resulting in a fracture of his thigh bone. He was confined to a hospital for two months, and at the time of the trial was still compelled to walk with crutches. He suffered considerable pain, and would not likely be able to follow his usual avocation. *Held*, that he was entitled to an allowance of \$1,750 against the barge.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 850, 860.]

In Admiralty. Libel to recover damages for personal injury.

E. G. Irving and E. R. Baird, Jr., for libellant.

Martin A. Ryan and Theodorick A. Williams, for respondent.

WADDILL, District Judge. The libellant, Andrew Williams, a longshoreman, was employed by Dalby, Nottingham & Co., stevedores engaged in the removal of a cargo of crushed stone from the ocean-going barge City of San Antonio. The stevedores furnished the necessary longshoremen, consisting of four laborers, who worked in the hold of the barge, filling the buckets with stone, and a gangwayman, who stood on the upper deck of the barge to direct the movements of the same, as they were filled, by giving notice of such fact to the operator of the steam winch used in raising the stone. They also furnished the buckets, ropes, etc., for the service in hand. The barge furnished the steam winch or donkey engine with which to raise the stone, and the winchman to operate the same. On the morning of the 5th day of August, 1904, between 9 and 10 o'clock, while engaged in the removal of the cargo from the lower hold of the after hatch of the barge, and before the stone had been entirely moved from under the hatchways to the bottom of the barge, the libellant, by reason of one of the buckets loaded by him with stone catching under the coaming of the hatch, and one of the ropes giving way, sustained serious injury by the bucket falling upon him and breaking his left thigh bone.

The sole question to be determined is, whose negligence caused the rope to give way and the bucket to fall? In the evidence there is less conflict as to how the accident occurred than is usual in this class of cases. The libellant, two of the longshoremen, the gangwayman, and two of the stevedores all testify that the injury was the result solely of the negligence and inefficiency of the operator of the winch. After maturely considering all the evidence, the conclusion of the court is that the accident was brought about solely by the careless and negligent manner in which the winchman performed his duty, and without any fault or negligence on the part of the libellant. The barge at the time of the occurrence was fastened to one of the piers of the Norfolk & Western Railroad, at Lambert's Point, with her port side made fast to the pier and her bow to the stream. The libellant, along with a co-laborer, was working on the port or inside side of the hatch, filling the buckets, which carried some 1,200 pounds of stone, from that side; and two other longshoremen were engaged on the opposite, or outer, side of the hatchway, filling the buckets on that side. The libellant, with his partner, had loaded the bucket, from the fall of which he sustained

his injury, on the inward, or port, side of the vessel, and was in readiness to steady the same so that it would clear the hatchway of the vessel; and he informed the gangwayman of the fact, who, in turn, in the regular way, notified the winchman; and, instead of the latter putting on the steam gradually and cautiously, he applied a full head of steam, suddenly snatching the bucket from its location, upwards, and violently against the starboard side of the hatch, where it hung under the coaming of the hatch, swung back against the port side, when the rope by which it was suspended gave way, and the bucket fell upon the libelant, causing the injuries sued for.

Respondent does not claim that the winchman, the barge's representative, and the longshoreman injured, the employé of the stevedores, are fellow servants (The *Lisnacrieve* [D. C.] 78 Fed. 570; The *Slingsby* [D. C.] 116 Fed. 227; *Id.*, 120 Fed. 749, 57 C. C. A. 52; The *Gladestry*, 124 Fed. 112; *Id.*, 128 Fed. 591, 63 C. C. A. 198; The *Elton* [D. C.] 131 Fed. 562), but insists that the accident arose through the negligence of the gangwayman, who, it is contended, is a fellow servant of the longshoreman. Conceding that the latter proposition is true, it does not avail to relieve the respondent from liability in this case; since the evidence clearly establishes that the negligence of the winchman, the barge's representative, and not that of the gangwayman (if, indeed, the latter was guilty of negligence at all, which does not appear), brought about this accident.

It follows from what has been said that the libelant is entitled to recover in this action for the damages sustained by him, and the remaining question to be determined is the amount to be allowed, which in this as in all other cases is a difficult and delicate one, as such different and varied considerations enter therein. Libelant is 56 years of age, of robust health, good character, and good habits; an excellent workman, having been in the service of his then employers some 10 years, and earned from \$2 to \$3 per day. The injury sustained was a very serious one, from which he has not been able, and is not likely again to be able, to follow his usual avocation. He was in the hospital some two months, and suffered considerably, and still walks with the aid of crutches. From the whole facts it is believed that an allowance of \$1,750 is reasonable, and a decree may be entered for that sum.

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## POWELL v. UNITED STATES.

(Circuit Court, W. D. New York. January 30, 1905.)

### 1. INTERNAL REVENUE — REBATES — RULES AND REGULATIONS — REASONABLENESS.

The rules and regulations prescribed by the Commissioner of Internal Revenue on April 23, 1902, providing for claims for rebate of taxes paid on manufactured tobacco and snuff, as authorized by Act April 12, 1902, c. 500, § 3, 32 Stat. 96 [U. S. Comp. St. Supp. 1903, p. 277], are not objectionable for unreasonableness.

### 2. SAME — NONCOMPLIANCE.

A bankrupt's trustee was not entitled to recover rebates of internal revenue on tobacco and snuff manufactured by the bankrupt, as au-

thorized by Act April 12, 1902, c. 500, § 3, 32 Stat. 96 [U. S. Comp. St. Supp. 1903, p. 277], where there was evidence tending to show that the bankrupt's claim was fraudulent, and there was a failure to comply with the rules and regulations prescribed therefor by the Commissioner of Internal Revenue.

**Action to Recover Rebate of Taxes Paid on Tobacco.**

Vincent H. Riordan, for plaintiff.

Charles H. Brown, U. S. Atty.

**HAZEL**, District Judge. The controverted questions submitted for decision are, first, whether the rules or regulations prescribed by the Commissioner of Internal Revenue on April 28, 1902, providing for claims for rebate under Act April 12, 1902, c. 500, § 3, 32 Stat. 96 [U. S. Comp. St. Supp. 1903, p. 277], of taxes paid on manufactured tobacco and snuff, are unreasonable; and, second, whether the bankrupts complied with such regulations in preparing and filing their claim. The evidence given to show the manner in which the inventory of stock was made by the claimants and their witnesses need not be repeated here. Special findings of fact have been made that the plaintiff failed to prove the claim for drawback. The authority to adopt such rules and regulations and to prescribe and furnish printed forms as may be necessary to carry the statute into effect is not questioned. A careful reading of the prescribed regulations for making the inventory of stock discloses no insurmountable difficulty or hardship in conforming to the requirements. Nor is the rule perceptibly unreasonable or oppressive. Its adoption undoubtedly was to facilitate carrying out the drawback provision and to prevent frauds. The trend of the adjudicated cases, to which attention was directed on the argument, is to the effect that a remission of a tax such as this can only be secured by a compliance with the reasonable exactions of the official empowered by act of Congress to carry out the rebate law. *Farrell v. The United States*, 99 U. S. 221, 25 L. Ed. 321; *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; *Campbell v. The United States*, 107 U. S. 407, 2 Sup. Ct. 759, 27 L. Ed. 592; *Pascal et al. v. Sullivan, Collector, etc.* (C. C.) 21 Fed. 496. Whether the rules and regulations must be strictly complied with or to a reasonable extent only, need not be decided. The elicited proofs show a failure to even reasonably conform to the requirements. The suggestion that the claim of the bankrupts is fraudulent, and that much of the tobacco claimed to have been inventoried in the manner indicated was never in their possession, is inferentially supported by the failure of the trustee in bankruptcy to find the property after his appointment. The difference between the amount of tobacco mentioned in the inventory and that actually accounted for is so great as to confirm such inferences. Moreover, the witnesses do not pretend that the inventory was made in accordance with the instructions of the Commissioner of Internal Revenue. The regulations prescribed by the commissioner are not unreasonable. The failure, therefore, of the bankrupts to conform to the governing rules and regulations is not satisfactorily explained.

The defendant may have judgment dismissing the complaint.

## In re DRAYTON.

(District Court, E. D. Wisconsin. November 10, 1904.)

**1. BANKRUPTCY—POWERS OF REFEREE—ADVERSE CLAIMS TO PROPERTY.**

A referee in bankruptcy has authority to entertain and consider the claim of an intervening petitioner to property or its proceeds in the hands of a trustee, alleged to be the property of the petitioner, and not of the estate in bankruptcy.

In Bankruptcy. On question certified by the referee, in substance, whether his general authority as referee extends to the consideration of an intervening petitioner's claim to specific property or proceeds in the hands of the trustee, alleged to be the property of the petitioner, and not of the estate in bankruptcy.

Durant, Price & Cowen, for petitioners.  
W. E. Burke, for trustee.

SEAMAN, District Judge. While the early decisions under the bankruptcy act appear to have raised doubts upon the question thus certified, I am satisfied that any doubt is cleared by the later rulings of the Circuit Court of Appeals, and finally by the Supreme Court, so that the question can be answered unhesitatingly in the affirmative.

The opinion of Judge Sanborn, for the Circuit Court of Appeals, Eighth Circuit, in *Re Rochford*, 59 C. C. A. 388, 124 Fed. 182, is not only directly in point, but exhaustive and convincing; and recently like view is upheld by the Supreme Court in *Hewit v. Berlin Machine Works*, 194 U. S. 296, 300, 24 Sup. Ct. 690, 48 L. Ed. 986, respecting a controversy analogous both in practice and principle with the case at bar. See, also, *Holden v. Stratton*, 191 U. S. 115, 117, 24 Sup. Ct. 45, 48 L. Ed. 116, and *Burleigh v. Foreman* (1st Cir.) 125 Fed. 217, 218, 60 C. C. A. 109. So in recent decisions the Circuit Court of Appeals for this circuit recognizes the rule thus stated (*In re Antigo Screen Door Co.*, 59 C. C. A. 248, 252, 123 Fed. 249; *In re Rodgers*, 60 C. C. A. 567, 575, 125 Fed. 169; *In re J. C. Winship Company*, 56 C. C. A. 45, 47, 120 Fed. 93), which is substantially this: That settlement of title to or claims against specific property in the hands of the trustee, as purported assets of the estate, is one of the "proceedings in bankruptcy" mentioned in section 23 of the act (Act July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431]), as there distinguished from separate "controversies at law and in equity" between "trustees, as such, and adverse claimants, concerning the property acquired or claimed by the trustees. The property or proceeds in question in the present case is in the hands of the trustee, in custodia legis, and the bankruptcy court is necessarily vested with both power and duty to determine all rights therein, upon proper notice, as "controversies in relation thereto," vide section 2, subd. 7, of the act (Act July 1, 1898, c. 541, 30 Stat. 545, 546 [U. S. Comp. St. 1901, p. 3421]); no inconsistent provision appearing elsewhere. It would be anomalous indeed if the act were interpreted to deprive the tribunal of such jurisdiction as a court of bankruptcy in possession of the res.

Section 38, subd. 4 (Act July 1, 1898, c. 541, 30 Stat. 555 [U. S.

Comp. St. 1901, p. 3436]), confers upon the referees power to "perform such part of the duties, except as to questions arising out of the application of bankrupts for compositions and discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided"; and general order 12 (32 C. C. A. xvi, 89 Fed. vii) directs that all proceedings after reference, "except such as are required by the act or by general orders to be had before the judge, shall be had before the referee." No provision of the act, general orders, or rule of this court requires claims of this nature to be primarily heard before the judge, and the jurisdiction of the referee to that end appears to be undoubted. The question certified is so answered.

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### THE ALNWICK.

(District Court, D. Massachusetts. February 23, 1905.)

No. 1,570.

#### SHIPPING—DAMAGE TO CARGO—TIME OF DELIVERY.

A provision of a bill of lading requiring the consignee to be ready to receive the cargo as soon as the vessel was ready to unload, in default of which she was authorized to land, warehouse, or lighter the same at the consignee's risk, does not relieve her from liability for damages arising from her failure to reasonably protect perishable goods landed on a dock upon a claim of delivery, where she refused to permit the consignee's agents to remove them, although having no claim thereon for freight.

In Admiralty. Suit to recover for damage to cargo.

Carver & Blodgett, for libellant.

Convers & Kirlin and Charles R. Hickox, for claimant.

LOWELL, District Judge. This was a libel by one Pastene against the steamer Alnwick for damage to a consignment of garlic. The seventh clause of the bill of lading reads as follows:

"Simultaneously with the Ship being ready to unload the above-mentioned Goods, or any part thereof, the Consignee of the said Goods is hereby bound to be ready to receive the same from the Ship's side, either on the Wharf or Quay at which the Ship may lie for discharge, or into Lighters provided with a sufficient number of men to receive and stow the said Goods therein, and in default thereof, the Master or Agent of the Ship, and the Collector of above port are hereby authorized to enter the said Goods at the Customhouse, and land, warehouse, or place them in Lighter, without notice to and at the risk and expense of the said Consignee of the Goods after they leave the Deck of the Ship. The Collector of the Port of Discharge being hereby authorized to grant a general order for discharge immediately after entry of the Ship. Steamer to work at night if required by Owners, Steamer paying any extra expense incurred thereby."

The garlic was shipped at Naples in good condition, and arrived in good condition at Boston. I find that it was landed on the wharf between December 30, 1903, and January 1, 1904. Probably it was all out of the ship on Thursday, December 31st, but I am inclined to think it was not sorted for delivery until January 2d. At the time it was actually placed on the wharf the thermometer was about



freezing, but on Saturday, January 2d, the thermometer fell below zero, and the garlic was frozen, as I find, on the afternoon of that day. I find that the garlic was put in a place which, without further protection, was unsuitable for the deposit of perishable articles, unless the same were to be removed immediately and without an intervening night. It follows that, if the delay in removal be chargeable to the vessel, then the vessel is liable for the damage caused by its negligence.

I find that Pastene's teamsters went on Saturday to take away the garlic, and that delivery was then refused them by Dwyer, a shipping clerk, who represented the Alnwick, because, as Dwyer said, the garlic had not yet been weighed by the customs officers. Dwyer denied this refusal, though not very strongly. Having heard the witnesses, I believe the teamsters. As indicating the control assumed by the ship, it is to be noted that on Monday, January 4th, delivery was again refused Pastene's teamsters unless they would give a receipt for garlic in good condition. If the vessel refused delivery at any time to the consignee, the refusal must have been based upon a supposed right to possess and control the garlic. If the garlic was then in the possession and control of the vessel, it had not then been so placed at the disposition of the consignee as to free the vessel from the duty of exercising reasonable care in its keeping. If the vessel intended to set up a delivery of the cargo made in accordance with article 7 of the bill of lading, it could not retain possession of cargo on which there was no claim for freight, nor could it hinder the consignee from dealing with it. If the customs officers objected to the removal, they might interfere, but the vessel is not protected by playing the customs officer. If the law placed upon the vessel the duty of hindering delivery before weighing, then the law prevented the vessel from complying with the conditions of article 7 until after weighing, and therefore the vessel was left subject to a carrier's ordinary duties. Article 7 gives a vessel no right to let the cargo freeze, while excluding the consignee from its control. The deposition of Hall was taken after the trial, without leave of court, and is excluded, of course.

Decree for the libellant for \$307.77 and costs.

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In re KEEFER.

(District Court, W. D. New York. February 20, 1905.)

No. 1,788.

**1. BANKRUPTCY—DISCHARGE—FAILURE TO KEEP BOOKS OF ACCOUNT.**

Failure of a bankrupt, who, in addition to teaching, was the agent of a small estate, consisting of a farm, to keep regular books of account or memoranda of his transactions, is not ground for refusing him a discharge, it not being shown such failure was with intent to conceal his financial condition to defraud his creditors.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 752-757.]

**2. SAME—CONCEALMENT OF PROPERTY—BURDEN OF PROOF.**

The burden of proving fraudulent concealment of assets by a bankrupt, because of which a discharge should be refused him, is on the objecting creditor.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 720.]

In Bankruptcy. Motion to confirm report of special master upon hearing of certain specifications filed in opposition to the bankrupt's discharge.

Reed & Shutt, for bankrupt.

Smith & Hebbard, for objecting creditor.

HAZEL, District Judge. The evidence indicates that the bankrupt did not keep books of account prior to his bankruptcy. He was not engaged in carrying on business or conducting any mercantile pursuit. His vocation was that of a school-teacher, though he also acted as agent for a small estate, consisting of a farm in Yates county, to which his wife was one of three heirs. The bankrupt collected the rent, paid the taxes and expenses of the farm, and divided the surplus between the heirs. His failure to keep regular books of account or memoranda of his transactions as custodian of the income from the farm does not justify withholding his discharge. If the evidence indicated a failure to keep books of account with intent to conceal his financial condition with the object of defrauding his creditors, a different question would be presented. The proofs to which my attention is directed do not clearly show such an intention. True, the fact that there is but a single creditor—the opposing creditor; that there was a mixing of moneys owned by the bankrupt and his wife, and a withdrawal of deposits in banks, and a redepositing thereof solely in his wife's name—are, perhaps, colorable and suspicious circumstances. The burden, however, of proving fraudulent concealment of property or assets is upon the objecting creditor. In *re Chamberlain* (D. C.) 125 Fed. 629; In *re Hamilton* (D. C.) 133 Fed. 823. The special master heard the bankrupt testify, and is better able than this court to judge of the truthfulness and credibility of his evidence. His finding upon the facts has great weight, and this court is not prepared to hold that his conclusions were mistaken. This determination applies generally to the facts on all the grounds urged in opposition to the discharge.

The report of the special master is affirmed.

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**In re HADDEN RODEE CO.**

(District Court, E. D. Wisconsin. November 23, 1904.)

**1. BANKRUPTCY—JURISDICTION OF BANKRUPTCY COURT—ADVERSE CLAIM TO PROPERTY.**

A petition filed in a bankruptcy proceeding by an adverse claimant of property which is also claimed by the trustee as a part of the bankrupt's estate, to determine the ownership thereof, presents a controversy in relation to the estate of which the court of bankruptcy is given jurisdiction by Bankr. Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 545 [U. S.

Comp. St. 1901, p. 3420]; and, the adverse claimant having voluntarily invoked such jurisdiction, no objection thereto can be raised by the trustee.

### In Bankruptcy.

On review of the order of the referee taking jurisdiction of a controversy presented on behalf of the Merchants' & Miners' Bank, as petitioner, claiming ownership of certain shares of mining stock by purchase for the bank, through the bankrupt; such shares being in the hands of the secretary of the mining company for delivery to the owner. It is alleged that such secretary refuses to deliver possession without consent of the trustee in bankruptcy, who claims title or interest therein for the estate; and the relief sought is, in effect, determination of the ownership as between the petitioner and the trustee. The trustee raises objection that such controversy is not within the bankruptcy jurisdiction.

Bloodgood, Kemper & Bloodgood, for petitioner.

W. A. Hayes and Turner, Pease & Turner, for trustee.

SEAMAN, District Judge (after stating the facts). The question of jurisdiction thus presented impresses me as free from difficulty, under the entire line of decisions by the Supreme Court in reference to the bankruptcy jurisdiction conferred by the present act, from *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, to *Hewit v. Berlin Mach. Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, inclusive. The subject-matter of the petition is the title to or interest in property claimed by the trustee as part of the estate, and "controversies in relation thereto, except as herein otherwise provided," are expressly declared by Bankr. Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], to be within the jurisdiction of courts of bankruptcy. As this is not a plenary suit, within the exceptions found in section 23 (30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), and the subject-matter is plainly cognizable in bankruptcy, the only inquiry is whether the adverse claimants as well are subject to the bankruptcy jurisdiction. Can this be doubted, when the one party is the trustee of the estate in bankruptcy, and the other voluntarily submits the controversy to the court for settlement? Surely the trustee, as the hand of the court in such matter, cannot withhold submission, if the consent of the adverse claimant confers jurisdiction for its determination. The authorities referred to concur in upholding jurisdiction in the bankruptcy court to that end when such consent plainly appears. Vide *Loveland on Law of Bankruptcy* (2d Ed.) 73. As the court is charged with the administration of the entire estate of the bankrupt, it must necessarily determine all "controversies in relation thereto" which are brought before it, and the test of power is the presence of all parties in interest. Voluntary appearance establishes such presence. Questions of the power to entertain summary proceedings against adverse claimants of property have frequently arisen, and the doctrine is settled that such proceedings are authorized only when the property is in the possession of the court, or in cases wherein the statute so provides in express terms. But no such inquiry or test is involved in the present proceeding, and I am of opinion that the controversy

so submitted is plainly within the bankruptcy jurisdiction. In conformity with the ruling of this court in the Case of H. B. Drayton, Bankrupt, 135 Fed. 883, the referee is invested with such jurisdiction, subject to review, and he rightly overruled the trustee's objection. His order, accordingly, is affirmed.

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In re ROSE,

(District Court, E. D. Pennsylvania. February 24, 1905.)

No. 1,787.

**BANKRUPTCY—GOODS OBTAINED BY FRAUD—EVIDENCE TO WARRANT RECOVERY.**

Evidence held insufficient to sustain a petition for the recovery of goods shipped by the petitioner to the bankrupt on the ground that they were obtained by means of a false financial statement, made by the bankrupt to a commercial agency, such statement not being in writing, and being denied by the bankrupt.

In Bankruptcy. On certificate from referee.

Samuel W. Cooper, for claimant.

George W. Carr, for trustee.

HOLLAND, District Judge. The question certified is whether John C. Wilson, trading as John C. Wilson & Co., is entitled to recover certain goods, amounting to the sum of \$152, which he alleges were obtained from him by the fraud of the said Rose, now bankrupt. The fraud or false pretense upon which it is alleged the goods were sold and delivered is that on May 14, 1903, Rose is alleged to have stated to the Bradstreet's Mercantile Agency that he had a capital of \$2,500, and no borrowed money. Some time in July the petitioner received an order for goods from Rose, and on about the 28th of that month he received a statement from Bradstreet as to his financial standing, which was, in effect, the report above set forth. This report of May 14, 1903, was taken by Bradstreet's agent, written in a book, was not signed by Rose, nor was any written statement given by Rose. Rose denied he ever made it, and the agent was unable to recall anything whatever about it; only the fact that he found this statement in his notes. He was unable even to identify Rose. Dun's report, made on the 29th of May, was to the effect that Rose stated he had "a capital of \$2,500, \* \* \* and that he received assistance from outside parties." None of these statements by Rose were in writing, and they are denied by him, and he insists that he stated his exact financial condition at the time these reporters called on him. The merchandise ordered from the petitioner was not shipped until August, and the last consignment arrived in September, and "in August he had written to the petitioner, asking him to delay shipment of the goods because business was dull; but the petitioner wanted to ship right off, because they had some of the stuff ready to ship, and the balance they shipped according to Rose's instructions." At this time

an examination of Rose's books would have shown an indebtedness of \$4,300 of borrowed money.

We do not think they have established with sufficient clearness that Rose made a false report to Bradstreet of his financial standing, and therefore sustain the order of the referee dismissing the petition, with costs.

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In re GRANT.

(District Court, E. D. Pennsylvania. March 9, 1905.)

No. 1,958.

**BANKRUPTCY—OPPOSITION TO DISCHARGE—ENTRY OF APPEARANCE.**

General Order in Bankruptcy No. 32 (89 Fed. xlii), requiring creditors opposing a discharge to enter an appearance on the return day fixed by the order to show cause, allows a later filing, if at all, only on good cause shown for the delay.

In Bankruptcy. Refusing to extend time for entering appearance and filing specifications.

Greenwald & Mayer, for bankrupt.

Richard L. Ashhurst and Rowland Evans, for objecting creditor.

HOLLAND, District Judge. The alleged bankrupt made application on January 26, 1905, for his discharge. All creditors were notified to show cause, if any they had, against said discharge on February 16, 1905, at 10 o'clock a. m. On February 27, 1905, the referee issued a certificate of conformity by the bankrupt, and the same day a creditor filed specifications of objections to the bankrupt's discharge; also a petition asking for an extension of time for the purpose of taking further testimony of the bankrupt, and preparing specifications of opposition to his discharge. No appearance was entered until the latter date, which was 11 days after the day fixed for a hearing on the rule to show cause. The specifications filed are very general in their terms, and do not set forth any reason specified in the act which would prevent a discharge. General Order No. 32 (89 Fed. xlii) provides:

"A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the ground of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge."

It will be noted that the requirement to enter an appearance by any creditor in opposition to a discharge "on the day when the creditors are required to show cause" is without qualification as to an extension of time allowed for any reason, and the fact that the power to extend the time in this connection is pointedly omitted, and in the following sentence, as to the filing of specifications, the judge is authorized, in his discretion, to enlarge or extend the time for cause shown, would indicate that the meaning of the order as to the appearance of counsel should invariably be entered not later

than on the day of the hearing on the rule to show cause. Why should this not be so? Surely there is no hardship in requiring the creditor's counsel to go to the clerk's office and enter his appearance. It requires no preparation to perform this mere act of filing a paper directing the clerk to make this entry, and as the application in this case for his discharge was made on the 26th day of January, and not returnable until the 16th day of February, 1905, there was ample time for counsel to visit the clerk's office for the purpose of entering an appearance. Instead, however, of complying with this requirement, the appearance was not entered until February 27th, 11 days after the return day on the rule to show cause. This question was considered by this court before, and we held that:

"Under General Order in Bankruptcy No. 82, requiring creditors opposing a discharge to enter an appearance on the return day fixed by the order to show cause and to file a specification of their objections within ten days thereafter, a creditor has no right to enter an appearance after return day, and should not be allowed to do so except for good cause shown in excuse of the delay." In re Ginsburg (D. C.) 130 Fed. 627.

We see no reason why the rule that an appearance must be entered on the day when the creditors are required to show cause shall be departed from.

The petition for an extension of time to file specifications of objections is therefore refused, the specifications filed are stricken from the record, and the discharge of the alleged bankrupt is granted.

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REA et al. v. BARKER.

(Circuit Court, D. Oregon. December 12, 1904.)

No. 2,820.

1. CONTRACTS—PARTIES—AGREEMENT FOR BENEFIT OF THIRD PERSON.

Both under the general authorities, and under the decisions of the Supreme Court of Oregon, a principal, for whose benefit a written contract was made by an agent, and who paid the consideration therefor—both the agency and the source of the consideration being known to the other party—may maintain an action directly for the enforcement of the contract, although not named therein.

At Law. On demurrer to complaint.

Huntington & Wilson, for plaintiffs.

Carey & Mays, for defendant.

BELLINGER, J. This is an action upon a contract in writing executed by one Ketchum, as the agent of plaintiffs, and the defendant. The plaintiffs' name does not appear in the contract. The agency of Ketchum was known at the time to the defendant. The consideration for defendant's promise was a payment of \$1,500, and this money was the money of the plaintiffs, which fact defendant also knew. In such a case the contract is that of the plaintiffs, and the plaintiffs' right thereunder is not derived from the agent. The weight of authority in this country is that a third party has a

right of action upon a promise made for his benefit, though he is a stranger both to the promise and to the consideration, and the case is all the stronger in favor of the right when the consideration for the promise is derived from the party for whose benefit the contract is made. In such a case there is, of necessity, an obligation on the part of the promisor to the third party. Note to *Baxter v. Camp*, 71 Am. St. Rep. 169.

It is held, in effect, by the Supreme Court of this state, that where there is an intent by a promisee to secure a benefit to a third party, and there is some privity between the two—some property or fund in the hands of the former upon which the latter has an equitable claim—the law implies a promise which will support an action by the third party. Such is the effect of the decisions in *Baker & Smith v. Eglin*, 11 Or. 333, 8 Pac. 280; *Washburn v. Investment Co.*, 26 Or. 441, 36 Pac. 533, 38 Pac. 620; and *Brower Lumber Co. v. Miller*, 28 Or. 565, 43 Pac. 659, 52 Am. St. Rep. 807. In this case the defendant has received the money of the plaintiffs as a consideration of the promise made to the agent for plaintiffs' benefit, and he received this money with knowledge of the source from which it was derived, and of the plaintiffs' interest in the obligation which the payment and the agreement imposed. If the general rule were otherwise, this court would feel obliged in such a case to follow the rule adopted by the courts of the state.

The demurrer is overruled.

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CUDAHY PACKING CO. v. McGUIRE et al.

(Circuit Court, N. D. Iowa, W. D. February 14, 1905.)

CLERKS OF UNITED STATES COURTS—FEES—MAKING AND CERTIFYING COPIES OF ORDER.

The right and duty of a clerk of a Circuit Court to charge the fees fixed by Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], for each copy of an injunctive order directed by the court to be certified and served on each defendant in a suit, is not affected by the fact that the copies, being large in number, were printed.

In Equity. On motion of complainant to retax costs.

M. L. Sears, for complainant.

REED, District Judge. The complainant in the above cause moves the court to retax and strike from the bill of costs the fees of the clerk for making and certifying to 520 copies of the restraining order, at \$5.70 each, issued by the court upon application of complainant against the defendants, upon the ground that complainant procured such copies to be printed and delivered to the clerk, to be signed and certified by him, and delivered to the marshal for service. There is some dispute between the deputy clerk and counsel for complainant as to who procured the printing to be done, but there is no dispute that the clerk paid therefor. This, however, is not material, for the order of the court granting the restraining order provides: "That a copy of this order, certified

under the hand and seal of the clerk of this court, be served on each of the defendants to be restrained thereby." This order required of the clerk that he make and certify to a copy of the restraining order to be served upon each of the defendants, and for this he is required by law to charge the statutory fee for making and certifying to such copies, and account for the same to the United States as a part of the fees of his office. See sections 828 and 833, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 635, 636]. It is not claimed that the amount taxed is in excess of the legal rate that the clerk is required by law to charge for such copies, but the contention of the complainant seems to be that because the copies were printed, only the actual cost of the printing can be taxed as costs. It is not material how the clerk makes the copies, whether he has them printed, typewritten, or written with a pen; in either case he is required to charge the statutory fee for making and certifying to the same, and the complainant cannot defeat the government or the clerk of the right to charge and receive the fees required by law to be charged for such services by himself preparing the copies and delivering them to the clerk, to be signed and certified by that officer. If parties may do this, they could deprive the government and the clerk of a large part of the emoluments of the clerk's office.

The motion to retax is overruled.

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SCOTT v. STOCKHOLDERS' OIL CO. et al.

(Circuit Court, E. D. Pennsylvania. February 24, 1905.)

No. 1.

**PLEA IN ABATEMENT—MOTION TO STRIKE OFF.**

A plea in abatement may be stricken off on motion, where not supported by depositions taken in conformity to the rules of the court.

On Motion to Strike Off Plea in Abatement.  
See 129 Fed. 615.

Laurence W. Baxter, for complainant.  
Wm. J. Wagenknight, for respondents.

HOLLAND, District Judge. This is a motion to strike off the plea in abatement to the service of an alias subpoena, for the reason that there were no depositions taken in support of the plea, in accordance with the rules of this court. There were, however, depositions taken and submitted, but not in accordance with the rules, and the action of the defendants in this case, as shown by the record, and as stated and practically admitted at the argument, has been such that the plaintiff is entitled to an enforcement of the rules.

Motion to strike off plea in abatement to service of alias subpoena sustained.



## In re CHANDLER.

(District Court, N. D. Illinois, N. D. December 19, 1904.)

**BANKRUPTCY—DISCHARGE—PENDENCY OF PROCEEDINGS—RESTRAINING ARREST.**

Bankruptcy proceedings are still pending in the District Court, notwithstanding its dismissal of the petition to revoke the order of discharge of bankrupt, so as to authorize it by an order therein to restrain arrest of the bankrupt while the cause stands on review in the Circuit Court of Appeals on petition under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431].

George Burry, for bankrupt.

J. B. Hutchinson, for Kilmer's Estate.

KOHLISAAT, District Judge. This cause comes before the court on the motion of Stephen C. Knight, administrator of the estate of Chauncey Kilmer, deceased, to vacate the order of this court heretofore entered, restraining said administrator and the sheriff of Cook county from proceeding under the warrant of the probate court of Cook county, Ill., until the further order of the court.

On October 27, 1902, said bankrupt was duly discharged. Afterwards certain creditors filed their petition to revoke the discharge, which petition was denied and dismissed by the court. The petitioners thereupon filed their petition for a review of the said proceeding under section 24b of Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431], which matter is now pending in the Circuit Court of Appeals for this circuit, and admitted in this record.

Section 9, cl. "a," 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425], of the act reads:

"(a) A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) \* \* \* (2) When issued from a state court having jurisdiction and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release and in such cases he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act."

Section 1, cl. 4, 30 Stat. 544 [U. S. Comp. St. 1901 p. 3418], reads:

"Bankrupt shall include a person against whom \* \* \* an application \* \* \* to revoke a discharge has been filed. \* \* \*"

The questions raised by the motion are: (1) Is Chandler a bankrupt at this time, within the meaning of section 1, cl. 4? (2) Does the debt set out come within the class named in section 9, cl. "a"?

It is urged that, by reason of the order of this court dismissing the petition to vacate the order of discharge, the cause is no longer pending here, even though it stands upon review in the upper court. This contention cannot be maintained. "The proceedings in review," says Loveland (page 815, 2d Ed.), "are a part of the original case, and, for the purpose of review, the parties are still in court." This manner of proceeding is speedy, and intended to facilitate the execution of the act, without unnecessary delay. It would be vain to attempt relief from the order of the court below if in such case there be no longer a cause pending. This position is sustained by the case of *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666. The statute makes no provision for any

suspension of the effect of the order to be reviewed, except that it requires notice to the opposing parties. No doubt, the Court of Appeals would, in a proper case, restrain the parties from proceeding under an order to be reviewed. That question, however, does not arise here. The directions of the appellate court must run to the District Court entering the order. I am satisfied that the order does not become final so as to leave no cause pending, so long as the review proceeding is pending. The order of the upper court would not operate to reinstate or create a cause, but to modify one already pending.

It then becomes necessary to determine whether the proceeding under which Chandler is threatened with arrest is based upon a claim which comes within the meaning of section 9, cl. "a." The only evidence bearing upon that point is found in the original petition of Chandler. A careful perusal of the allegations of that petition satisfies me that the case comes squarely within the terms of *Crawford et al. v. Burke*, just decided by the Supreme Court of the United States and reported in 25 Sup. Ct. (National Reporter System) 9, 49 L. Ed. —.

I therefore hold that the cause is still pending, for the purposes of this hearing in this court, and that the cause of action comes within the statute, and therefore that the petition to vacate the restraining order should be and is denied.

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#### HAIGHT & FREESE CO. v. McCOACH.

(Circuit Court, E. D. Pennsylvania. March 16, 1905.)

No. 68.

#### INTERNAL REVENUE—SUIT TO RECOVER TAXES PAID—STATEMENT OF CLAIM.

A statement of claim in a suit against a collector to recover internal revenue taxes assessed and collected from plaintiff as a broker under War Revenue Act June 13, 1898, c. 448, § 1, 30 Stat. 448, as amended by Act March 2, 1901, c. 806, § 1, 31 Stat. 938 [U. S. Comp. St. 1901, p. 2286], on the ground that plaintiff was not subject to such taxes, should set out the transactions on account of which they were assessed.

#### On Rule for More Specific Statement.

F. B. Bracken, for plaintiff.

John C. Swartley and J. Whitaker Thompson, for defendant.

HOLLAND, District Judge. On this rule to show cause why a more specific statement should not be filed we are of opinion that the defendant's objections 3 and 5 are well founded. The plaintiff alleges that William McCoach, collector of internal revenue in this district, collected \$1,001.56 from it as a broker, class 2, in accordance with the provisions of Act June 13, 1898, c. 448, § 1, 30 Stat. 448, as amended by Act March 2, 1901, c. 806, § 1, 31 Stat. 938 [U. S. Comp. St. 1901, p. 2286], and that the assessments against the plaintiff were entered on a certain schedule or assessment list, which was, pursuant to the provisions of law, forwarded by the said commissioner of internal revenue to the office of the collector of internal revenue for the First United States Internal Revenue Collection District of the state of Pennsyl-

vanla, with instructions to said collector to make collections from the plaintiff of the amount of the taxes so assessed thereon.

There is a general denial of liability for taxes of any kind under the sections referred to in the statement, but there is no specific statement of the transactions upon which the assessment of 2 per cent. was made. It must be assumed that the collector of internal revenue levied and collected a tax on certain transactions, and that the plaintiff was notified upon what the tax was levied. When it alleges that the tax was illegally collected, and seeks to recover, we think it should state the specific transaction upon which the tax was levied and collected, so that the defendant can know how to answer.

There are six reasons assigned by the defendant why the plaintiff's statement is insufficient. Of these the third and fifth are sustained. The others are overruled, and the plaintiff is given leave to amend its statement by filing a schedule of amounts and of property or transactions upon which it claims an illegal assessment and collection of taxes from it by the defendant.

### THE MARY N. BOURKE.

(District Court, W. D. New York. February 27, 1905.)

#### 1. SHIPPING—CONTRACT FOR REPAIRS—CUSTOM OF MEASUREMENT.

Where it was the custom of a shipyard to add an arbitrary per cent. to the net measurement of timber used in repairing vessels, for wastage, a contract with such yard for making repairs to a vessel will be presumed to have been made with reference to such custom, in the absence of evidence to show otherwise.

#### 2. SAME—ADJUSTMENT OF ACCOUNT.

An account for materials and labor furnished in the repairing of a vessel considered and adjusted.

#### 3. SAME—DEMURRAGE—BASIS FOR ALLOWANCE.

The owner of a vessel cannot recover demurrage from a repairer on account of delay in completing the repairs, in the absence of contract, and of evidence showing an actual loss, or what her earnings during the detention would probably have been.

[Ed. Note.—Demurrage, see notes to *Harrison v. Smith*, 14 O. C. A. 657; *Randall v. Sprague*, 21 O. C. A. 337; *Hagerman v. Norton*, 46 O. C. A. 4.]

In Admiralty. Suit in rem to enforce lien for repairs.

Clinton & Clinton, for libelants.

Tarsney & Fitzpatrick, for respondents.

HAZEL, District Judge. This is a libel in rem, based upon the statutes of the state of Michigan, to recover the sum of \$20,255, balance due for rebuilding, repairing, docking, and equipping the schooner *Mary N. Bourke*, owned by George Nester and others, between May 7 and September 20, 1902. The reasonable value of such work performed and materials furnished is alleged to be \$25,255, on account of which respondents paid on August 4, 1902, the sum of \$5,000. The libelants are copartners owning and operating a

dry dock at Bay City, Mich. At West Bay City, not far distant across the Saginaw river, the libelant James Davidson, individually, conducts a shipyard and dry dock. It appears that for a portion of the work performed upon the barge, namely, that of removing old and supplying new rails, and putting in steel arches, the price of \$2,800 was agreed upon in writing. As to the major part of the repairs, no written agreement or memorandum was made. The defenses are excessive and erroneous charges for labor, lay days, and materials; and, in addition thereto, respondents claim to have sustained an actual loss on account of demurrage. The answer also alleges that the reasonable value of the repairs and alterations to the barge was about the sum of \$15,000.

The necessity for extensive repairs to the Bourke is conceded, for on April 26, 1902, while on a voyage from Duluth, Minn., to Tonawanda, N. Y., loaded with lumber, she collided with the schooner George Nester and stranded off Marquette, Mich. The injured vessel was taken to libelants' dry dock, at Bay City, for repairs. Upon her arrival a survey was made, in behalf of the owners and the underwriters, to determine the loss. The surveyors estimated that the cost of repair and equipment would amount to \$13,405. A supplementary report was made by them, showing the necessity for replacing the mast, which was not included in the original survey. The answer further alleges that respondents relied upon the survey, and that libelants stated that the repairs would not cost near as much as had been anticipated. The evidence, however, does not show that the libelants were parties to such survey, and the court does not understand that respondents claim the libelants were bound thereby. The only significance attaching to this testimony is that it may be considered to show the nature and extent of the injuries to the barge, as well as the repairs which were necessary to put her in seaworthy condition. The bill of particulars specifies the items of work and materials furnished by libelants, and the charges therefor. Neither the extent nor the making of the repairs, other than those specified in the written contract, is disputed. That they were skillfully made is conceded, and no fault is found with the materials used. What was the reasonable value of the repairs and materials furnished? Was the work upon the vessel unreasonably delayed, and did the claimants suffer loss by such detention?

Giving due weight to the evidence of respondents' witnesses who testified to the character of the repairs, the timber required, and the labor employed, I conclude that a reasonable deduction must be made upon the various items hereafter enumerated. The evidence on the part of claimants shows that the master of the Bourke, Capt. Hanley, who, in the capacity of their superintendent, was present on the vessel while the repairs were being made, kept a daily record of the work performed, together with the lumber and materials used. Libelants challenge the detailed statements of this witness on the ground that some of the materials were furnished and a portion of the work performed before he began to keep his tallies or records, and, further, that his measurements of timber were not made at West Bay City, the place of shipment. It is claimed that

the measurements of libelants' witnesses were made at that point, and therefore are entitled to greater reliance. An examination of the testimony of Hanley and his tallies indicates that they were carefully kept, and in some particulars they agree with those of libelants' employés. The record shows, however, that libelants had several men employed at keeping tallies. These are agreed as to the amount of work and materials furnished. Hence the court is not prepared to accept the records of the witness Hanley as absolutely reliable, to the entire exclusion of libelants' books. Some evidence is given tending to show an overcharge in prices and quantities. The basis for such claim regarding the timber rests largely upon the method of measurement; that is, whether so-called log measurements should indicate the quantity or the product of the log after it was sawed into timber. Evidence was given at the trial showing two methods—the Doyle and Scribner—of measuring round logs to ascertain the number of feet contained in them. A discussion of the evidence regarding these rules of measurement is not deemed essential. It was libelants' custom to add an arbitrary 25 per cent. to the net measurements of the timber for wastage in manufacture. Libelants' method of measurement and arbitrary charge for wastage, in the absence of any designation of a different rule or arrangement as to prices charged, will be presumed to have been the understanding of the parties. It has often been held that "parties who contract on a subject-matter concerning which known usages prevail by implication incorporate them into their agreement, if nothing is said to the contrary." *Peterson v. Eight Hundred and Sixty-Nine Cedar Logs* (D. C.) 127 Fed. 869; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987, and cases cited.

Libelants make a charge for timber and planking as follows:

86,023 feet of oak, at \$45 per M.....	\$1,621 04
34,935 " " Norway, 40 to 60 ft., at \$45.....	1,572 08
32,093 " " pine, 40 to 60 ft., at \$45.....	1,444 19
8,830 " " docking, at \$40.....	353 20
	<hr/>
	\$4,990 51

Respondent insists that the testimony of the witnesses Hanley and Williams shows that only 73,591 feet of timber was used; but, as already intimated, the tallies of Hanley are not entitled to outweigh libelants' evidence upon this point, nor, indeed, can the testimony of the witness Williams be given the importance contended for. His estimate of the lumber furnished and work performed is based entirely upon the survey hereinbefore mentioned, and an inspection of the barge after the work was entirely completed. Such opinion evidence, in my judgment, does not merit the weight that must be given to the libelants' witnesses, who were actually present during the progress of the work, and kept record of the details thereof.

The measurements of the timber are allowed as charged, except that a deduction is made from the oak of 4,212 feet on account of contract work; the evidence not being clear that any deduction was made for lumber furnished for that purpose. There is evidence

tending to show that the prices charged for the lumber were excessive. It is thought that a reduction of the prices to \$40 per M for oak, Norway, and pine, and \$35 per M for docking, is fair and reasonable. The allowance for timber, therefore, is as follows:

30,759 feet of oak, at \$40 per M.....	\$1,230 36
34,935 " " Norway, at \$40 per M.....	1,397 40
82,092 " " pine, at \$40 per M.....	1,283 50
8,830 " " docking, at \$35 per. M.....	309 05
	<hr/>
	\$4,220 31

Delay in the work occurred at different times, and the expense for the lay days must accordingly be reduced. The evidence does not indicate that there was an agreement, as claimed by respondents, that the work should be completed in three or four weeks, or within any specified time; nor was the delay of such a nature as to warrant the inference that the vessel was detained because of the carelessness or negligence of libelants. Complaints of delay were frequent, and some evidence was given tending to show that an insufficient number of workmen were employed at different times in completing the repairs. The estimate of respondents' witnesses that there was an unreasonable delay of 50 days is not persuasive, although the work of repairing the barge might have been hurried. Giving consideration to all the evidence upon this point a deduction of 20 lay days would seem proper and just. This would reduce libelants' charge for lay days from \$4,416 to \$3,312.

The amount charged for labor, including gains and profits, is \$9,882.82; the actual cost thereof, according to libelants' testimony, being \$7,552.93. I think a profit of 20 per cent. is reasonable and just, and therefore the amount charged for labor is reduced from \$9,882.82 to \$9,063.51.

Respondents claim that the profit and gain charged on an expenditure of \$1,149.60 for certain materials, tools, etc., furnished, amounting to \$556.20, is excessive and unreasonable. The proofs show that the libelant James Davidson sold the articles mentioned to the firm. There is no substantial reason for denying a reasonable profit to the seller of these materials, as well as to the libelants, who used them in making the repairs. The libelant James Davidson, on cross-examination, testifies that a profit of 15 per cent. would not be excessive, and that he stood ready to accept such an estimate of profit. Undoubtedly he had in mind a clear net gain of 15 per cent. over and above all expenditures. In estimating an allowance of gains and profits, regard must be had for the general expense of maintaining the dry dock. I think \$200 a proper deduction from the estimate of gains and profits on these materials, making the allowance therefor the sum of \$1,505.80. The amount of \$50 is allowed for rigging bands, instead of \$60, as charged, and \$12 for pitch, instead of \$20, as charged. The items enumerated in subdivision 2d of respondents' brief, consisting of wedges, files, etc., charged at \$144.85, are disallowed, as is also the charge of \$15.53 for hoisting line. The charges of \$27.31 for connecting pony engine, and \$60 for jig sawing, are disallowed. The item of round

iron, at quantities charged, is reduced from \$472.63 to \$400. The item of spike is allowed at \$400, instead of \$486.40.

The counterclaim of respondents remains to be briefly considered. The evidence falls short of establishing that there was an actual loss of earning capacity of the barge, nor does it sufficiently appear what her net earnings during the detention would probably have been. The *Conqueror*, 166 U. S. 133, 17 Sup. Ct. 510, 41 L. Ed. 937. Hence no offset as a result of detention is allowed. The charges for the various other items not mentioned herein are allowed.

A summation of the evidence warrants the conclusion that the libelants are entitled to recover the sum of \$16,936.77, with interest from April 1, 1904, the time when the briefs herein should have been filed with the court, together with the costs of the action.

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LANAHAN et al. v. JOHN KISSEL & SON.

(Circuit Court, E. D. New York. February 24, 1905.)

1. TRADE-MARKS—INFRINGEMENT—"HUNTER WHISKEY."

Complainants and their predecessor since 1860 have sold a brand of whiskey for which they adopted and used as a trade-mark the arbitrary word "Hunter," and their product became widely known throughout the country as "Hunter Whiskey," and was the only whiskey known to the trade by that name, although the word "Hunter" was used by some other small dealers at various times, in combination with other words, as the name of a whiskey having a local market. Purchasers in bulk in some cases bottled the whiskey, using on the bottles white labels furnished by complainants, having thereon the words "Hunter Baltimore Rye Whiskey," with the name of the immediate vender as bottler, and also a picture of a uniformed man on horseback. Complainants also sold some of their product in bottles having a dark label with the word "Hunter," in white letters, conspicuously shown thereon, and a white medallion in the center, containing the same picture. After 1900 defendants began the sale of whiskey in bottles having a white label, with the picture of a huntsman on foot, with dogs, thereon, and the words "White Label Hunter Whiskey, Bottled by," followed by their own name and address. *Held*, that such labels were an infringement of complainants' exclusive right of trade-mark in the word "Hunter," and were calculated and evidently designed to induce the belief on the part of purchasers that the whiskey was that of complainants, bottled by defendants.

2. SAME—RIGHT TO INJUNCTION—PREVENTION OF THREATENED INJURY.

The infringement of a trade-mark implies injury, and, where it is of such character as is calculated to deceive purchasers, the owner is not bound to wait until injury has actually resulted, before he can maintain a suit for relief by injunction.

In Equity. Suit to enjoin infringement of trade-mark.

Wise & Lichtenstein (Morris S. Wise, of counsel), for complainants.  
Hess & Holstein (Charles A. Hess, of counsel), for defendant.

THOMAS, District Judge. In 1860 one William Lanahan, the predecessor of the present complainants, at Baltimore, Md., first adopted as a trade-mark the arbitrary word "Hunter" for the purpose of identifying and distinguishing whiskey made and sold by him. At that time and for some years thereafter such Lanahan and his successors sold

such whiskey in bulk, but purchasers, for the purpose of reselling, often bottled the liquor, and placed on the bottles white labels carrying in script type the words

"Hunter  
"Baltimore Rye  
"Whiskey."

Below these words, and between the word "trade" and the word "mark," was the picture of a uniformed man on horseback. Beneath the picture were either the words "Wm. Lanahan & Son, Baltimore, Md.," or the name and address of the immediate vender—for instance, "Johnson & Ascher, 819 North Clark St., cor. Wisconsin St., Chicago.

In the year 1894 the complainants, who had succeeded to all former rights of the first Lanahan, began to sell whiskey in bottles, continuing also the sale in bulk, and attached to each bottle a label of the following description: A dark background, with a white medallion center, containing a horse with a uniformed rider, holding a hat in his right hand (the same picture shown on the white label), with the word "trade" at the left, and the word "mark" at the right thereof; above the picture, in large white capital letters, the word "Hunter," and below the picture the words, in white capital letters, "Baltimore Rye Bottled by Wm. Lanahan & Son, Baltimore." The complainants continued to furnish the white label to their customers, which, when desired, was used by them for bottling whiskey purchased in bulk, and the complainants also supplied bottles for bar purposes carrying the word "Hunter." The complainants' whiskey in bottles and in bulk, as above described, has been sold generally throughout the United States, and has also been sold in Europe, Central America, and South America. It is proved that in the trade the complainants' whiskey only is known as "Hunter Whiskey," and that, when "Hunter Whiskey" is called for, the complainants' goods are intended and are supplied. There is evidence, making imperfect proof, that whiskey has some sale in bottles bearing a dark label with a white medallion therein, showing a huntress on horseback; the label bearing the words "Old Hunter Belle Rye, 17 Years," etc. It is alleged that it is bottled and sold by "The Consolidated Hopewell Co.," of Cincinnati; but such company is of very recent formation, and apparently is unknown to the trade. There is no evidence that the complainants had knowledge of this brand until the evidence herein was taken.

The evidence shows that V. E. Shields & Co., of Cincinnati, Ohio, bottle and sell, and have sold since 1873, whiskey bearing the name "Hunter's Own." V. E. Shields & Co. on December 7, 1875, registered a trade-mark designated "Hunter's Own Bourbon," but the words "Hunter's Own" were used by Shields to designate both rye and bourbon whiskey sold by them, whether in bottles or in bulk, and a bar decanter carrying such words was supplied to their customers. While Shields' sales have not been specifically located, yet they have been made to persons at several places in the United States; the total thereof having been, as nearly as Mr. Shields ventured to estimate, "a thousand or two" cases, while complainants' sales of "Hunter Whiskey" in 1902 reached 40,000 cases. The complainants had no knowledge of the Shields brand, except as this suit disclosed its existence. Indeed, Ot-



tenheimer, engaged in the liquor business since 1871, and Peebles, grocers, importers, and large dealers in wines, liquors, and whiskies, each located at Cincinnati, testified that he had never heard of the "Hunter's Own" brand.

As early as 1870, whiskey was sold in bulk, and barrels were branded "Hunter's Game," by D. P. Elv's Nephews, and later by their successor, Frank Seaman, and it is still sold in Brooklyn, N. Y., and to a slight extent elsewhere. About 200 barrels a year have been sold to small jobbers and retail dealers, and of late 80 per cent. of it in Brooklyn. The business was disturbed, but not terminated, by Mr. Seaman's bankruptcy in 1898. The complainants had no knowledge of it, and it is not known to the trade as "Hunter Whiskey."

The only other brand meriting discussion is that on which is printed, in white letters, "Whiskey Distilled by Louis Hunter 1870," with the word "trade" at the left, and the word "mark" at the right, of the date. Below the date is this:

"Harrison Co., Ky. Pure Rye. The Louis Hunter 1870 whiskey and pertaining labels and brand are our exclusive properties and will be legally defended against all infringements.  
J. & A. Frieberg."

It has not been sold with the black label, with inscription in white letters, since 1901. It appears that in or after 1870 there was a distillery located in Harrison county, Ky., and that one Louis Hunter conducted it, and sold liquor in packages branded "Louis Hunter," and later the figures "1870" were added. The interest passed finally to one S. J. Craig in 1878, who operated the distillery to 1879 or 1880, when he ceased operations. Thereafter Craig sold to others, who opened the distillery as the "Sharpe Distillery," and eliminated the name "Louis Hunter" from the distillery and its trade. Since about 1883, Frieberg, of Cincinnati, Ohio, has been selling whiskey, using the label "Louis Hunter 1870" as a trade-mark. This brand is not known as "Hunter Whiskey," and the goods are not sold generally, actively, or extensively. It appears that in 1900 one of the complainants first had knowledge of this brand, although complainants' agent in New York testified that he had seen the brand in windows of dealers in three or four instances.

The defendants recently began to use the word "Hunter" on their labels, and the complainants duly filed the present bill. The ground of defendants' label is white, containing the picture of a huntsman and dogs, with the word "trade" at the left, and the word "mark" at the right, side thereof, and the words "Full Quart" at the lower corner of the picture. Above the picture are the words, "The Cream of all Whiskies," in large black type, beneath which, in smaller black type, are the words "Absolutely Pure." Beneath the picture are the words:

"White Label  
"HUNTER WHISKEY  
"Bottled By  
"John Kissel & Son  
"Brooklyn,"

—All in black type. The words "Hunter Whiskey" are much larger and heavier than other parts of the inscription, and at once and primarily catch the eye and attention. The defendants solicited custom from the

trade by cards offering "White Label Hunter Whiskey," but the signature was "John Kissel & Son, Brewers and Distillers, 169 Harrison Ave. cor. Wallabout St., Brooklyn, N. Y." In the circular was the following: "We guarantee prompt protection to customers against any intimidation." This language indicates either that the defendants were raising an issue, or that some one had raised an issue, concerning the label used. Defendants, by their labels, in effect, stated that they offered for sale "Hunter Whiskey Bottled by John Kissel & Son." There is but one "Hunter Whiskey" known to the trade, to wit, that of the complainants. Therefore the defendants' assurance is, in its effect, an offer of complainants' "Hunter Whiskey," bottled by the defendants. Such is the necessary interpretation of the language. Such thought was conveyed to the public. Starting with the thoroughly established fact that only one "Hunter Whiskey" is known, it follows that a person proffering "Hunter Whiskey" must be deemed to mean the only "Hunter Whiskey" of whose existence there was knowledge, and of whose existence there was in fact wide knowledge. This intention to offer complainants' "Hunter Whiskey" is not modified by the fact that the defendants' label states that it is "Bottled by John Kissel & Son." Such statement rather emphasized the assurance, because it was the custom of dealers in complainants' product to sell "Hunter Baltimore Rye Whiskey" purporting to be bottled by the complainants or by the person or firm bottling and offering it for sale. The defendants' statement that they bottled "Hunter Whiskey" merely classed them with the great number of persons who did the same thing. But the defendants placed above the words "Hunter Whiskey" the words "White Label." This does not qualify, but rather tends to accentuate, the statement that it is complainants' "Hunter Whiskey," because all complainants' purchasers who bottle "Hunter Whiskey" bought in bulk use white labels. The letters on the complainants' black label are large and white, and, together with the white medallion, are the striking elements of the label. These common and well-known facts the defendants, by design or by singular chance, have used of late to promote the sale of their own goods. Their statement then became as follows, in effect: "This is the 'White Label' Hunter Whiskey, which we bottle." Hence unwary persons, in a general way associating white labels with "Hunter Whiskey," would be attracted by defendants' white label, and the assurance that it was in fact "White Label Hunter Whiskey," bottled by defendants. It is true that the defendants showed a hunter afoot, and not on horseback; but the label conveyed to the mind of an observer the thought of a huntsman, which idea complainants' label also suggested. In varying forms, the pictures result in the same conception. A person of accurate knowledge and observation would detect the differences in the details of the pictures. The general or indifferent observer would quite probably often recall only that the genuine Hunter label displayed the picture of a hunter. However that may be, the differences in the pictures would not suggest to the ordinary observer that the "Hunter Whiskey" bottled by defendants was not the complainants' product. The other words of commendation appearing on defendants' bottles would not distinguish to such person that complainants' article was not offered.

The fact seems to be that the complainants' wide and persistent advertisements, the long-established fame resulting therefrom and from the use of their goods, had given their whiskey a certain name, to wit, "Hunter." Purchasers from complainants had further identified the goods by using white labels, or, if sold in original bottles, the large white letters and white medallion, made more apparent on the black ground, had to some extent associated white labels with the goods. The defendants gathered all these phenomena, known to the public more or less accurately, and used them on their own label to market their goods. Why did they select the words "Hunter Whiskey," if they did not seek to avail themselves of complainants' reputation? Why did they use white labels, unless they wished to suggest the white labels often used on complainants' goods? Why did they depict a hunter, unless they wished to avail themselves of such knowledge as people possessed that a hunter was displayed on complainants' label. Of course, much that defendants did they had a right to do; but, when all they did is considered, in connection with the use of the word "Hunter," it is easily concluded that they intended to facilitate the sale of their goods by assimilating their description to that shown on complainants' label.

It is concluded that complainants have a special property in the use of the word "Hunter" as a trade-mark, for the purposes for which they use it; that the defendants have infringed thereon; and that the defendants have designedly used such trade-mark for the purposes of unduly marketing their goods. It is true that there is no evidence that any specific person has been deceived. The object of injunctive relief is to prevent injury, threatened and probable to result, unless interrupted. Why should a person be required to stand by and see his property impaired, before he may stay the hand of the person seeking to offend? Actual injury may be the best evidence of its own existence, but a person should not be compelled to abide the results of trespass for the purpose of obtaining evidence of its injurious effects. Wrongs which are the probable result of given means should be prevented, not awaited. The infringement of the trade-mark implies injury. Such use as the defendants made of it shows that actionable injury would be the probable result of their conduct.

It is urged that the complainants for a time countenanced an advertisement that their whiskey was pure rye whiskey, and 10 years old. Even so; there is not proof that it was not ten years old, nor is there proof that it was not pure rye whiskey. The evidence seems to show that whiskey may be pure, although it is blended, and not distilled in the form in which it is sold. It is blended. But how? What are the constituents? This does not appear. The defendants, to avoid the consequences, and to retain the benefits of their wrong, accuse the persons whom they have injured of fraud. They are bound to make proof of their accusation. It is considered that they have failed.

As already stated, none of the persons, except the complainants, using the name "Hunter," sold an article that was known as "Hunter Whiskey." If a person inquired for "Hunter Whiskey," he would not have received "Louis Hunter 1870 Pure Rye," "Hunter's Own," "Hunter's Game," or "Old Hunter Belle Rye." All, unless, maybe,

the "Louis Hunter 1870 Pure Rye," had small sales, largely localized. The "Louis Hunter" existed. It had no broad popularity. If it went into many states, it had no such general sale therein as to establish for it a general reputation. If it should be judged by the tardy and scant sales testified to by some of defendants' witnesses, the demand for it was so slight as to be negligible. But the essential point is that it is not "Hunter Whiskey." If it is anything, it is "Louis Hunter 1870 Pure Rye," and is so known. In any case, the existence of these brands does not impair the complainants' property in the word "Hunter," nor their right to protect it from defendants' encroachment.

The complainants should have a decree pursuant to the above views.

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### MACKEL v. ROCHESTER.

(District Court, D. Montana. March 13, 1905.)

#### No. 13.

#### 1. BANKRUPTCY—STAY OF PENDING SUITS—ACTION BASED ON FRAUD.

A bankrupt is not entitled to a stay of a pending suit against him, which is based upon his alleged fraud, although the plaintiff in his complaint has waived the tort and sued upon an implied contract; the claim sued on being one from which, if sustained, a discharge would not be a release.

#### 2. SAME—DISCHARGE—DEBTS NOT DISCHARGED.

The liability of a bankrupt to the trustee of another bankrupt under Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], for the value of property transferred to him by the latter while insolvent, in fraud of his creditors, is one based upon his own fraud, from which he is not released by a discharge under section 17a(2), as amended in 1903, 32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 411].

At Law. On motion for stay of proceedings.

John A. Shelton, for plaintiff.

M. P. Gilchrist, for defendant.

HUNT, District Judge. On April 3, 1899, the plaintiff, as trustee in bankruptcy of the estate of F. A. Bartlett, a bankrupt, brought this action in this court against the defendant, Rochester, to recover judgment for \$8,563 and interest. Plaintiff alleges that on February 4, 1899, the said Bartlett then being insolvent and having been insolvent for a long time prior thereto, and then contemplating the filing of a petition in bankruptcy, fraudulently sold and transferred to the defendant, Rochester, a large stock of merchandise, which was all the property owned by Bartlett not exempt from execution; that thereupon the said defendant, Rochester, took possession of the said stock, and converted the same to his own use, and that the value of same is in excess of the sum of \$8,563; that the said pretended conveyance was made with the intent and purpose upon the part of Bartlett willfully to delay and defraud his creditors, and that the defendant, Rochester, at the time of the said pretended conveyance, knew and had cause to believe that the said pretended conveyance was so made by the said Bartlett with such intent, and that the said

defendant, Rochester, did not pay a fair compensation for the stock, and he knew and had reasonable cause to believe that the said Bartlett was insolvent; that, since the defendant took possession of the stock as aforesaid, he has sold and disposed of the same, and has received a sum in excess of \$8,563 therefor. The complaint then continues: "And plaintiff, now waiving the tort, alleges that the defendant is indebted to him on account of the goods, wares, and merchandise sold and delivered as aforesaid, converted by the said defendant, in the sum of \$8,563." The defendant admits the bankruptcy of Bartlett, and admits the sale to him by Bartlett, but denies that the value of the stock exceeded the sum of \$6,344; denies the allegations of intent to hinder, delay, and defraud creditors; admits that he sold and disposed of part of the stock, but denies that he received more than \$6,344, which was a present fair consideration of the property so purchased.

This cause has been tried five times in this court, and has been appealed once to the Circuit Court of Appeals. 102 Fed. 314, 42 C. C. A. 427 (decided May 14, 1900). At the call of the trial calendar at this term, the cause was set for trial on March 17. On February 27th, Rochester, the defendant, filed a motion for an order vacating the order for trial on March 17th, and for a stay, upon the following grounds: First. That on October 15, 1904, he (Rochester) was adjudged a bankrupt in this court; that 12 months have not elapsed since the date of said adjudication; that this defendant has not yet filed his petition for discharge; that said petition has not been dismissed; that the question of his discharge has not been determined. Second. That the alleged claim upon which the action is founded would be released by a discharge in bankruptcy. Third. That this action was pending at the time that this petition was filed in bankruptcy. Fourth. That the action being founded upon a claim from which a discharge would be a release, defendant is entitled to a stay pending the result of the determination of the question of the discharge of the bankrupt.

The trustee had a choice of remedies—that is, a right to sue either in tort or in assumpsit—but by express waiver of the tort he has waived any damages for the conversion, and must rely upon a recovery for the value of the property converted. Am. & Eng. Ency. Law, vol. 15, p. 1111. A debt of a bankrupt may be proved and allowed against his estate, which is founded upon an open account, or upon a contract, express or implied. Section 63a of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]). Formerly it was held that the operation of a discharge in bankruptcy was determined by the election of the creditor to sue in assumpsit or in case. But the Supreme Court, in the case of *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. —, decided that section 63a, defining provable debts, must be read in connection with section 17 (30 Stat. 550, 551 [U. S. Comp. St. 1901, p. 3428]), limiting the operation of discharges in which the provable character of claims for fraud in general is recognized, by excepting from discharge claims for fraud which have been reduced to judgment, or which were committed by

the bankrupt while acting as an officer or in a fiduciary capacity. The amendment of 1903 to section 17 (32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 411]), changed the nature of the debts included within the exceptions, by providing that a discharge in bankruptcy shall release the bankrupt from all his provable debts except such as "(2) are liabilities for obtaining property by false pretenses or false representations, \* \* \* or (4) were created by his fraud, embezzlement or defalcation while acting as an officer." The difference, proper to be noticed in the present case, between the law as it stood prior to 1903 and as it is at present, rests in this: Before the amendment of 1903 the bankrupt was released from all provable debts except claims in actions for fraud or for obtaining property by false pretenses or false representations, which had been reduced to judgment, while now the exception includes liabilities for obtaining property under false pretenses or false representations; that is to say, before the present statute a bankrupt might have been released unless a provable debt for fraud, as specified in subdivision 2, was in judgment, while now he will not be released if the claim is merely upon a liability for fraud in obtaining property by false pretenses or false representations, whether or not such liability is reduced to judgment. The Supreme Court has also decided that if a debt originates or is founded upon an open account, or upon a contract, express or implied, it is none the less provable, though the creditor may elect to bring his action in trover as for a fraudulent conversion, instead of in assumpsit for the balance due upon an open account.

"It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63a. It results from the construction that we have given the latter section that all debts originating upon an open account, or upon a contract, express or implied, are provable, though the plaintiff elect to bring his action for fraud." *Crawford v. Burke*, supra. That case, however, was one where the debt originated upon an open account or upon a contract, yet where an action in trover was instituted to recover damages for the willful and fraudulent conversion of certain reversionary interests of the plaintiff in shares of stock belonging to him; and upon that premise the court held that, although the plaintiff might have sued in an action on contract, yet his election to sue in tort did not deprive his debt of its provable character, and that therefore the plaintiff's claim against the defendant was discharged by the proceedings in bankruptcy. In *Ames v. Moir*, 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951, it was decided that fraud under the bankruptcy act, defining debts from which the bankrupt could not be relieved by a discharge in bankruptcy, means positive fraud or fraud in fact, involving moral turpitude or intentional wrong. In that case *Moir* sued *Ames* to recover the value of certain wines taken. *Ames* pleaded that he was discharged by the District Court of the United States, sitting in bankruptcy, from all debts and claims which by act of Congress might have been proved against his estate on the day when the petition for adjudication was filed against him, except-

ing such debts, if any, as were not by said act excepted from the operation of the discharge in bankruptcy. The case was tried upon the question of whether or not the claim or debt was created by fraud. The Supreme Court reviewed the evidence, and sustained the judgment; the court finding that the defendant was guilty of fraud in fact, and was not protected against the claim of the plaintiff by his discharge under the bankruptcy act. In *Forsyth v. Vehmeyer*, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, an action was brought against Forsyth in the state court of Illinois upon a judgment in favor of Vehmeyer, which he had recovered against Forsyth. To the declaration in the action upon this judgment the defendant pleaded a discharge in bankruptcy under the bankrupt act of 1867. Plaintiff replied to that plea that the debt mentioned in the judgment was created by fraud, and therefore was not discharged under the bankruptcy act. The original judgment was in favor of the plaintiff. The court, by Justice Peckham, held that, unless the judgment was recovered upon a debt created by fraud, the defendant's discharge in bankruptcy was a bar. It was contended that the original judgment was not recoverable in an action for fraud and deceit, and, even if it were, that the fraud proven was not that kind of fraud which was debarred from a discharge in bankruptcy. After reiterating the rule that the fraud complained of must be fraud in fact, involving moral turpitude or intended wrong, the court said:

"Within this rule as maintained by the court, there can be no doubt that the defendant below was not discharged under the bankrupt act. A representation as to fact, made knowingly, falsely, and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong. It is not necessary to enlarge upon the subject. It is so plainly a fraud of that description that its mere statement obtains our ready assent. The courts below were, therefore, right in denying to the defendant any benefit by reason of his discharge in bankruptcy."

The very latest consideration given by the Supreme Court to the question of release by discharge where fraud is pleaded is in the case of *Bullis v. O'Beirne*, 195 U. S. 606 (decided December 12, 1904) 25 Sup. Ct. 118, 49 L. Ed. —. Bullis, having been discharged in bankruptcy which discharged provable debts, made application for the discharge and cancellation of certain judgments rendered against him in New York. The defendants in error, judgment creditors of Bullis, opposed this upon the ground that the judgments against Bullis were in an action for fraud, and were therefore not discharged under the bankrupt act. The Supreme Court of the state denied the application, and the Supreme Court of the United States affirmed this judgment. The action originally brought against Bullis charged false and fraudulent representations in respect to certain lands, and agreements concerning the same, and that certain conveyances made were false and fraudulent. The complaint further prayed for specific performance, and for injunction and for general relief. The Supreme Court commented upon the difference under the bankrupt law of 1867, which provided that no debt created by fraud of the bankrupt should be discharged by proceedings in bankruptcy, and the law of 1898, wherein it was provided

that, instead of exempting debts treated by fraud from the operation of the discharge, only judgments in actions for fraud should be discharged. The court still adhered to the doctrine that the fraud referred to must be positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, which may exist without any imputation of bad faith. But in examining into the foundation upon which a judgment rests under the act of 1898, the court said:

"We think a correct interpretation of the law does not require a close examination into the form of the action to determine whether it is technically one *ex delicto* or otherwise, but the real question is, was the relief granted in the judgment based upon actual, as distinguished from constructive, fraud of the bankrupt? If the judgment is thus founded, whatever the form of the action, it is the intent and purpose of the law that the bankrupt shall not be discharged from it, but shall still rest under its obligation so far as the bankrupt law is concerned."

If, therefore, it is proper for the court to look into the foundation of a judgment, whatever the form of the action may be, to the end that the intent and purpose of the law shall be fulfilled, with much greater force it would seem to be the duty of the court to overlook the technical form of action in deciding the real question whether the debt is one resting on a liability for obtaining property by false pretenses or false representations, or one created by actual fraud of the bankrupt. If the debt is such a liability, and has been created by actual fraud, the bankrupt shall not be discharged from it; but shall still rest under its obligation so far as the bankrupt law is concerned. My interpretation of this language of Justice Day is that although the trustee in this action has waived the damages for conversion, and sued for the value of the property, yet, upon the face of the complaint, the debt sued for and stated to be due was created by the actual fraud of the bankrupt in entering into an arrangement with Bartlett for the transfer, by a pretended conveyance, of all Bartlett's property, with intent wrongfully to hinder, delay, and defraud the creditors of Bartlett, and for a consideration which the defendant knew was not sufficient; he well knowing all the while that Bartlett was insolvent and contemplating bankruptcy. The courts are not precluded from inquiring into how a debt was created, although a trustee may waive the damages and rely on the conversion. *Brandenburg on Bankruptcy*, § 433.

It follows, therefore, that the plaintiff may maintain this action at this time, the suit not being one founded upon a provable claim, from which the discharge would be a release, and which should be stayed until after the adjudication or dismissal of the bankrupt's petition.

Motion for stay denied.



## O'MALLEY v. TIMES PUB. CO. et al.

(Circuit Court, E. D. Pennsylvania. March 16, 1905.)

No. 24.

**MOTIONS—RULE TO SHOW CAUSE—SUFFICIENCY OF MOTION PAPERS.**

Under the Pennsylvania practice, an affidavit filed as the foundation for a rule to show cause should contain concise averments of all the necessary facts to make a prima facie case for the relief sought.

At Law. On rule to show cause.

Myles Higgins and Ambrose Higgins, for plaintiff.

D. Stuart Robinson, for defendants.

HOLLAND, District Judge. Suit in this case was brought by O'Malley against the Times Publishing Company and others for libel. After the running of the statute of limitation, it was discovered that the newspaper known as the Philadelphia Times, which had published the libel, was owned and published by the Philadelphia Times Company. The plaintiff, now that the statute of limitations bars his right to bring a new suit, asks the court to permit him to amend the record by substituting the Philadelphia Times Company for the Times Publishing Company. The paper filed upon which this rule was granted was an affidavit of Abram B. Meyers, deputy United States marshal, in which he states that "he did on the sixth day of April, 1903, serve the writ of summons issued in above case upon the Times Publishing Company by handing a true and attested copy thereof to George W. Ochs, who then and there stated that he was vice president of said company; \* \* \* that the service was intended to be upon the officers of the corporation owning and publishing the newspaper known as the Philadelphia Times." In addition to this, there was an ex parte affidavit, which gives very little more information than the affidavit upon which the rule was granted. Being ex parte, however, it cannot be considered, as it is objected to by counsel for the Philadelphia Times Company. At the argument on this rule, counsel for the plaintiff stated that George W. Ochs, upon whom service of the summons was made, is not vice president of the Times Publishing Company, but is vice president of the Philadelphia Times Company, the owner of the Philadelphia Times newspaper at the time the libel was published. Other facts were stated showing how the mistake occurred, and an accounting for the delay in the discovery of the mistake. These statements, however, were not assented to by the opposing counsel, who insisted that they should be established by depositions. It is further to be noted that none of these facts upon which counsel for the plaintiff relied to authorize the court to allow this amendment were stated in the affidavit upon which the rule was granted.

In the practice in Pennsylvania in regard to that class of rules which require an allocatur, the ground must be laid in the affidavit setting forth facts upon which relief is sought. The affidavit or petition, being the foundation of the rule, should contain concise

averments of all the necessary facts to make a prima facie title to the relief sought, but it need not in ordinary cases do more. It is not, therefore, necessary in general to go into all the facts with the same detail as would be required in a deposition, but it will always be safer to err on the side of fullness, rather than to run the risk of failing by the omission of a point which may turn out to be material. Mitchell on Motion and Rules, p. 19. In this case it will be noted that the amendment is urged upon the ground that the proper corporation, to wit, the Philadelphia Times Company, was served through its vice president, George W. Ochs; but there is nothing in the affidavit filed, upon which the rule was granted, to show that George W. Ochs is the vice president of the corporation intended to be served, but, on the other hand, the affidavit states that he represented himself to be the vice president of the Times Publishing Company when the officer served the writ upon him, and there is nothing in the case to establish the contrary, so that, as the record now stands, it shows that the vice president of the Times Publishing Company was served. If, as claimed, however, George W. Ochs is not vice president of the company named in the suit, but is vice president of the Philadelphia Times Company, and it was the intention of the plaintiff to sue that company, and it did serve notice upon its vice president, these facts, together with those stated at the argument, should be properly put in issue, and, if denied, supported by depositions.

The order of the court, therefore, is that the plaintiff shall have 10 days from this date to amend his petition or affidavit in accordance with this opinion.

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In re LADUE TATE MFG. CO.

(District Court, W. D. New York. January 21, 1905.)

No. 1,652.

**1. BANKRUPTCY—PROVABLE DEBTS—CONTRACT FOR COMMISSIONS.**

A contract between a bankrupt mercantile company and a sales agent construed, and held to entitle the agent to commissions on orders obtained by him which were accepted and filled by the company, but not on orders which, for sufficient reason, were not accepted or were canceled by the buyers.

**2. SAME—EVIDENCE—UNAUTHENTICATED LETTERS.**

On the hearing of a claim against a bankrupt estate for commissions on orders for goods obtained by the claimant as sales agent for the bankrupt, letters received by the trustee, purporting to have been written by customers from whom the claimant had taken orders, are not admissible to prove a cancellation of such orders, without proof of their authenticity.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1648-1652.]

In Bankruptcy. On review of referee's decision on contested claim.

William F. Wierling, for claimant.

Baker & Schwartz (Thomas C. Burke, of counsel), for trustee.

HAZEL, District Judge. The claim filed herein by Christian E. Geiger, amounting to \$3,264.23, is for commissions alleged to have been earned as sales agent for the bankrupt, a mercantile corporation. Objections to the allowance thereof were interposed by the trustee. The referee, after hearing the evidence, allowed the claim at \$51.40. Upon the hearing the claimant had the affirmative of the issue. He proved that he had procured for the bankrupt a large number of orders for merchandise to be delivered at a future time, but he failed to satisfactorily establish the amount of commissions actually earned, or the amount of money received by him to apply thereon, prior to December 31, 1903. The testimony of the claimant that the bankrupt was indebted to him in the sum of \$600, commissions earned between September 6, 1901, and June, 1902, and the further sums of \$1,000 for the year ending June, 1903, and \$1,300 for the period between said last-mentioned date and September 25, 1903, is indefinite, vague, and uncertain. The arrangement between Mr. Tate, general manager of the bankrupt, and Geiger, was that commissions should be earned upon all orders accepted and filled by shipment, and not merely upon orders obtained. Such an arrangement between the parties must be fairly interpreted, and the employer has no right to arbitrarily reject orders obtained in good faith. *Taylor v. Enoch Morgan Sons Co.*, 124 N. Y. 188, 26 N. E. 314. The claim is interposed on an erroneous assumption that the commissions were earned when orders were obtained by the sales agent and turned over to his principal, instead of on all goods sold and shipped. The contract, as interpreted by the referee, undoubtedly expressed the intention of the parties, and hence I agree in his conclusion respecting the same.

After the filing of the petition in bankruptcy, various customers canceled orders amounting to \$5,336.28. It is quite possible, had bankruptcy not intervened, that, with the exception of those of Geddes & Bennett, McClean, Bowman & Co., Harry L. White, and John Brash & Co., all such orders would have been filled, and the commissions earned by the sales agent. The burden was undoubtedly upon the trustee to show which orders were not finally shipped, and, if there was a justifiable cancellation thereof, to establish that fact; otherwise the claimant was entitled to commissions on such sales. The evidence in support of certain cancellations was improperly received. The record shows that about seven letters written and mailed to the trustee in bankruptcy by customers canceling orders for merchandise previously given were received in evidence over claimant's objection to their introduction, without any proof of their genuineness. The mere fact that they were received by the trustee in the manner indicated, without proof of their authenticity (they not being strictly part of the transaction between claimant and the bankrupt), does not establish their contents. *Greenleaf on Evidence*, vol. 1, § 575 (16th Ed.) vol. 9, *Amer. & Eng. Ency. of Law*, 898; *Hildreth v. Shepard*, 65 Barb. 265. These orders were from responsible parties, and undoubtedly were acceptable to the bankrupt. The suggestion that Geiger notified the writers of the letters or some of them of the bankruptcy, and suggested cancellation of their

orders, would, if true, have weight, and would perhaps warrant their reception without other evidence of the signatures or authorship. But the suggestion mentioned is not borne out by the proofs. Admittedly, Geiger notified his customers, some of whom had previously given him orders as sales agent of the bankrupt, that bankruptcy proceedings had been instituted, but I am unable to infer from the showing that he invited cancellations of any of the orders. No claim is made for commissions upon merchandise sold to such customers who afterward elected to place their orders elsewhere. In the circumstances, the claimant is entitled to recover commissions claimed to be due from the bankrupt on the following orders, in addition to those enumerated by the referee: Robinson & Co., J. A. Borland, Sarah A. Herrick, Jennie E. Zimmerman, and William Windhorst.

It was conceded at the argument that claimant is entitled to a further sum of \$80.16, on account of an additional  $2\frac{1}{2}$  per cent. commission on certain orders which apparently the referee overlooked. The claim is allowed at \$465.75.

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### HELMRATH v. UNITED STATES.

(Circuit Court, S. D. New York. December 21, 1904.)

No. 8,028.

#### 1. CUSTOMS DUTIES—PROTEST—SUFFICIENCY.

An importer protested against the payment of duty on 99 skins, classified as hides, in regard to which he stated in his protest, "each of which weighs under 12 pounds; and looking to you for the refund of duty on these 99 skins I remain," etc. It appeared that 12 pounds is the dividing line between hides and skins, and that paragraph 664 of the Free List, Tariff Act July 24, 1897, c. 11, § 2, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], is the only paragraph authorizing the admission of such skins free of duty. *Held*, that the protest was sufficient under section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], requiring that protests shall point out "distinctly and specifically" the grounds of the importer's objections to the assessment of duty.

#### 2. SAME—EVIDENCE—SUFFICIENCY.

Where importations of hides and skins, mixed together, were sorted by experienced men, who determined whether they were under or over 12 pounds, the dividing line between hides and skins, by handling alone, except with doubtful pieces, on which they used the scales, and it appeared that the pieces considered by them to be skins were treated as such, being sold on that basis, *held*, that the evidence of these facts justified a finding that such pieces were actually skins, and not hides.

On Application for Review of Decisions of the Board of United States General Appraisers.

This case relates to three decisions of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by W. Helmrath. Among the issues raised was the question of whether the protests were sufficient under section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], requiring that

protests shall set forth "distinctly and specifically" the grounds of the importer's objections to the assessment of duty.

J. Stuart Tompkins, for importer.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in question consists of dried calfskins, imported from South America at the port of New York, which were assessed for duty at 15 per cent. ad valorem, under paragraph 437 of the Tariff Act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], the material part of which reads:

"437. Hides of cattle, raw or uncured, whether dry salted or pickled, fifteen per cent. ad valorem."

The importer claims that certain of the pieces in question were skins, as distinguished from hides, and that he was therefore entitled to a refund of the duty paid on the skins.

The protest filed in connection with one of the invoices serves to raise the first question at issue, since they were all alike so far as the specific cause of complaint is concerned, which protest is as follows:

"I herewith protest against the liquidation of my entry of hides and skins Ex. S. S. Alene, entered June 8rd, 1903, Entry No. 111,033, marked as follows: 'P. R. 1,343 Pieces, D 600 Pieces.' As per city weighmaster's return, whose affidavit I herewith attach, the above P. R. contains 89 skins, and D 10 skins, each of which weighs under 12 pounds; and looking to you for the refund of duty on these 99 skins I remain," etc.

There is only one paragraph in the free list which could apply to skins, and which would sanction the refund of duty demanded by the protestant, and that is paragraph 664, § 2, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], which reads:

"Skins of all kinds, raw (except sheep skins with the wool on) and hides not specially provided for in this act."

It was known by everybody concerned that the line of demarcation between hides and skins had been placed at the 12-pound weight, and the collector could not have been in doubt as to what the importer meant. The protest is amply sufficient under the decisions.

Much testimony was taken before the General Appraisers which relates to separate invoices, each containing both hides and skins, and upon that testimony and the other papers in the case the General Appraisers made three separate decisions, which are found in the record as Exhibits P, Q, and R. While criticising the protests, they do, however, undertake to decide the question upon its merits. In Exhibit P they say:

"We find that there is no evidence before us to sustain the claim that each skin weighed less than twelve pounds, and therefore, regardless of the form of the protests, they are overruled."

In Exhibit Q they say:

"We have no sufficient proof to justify a finding that any of the alleged skins weighed less than twelve pounds. It appears that the counting, separation and weighing of the hides and alleged skins was done by city weighers in block, and not separately. The weighers claim to be able, by reason of ex-

perience, to tell by examination whether a skin weighed over or under twelve pounds, and their sworn certificates of return of the weighing, although there had been no separate weighing of the skins, set forth that each of the alleged skins weighed less than twelve pounds. We are not satisfied with such proof, and think the protestant has failed to furnish sufficient evidence that any of the skins weighed less than twelve pounds."

And in Exhibit R they say:

"The weighing of the hides and skins was done by city weighers in block, and not separately. Mere handling, and, as a result thereof, estimating the weight of the alleged skins, in the absence of separate weighing, is insufficient."

The rule of law is plain, as laid down by the Circuit Court of Appeals, that a finding of fact by the Board of General Appraisers is not conclusive upon this court, and should not be followed "where such finding is contrary to the weight of evidence." In *re Van Blankensteyn*, 56 Fed. 474, 477, 5 C. C. A. 579; *Apgar v. U. S.*, 78 Fed. 332, 334, 24 C. C. A. 113. A somewhat careful examination of the testimony establishes these facts: (1) In each consignment the hides and skins were all handled, the skins being thrown in a pile by themselves, and, if there was any doubt as to the 12-pound limit in the mind of the weigher, the scales were used upon the doubtful piece. The weighers were experienced men. (2) The skins did not average over 10 pounds, and it is impossible to conceive that any serious mistakes were made. The pieces thrown out and treated as skins were sold in the trade based upon these weights, and none were returned on account of error. The same is true of the hides. The testimony satisfies me that, trifling accidents excepted, each skin weighed under 12 pounds. If a single skin did happen to run a trifle over weight, I see no reason why the protestant should not have the advantage, and the government be bound to accept the well-known maxim of the law, "*De minimis non curat lex.*"

The protests apply, as I understand it, to 429 pieces, for which the refund as skins is claimed. To this extent the decision of the Board of General Appraisers is reversed.

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#### BRODIE v. UNITED STATES.

(Circuit Court, S. D. New York. December 16, 1904.)

No. 8,728.

#### CUSTOMS DUTIES—CLASSIFICATION—ORNAMENTAL FEATHERS.

Crude ostrich feathers, which in that condition are never used for ornamental purposes, but need to be dressed and otherwise manufactured before becoming suitable for such use, are dutiable as "feathers \* \* \* crude," and not as "ornamental feathers," under paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by H.

W. Brodie. Note *Silva v. United States* (C. C.) 127 Fed. 781, and *Spero v. United States* (C. C.) *infra*.

William B. Coughtry, for importer.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in question consists of crude ostrich feathers, which were assessed as "ornamental feathers," at 50 per cent. ad valorem, under paragraph 425 of the Tariff Act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], and are claimed by the importers to be dutiable only at the rate of 15 per cent. ad valorem, under the first provision of said paragraph, for "feathers of all kinds \* \* \* crude or not dressed, colored, or otherwise advanced or manufactured in any manner." The undisputed evidence is that ostrich feathers in their crude condition are never used for ornamental purposes. They have to be dressed and otherwise manufactured before they are suitable for such use, or become in any sense ornamental feathers. I am clearly of opinion that the condition, and not the use of the feather, governs its classification under said paragraph 425, and that the inclusion of "ornamental feathers" at the rate of 50 per cent. in the latter part of said paragraph, as well as its association therein with other enumerated articles, all of which are self-evidently wholly or partly manufactured, indicates that only such "ornamental feathers" as have been "dressed, colored, or otherwise advanced or manufactured in any manner" are properly dutiable at said rate of 50 per cent. ad valorem. Crude feathers of all kinds are dutiable at 15 per cent. ad valorem. The word "ornamental," as it appears in said paragraph, applies not only to feathers, but to fruits, grains, leaves, flowers, and stems as well. It is difficult to perceive why that word should be given a different significance when applied to a natural feather, just as it is plucked or clipped from the bird (elsewhere provided for in paragraph 425 among "feathers of all kinds, crude"), than when applied to a natural flower, just as plucked or clipped from the bush (elsewhere provided for in paragraph 251, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1650] among "natural flowers of all kinds, fresh") yet no one would be likely to seriously contend that paragraph 425 is intended to cover natural flowers, although they are generally used for ornamental purposes.

The decision of the Board of General Appraisers is reversed.

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### SPERO V. UNITED STATES.

(Circuit Court, S. D. New York. December 16, 1904.)

No. 3,494.

#### CUSTOMS DUTIES—CLASSIFICATION—CRUDE ORNAMENTAL FEATHERS—CONDOR AND EAGLE QUILLS.

*Held*, that certain eagle and condor quills, which are ornamental feathers, but are in a crude state, and require further treatment before becoming suitable for ornamental purposes, are dutiable as crude feathers, and not as ornamental feathers, under paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question (G. A. 5,540, T. D. 24,910) affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by David Spero.

This case relates to certain feathers imported into the port of New York by David Spero, consisting of crude eagle and condor quills, which are ornamental in character, but require to be cleaned, dressed, etc., before being suitable for ornamental purposes. They were classified as ornamental feathers, under paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], and were claimed by the importer to be dutiable as crude feathers, under the same paragraph. This contention was overruled by the Board of General Appraisers. G. A. 5,540, T. D. 24,910.

Frederick W. Brooks, for importers.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. The same principles are applicable to this case as those set forth in my opinion filed on this date in the case of *H. W. Brodie v. United States* (suit No. 3,726) 135 Fed. 914.

The decision of the Board of General Appraisers herein is accordingly reversed.

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FRITZ & LA RUE v. UNITED STATES.

W. & J. SLOANE v. UNITED STATES.

(Circuit Court, S. D. New York. December 19, 1904.)

Nos. 3,614, 3,615.

**CUSTOMS DUTIES—MEASUREMENT—SELVAGE OF RUGS.**

In assessing the duty "per square foot" provided for rugs in paragraph 379, Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668], *held*, as to certain oriental rugs having a pile and a selvage, that the entire area of the rug, including the selvage, should be measured, in ascertaining the number of square feet.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,711, T. D. 25,384, which affirmed the assessment of duty on merchandise imported at the port of New York by Fritz & La Rue and W. & J. Sloane.

Albert Comstock, for importers.

Henry A. Wise, Asst. U. S. Atty.

PLATT, District Judge. The importations in question consist of oriental rugs, which were assessed for duty under paragraph 379 of the tariff act of July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668], which reads as follows:

"Par. 379. Carpets of every description, woven whole for rooms, and oriental, Berlin, Aubusson, Axminster and similar rugs, ten cents per square foot and in addition thereto, forty per centum ad valorem."

In making the estimate of duty upon the basis of measurement, the collector included not only the pile-fabric portion, but also the selvage



of the rugs. The importers claim that in making this measurement the selvage should have been excluded from the square-foot measurement. But they admit that in making the measurement the extra selvage beyond the pile on the sides may be counted, and say further that some selvage must be left on the ends of the rug in order that it shall not ravel. If a certain addition on the sides and ends of the importation still permits the entire article to answer the definitions for rugs, it is not easy to perceive how the addition of a few extra inches to the selvage on the ends can change the way in which the definition should be interpreted. It is not believed that the testimony bearing upon the custom of the trade in this regard affects the plain meaning of the language of paragraph 379. The only remedy for the importers' troubles is to take care that as little as possible of what they term useless and extra length shall be present in the imported articles.

The decision of the Board of General Appraisers is affirmed.

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E. H. BAILEY & CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. March 15, 1905.)

No. 18.

**CUSTOMS DUTIES—CLASSIFICATION—METAL BUCKLES—SLIPPER ORNAMENTS—JEWELRY.**

*Held*, that certain slides or buckles, made of steel or a base metal, some ornamented with rhinestones and some colored in imitation of precious metals, and used in ornamenting slippers, are not within the provision in paragraph 434, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "articles commonly known as jewelry," but are dutiable as manufactures of metal, not specially provided for, under paragraph 193 of said act, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below related to merchandise imported by E. H. Bailey & Co. at the port of Philadelphia, and, following a previous decision of the board on the same subject (*In re Stern*, G. A. 4,306, T. D. 20,298), affirmed the assessment of duty by the collector of customs at that port.

Hatch, Keener & Clute, for petitioners.

Wm. M. Stewart, Jr., and J. Whitaker Thompson, for the United States.

J. B. McPHERSON, District Judge. The articles in question are slides or buckles made of cut steel, or a base metal, some ornamented with rhinestones, and some colored in imitation of gold or silver. They were imported in 1899, 1900, and 1901, to be used, and were in fact used, in the manufacture of slippers, partly to cover certain imperfections in the making, and partly as ornaments, and are not adapted for any other use. The collector classified them under paragraph 434

of the act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], which imposes duty as follows:

"Articles commonly known as jewelry, and parts thereof, finished, or unfinished, not specially provided for in this act, including precious stones, set, pearls, set or strung, and cameos in frames, sixty per centum ad valorem."

The importers protested that the duty should have been imposed under paragraph 193, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], which levies a duty of 45 per centum ad valorem upon—

"Articles or wares, not specially provided for in this act, composed wholly, or in part, of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured."

The Board of General Appraisers sustained the collector upon the authority of G. A. 4,306, and the partial affirmance of that decision by the Circuit Court for the Southern District of New York in *Bader v. United States* (C. C.) 116 Fed. 541, saying:

"We find from an inspection of the samples and the record that this merchandise is identical in character with that passed upon by the board in G. A. 4,306 (T. D. 20,298), which decision, upon appeal, was affirmed by the Circuit Court for the Southern District of New York."

I am unable to agree with this finding of fact. The samples that were offered in evidence in *Bader's Case* are before me, and it seems clear to my mind that they differ materially from the articles in question in the present case. Not much testimony has been offered, but what there is tends toward the same conclusion. In my opinion, inspection of the articles is all that is needed to satisfy the mind with approximate certainty that they are not "commonly known as jewelry." They would, I think, be more properly described as millinery goods, trimmings, or findings.

The decision of the Board must be reversed.

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**MENZEL & CO. v. UNITED STATES. MEYER & LANGE v. SAME  
WEBER v. SAME.**

(Circuit Court, S. D. New York. December 14, 1904.)

No. 3,636, 3,637, and 3,638.

**CUSTOMS DUTIES—CLASSIFICATION—FISH ROE—CAVIAR—SIMILITUDE.**

Fish roe, or caviar, in tin packages, is, by virtue of the similitude clause in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], dutiable at the rate applicable to fish in tin packages, enumerated in paragraph 258 of said act, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], which article it resembles in quality, texture, and use, especially use, within the meaning of said section.

On Application for Review of Decisions of the Board of United States General Appraisers.

The decisions in question affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Menzel & Co., Meyer & Lange, and Jules Weber. Note G. A. 5,424, T. D. 24,682.

Albert H. Washburn, for importers.  
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in question consists of caviar, the roe of the sturgeon. It was assessed for duty by the collector of customs under paragraph 258 of the tariff act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], as "fish, in tin packages." The importers protested against said classification and assessment, and claimed the merchandise to be properly dutiable, under the provisions of section 6 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), as a nonenumerated manufactured article. The board of general appraisers overruled the protest of the importers, holding the merchandise to be dutiable, either directly or by similitude, as fish, under said paragraph 258 and section 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

I do not agree with the board of appraisers on the proposition that this caviar is fish, but think, under the similitude clause, that, since it is so near fish in quality, texture, and the use to which it may be applied (especially the use), that provision should control.

The decision of the board is therefore affirmed.

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HERZOG v. UNITED STATES.

(Circuit Court, S. D. New York. December 18, 1904.)

No. 3,495.

**CUSTOMS DUTIES—CLASSIFICATION—SHOE LABELS.**

The provision in paragraph 320, Tariff Act July 24, 1897, c. 11, § 1 Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], for "labels for garments or other articles, composed of cotton," does not include strips of cotton containing certain words woven therein in silk, which are intended, when properly cut, to be attached to the top of shoes. Such articles are dutiable as manufactures of cotton, under paragraph 322 of said act, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661.]

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision under review see G. A. 5,553, T. D. 24,939, which affirmed the assessment of duty on merchandise imported at the port of New York by A. Herzog.

Frederick W. Brooks, for importer.  
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The importations in question were classified for duty under the provisions of paragraph 320 of the tariff act of July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], as "labels, for garments or other articles, composed of cotton or other vegetable fiber, fifty cents per pound and thirty per centum ad valorem." The importer protested, claiming the same to be properly dutiable at 45 per cent. ad valorem, under the provisions of paragraph 322 of the same act, as "manufactures of cotton not specially

provided for." In *Worthington v. Robbins*, 139 U. S. 337, 11 Sup. Ct. 581, 35 L. Ed. 181, the court uses this language:

"In order to produce uniformity in the imposition of duties, the dutiable classifications of articles imported must be ascertained by an examination of the imported article itself in the condition in which it is imported."

It appears from an examination of the samples admitted in evidence that the goods consist of woven strips of colored cotton, about two inches in width and several yards in length, into which are woven in coarse silk at intervals varying from three to six inches, the names of certain shoe companies, together with the word designed to indicate the particular style of shoe, the goods being intended, when properly cut, to be sewn or otherwise attached inside the tops of shoes. It would seem that the article in question, in the condition in which it is imported, cannot be classified as labels; certainly not as labels composed of cotton or other vegetable fiber. It is necessary that something should be done to the article imported before it becomes a label. In *United States v. Downing*, 129 Fed. 90, 63 C. C. A. 532, the article imported was "sticks of carbon, adapted and intended to be used in electric lighting, but not yet completed for such use when imported." The article was classified by the collector, who was sustained by the Board of General Appraisers, as carbons for electric lights, under paragraph 98 of Schedule B of the act of July 24, 1897, c. 11, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]. It was placed by the Circuit Court under paragraph 97 of said act, as "carbons not specially provided for," and the ruling of the Circuit Court was affirmed in the decision referred to. The importation now under discussion seems to me to be on all fours with the carbon case. The government relies upon the case of *Oppenheimer et al. v. U. S.*, 66 Fed. 52, 13 C. C. A. 327, but seems to lose sight of the fact that the article there imported was only made up in part, and had been classified for duty under paragraph 413 (Act Oct. 1, 1890, c. 1244, 26 Stat. 598) as an article of wearing apparel, made up or manufactured in whole or in part, etc.

The decision of the Board of General Appraisers is reversed.

## In re MARINE CONSTRUCTION &amp; DRY DOCK CO.

(District Court, E. D. New York. March 22, 1905.)

**CHATTEL MORTGAGE—VALIDITY—AGREEMENT FOR SALE AND REPLACEMENT OF PROPERTY BY MORTGAGOR.**

A mortgage given by a shipbuilding company on its plant, machinery, tools, and stock of material for money borrowed expressly for use in carrying on its ordinary business of building and repairing vessels, which mortgage by its terms, or by necessary intendment from such purpose, permits the company to use the stock mortgaged and replace the same, is void as to such stock and as to a boat made therefrom for a customer both under the federal and New York decisions, and the mortgagee has no lien on such stock or the boat or its proceeds as against the company's trustee in bankruptcy.

In Bankruptcy. On distribution of proceeds of bankrupt's property.

David B. Simpson, for petitioners.

David Bennett King, for trustee.

THOMAS, District Judge. The bankrupt corporation was organized for the purpose of doing a general manufacturing business, and was for that purpose, on September 1, 1902, the owner of land and a shipbuilding plant at Staten Island, subject to a mortgage of \$40,000. At that date it executed to the Guaranty Trust Company a mortgage to secure \$37,500 of bonds, and on September 25, 1903, executed a mortgage to secure \$11,000 of notes. The notes and bonds are now owned by petitioners. The second and third mortgages (to which alone reference is hereafter made in the use of the word "mortgages") each contain a description of the land, and also—

"All the dry docks, marine railways, piers, docks, wharves, rails, wires, lumber, iron, steel, metals, timber, coal, motors, machinery, boilers, furnaces, house, engines, work-shops, stock, tools, implements, materials, improvements, boats, vessels, ships, barges, scows, tenements and hereditaments now owned by the Manufacturing Company or hereafter at any time or howsoever acquired by it.

\* \* \* \* \*

"Together with all and singular the liberties, privileges and franchises connected with or relating to the Manufacturing Company's property, real and personal hereby mortgaged, which are now or may hereafter be owned, possessed, enjoyed or exercised by the Manufacturing Company, with all and singular the tolls, income, profits, advantages, hereditaments, easements, appurtenances to the above described and hereby mortgaged Manufacturing Company's real and personal properties, franchises and premises, in the County of Richmond, or in the City of New York, or in the State of New York, or elsewhere or any part thereof, now or hereafter belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the Manufacturing Company, in and to the same and each and every part thereof, with the appurtenances."

Proceedings in bankruptcy were instituted against the bankrupt on December 31, 1903, and thereupon a receiver appointed in such proceedings took possession of all its property. A trustee, duly elected and qualified, continued such possession, and either the receiver or trustee

sold all the property of the estate, free from the liens of the mortgages, either in the course of the business or at public sale, and the question now present is to what extent the mortgages are a lien upon the proceeds. For the purposes of the present decision, the mortgages are liens upon the proceeds of sale to the same extent as upon the property itself, subject to certain expenses of administration, concerning which there is no controversy, and, as to the houseboat hereinafter mentioned, subject to any lien that may be established by Froment & Co.

The petitioners purchased the real estate subject to a first mortgage for the sum of \$3,000, and made payment therefor by delivering a similar amount of the first-mortgage bonds to the trustee, and also provided for the payment of the trustee's commissions and expenses of sale. This is approved.

The petitioners are also entitled to the benefit of the sale of the office furniture, tools, machinery, and appliances, which sold for the sum of \$2,000.

This leaves in dispute the proceeds of the sale of the stock sold by the receiver and trustee in the conduct of the business, amounting to the sum of \$2,027.45, and the proceeds of the remainder of the stock and materials, amounting to \$4,800, and \$6,000 collected by the trustee from one Emerson on a contract for the construction of a houseboat, which was completed, but not delivered, at the time the bankruptcy proceedings were instituted. For present purposes, it will be assumed that all the stock and materials were on hand at the time both mortgages were given. In the year 1903 the company contracted with Emerson to construct for him a houseboat, at the agreed price of \$35,000, whereof \$22,500 was paid prior to the possession of the receiver in bankruptcy. The question is whether the mortgages are valid, as against the trustee in bankruptcy, as to the material which, as will hereafter appear, the mortgagor was empowered to use and to sell for the purposes of its business, and not for the benefit of the mortgagees. This question must be determined in view of the decisions of the federal courts and of the Court of Appeals of the state of New York.

The decision of Judge Story, in *Mitchell v. Winslow*, 2 Story, 630, 17 Fed. Cas. 527, will be considered. The mortgage was of machinery in and belonging to the mortgagor's factory—

"With all the tools and implements of every kind thereunto belonging and appertaining, together with all the tools and machinery for the use of said manufactory, which we may at any time purchase for four years from this date, and also all the stock which we may manufacture or purchase during said four years. \* \* \* Provided that it shall be lawful for the mortgagors prior to default to hold and enjoy \* \* \* the premises hereby granted, and to secure and take the rents and profits therefor, to and for their own use and benefit."

The question was whether after-acquired machinery, tools, and stock in trade taken by the mortgagee before bankruptcy proceedings belonged to the purchaser or the assignee in bankruptcy, under the bankruptcy act of 1841. Judge Story decided: (1) That the assignee, in absence of fraud, takes only such right and interest as the bankrupt himself had and could assert at the time of his bankruptcy, and that all equities affected alike the rights of the mortgagor and his assignee in

bankruptcy. (2) That the mortgage as to the after-acquired property in question was valid as against the mortgagor, and hence against the assignee. (3) That an assignment of property not in esse takes effect and attaches as soon as it comes into being, and as such may be enforced in equity, and he refers to the assignments of contingent interests, possibility of inheritance, the freight of an intended future voyage, etc. (4) That there was neither actual nor constructive fraud, nor was the mortgage inoperative by reason of the agreement that the mortgagor should retain the possession and use of the property and take the rents and profits thereof, and sell the stock in trade and other mortgaged property, for, as he states, in case of sale the proceeds or other equivalent property may be substituted, if the parties consent thereto; and cites *Abbott v. Goodwin*, 20 Me. 408. This holding may be compared with later decisions.

In *Robinson v. Elliott*, 89 U. S. (22 Wall.) 513, 22 L. Ed. 758, the mortgage contained the following stipulation:

"And it is hereby expressly agreed that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part may remain in possession of said goods, wares, and merchandise, and may sell the same as heretofore, and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store, or any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage."

The instrument then concluded with power to the mortgagee, upon any default, to enter into said store of the firm and take possession of a sufficient amount of goods to satisfy, pay, and discharge all the paper due, and, upon 10-days' public notice, to sell at public auction such amounts of said goods as should be necessary to pay said paper. The court held that the mortgage was void. The question arose, in equity, between the mortgagee and the assignee in bankruptcy. The mortgagees had seized the goods September 15th, and were about to sell, but, September 26th, bankruptcy proceedings were begun, and therein the sale was enjoined. The court recognized the validity of a bona fide agreement, upon good consideration, whereby the mortgagee is permitted to retain possession of the mortgaged goods, and even to sell the same for the benefit of the mortgagee, but states that the law—

"Will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract. \* \* \* Manifestly it [the mortgage] was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion. But apart from this, security was not the leading object. If so, why does Mrs. Sloan's note remain overdue for twenty-one months, and why does Robinson continue to indorse? This conduct is the result of trust and confidence, which, as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud. In truth, the mortgage, if it can be so called, is but an

expression of confidence, for there can be no real security where there is no certain lien. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes, and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and, where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common-law doctrine, and are sustained by a number of American decisions. In the American editor's note to *Twyne's Case* (in 1 Smith, Lead. Cas. p. 52 [7th Am. Ed.]) most of the cases in this country on the subject are collected and classified. \* \* \* Finally, it is insisted, if the mortgage is held void in law, still the delivery of the goods in pledge vests a sufficient lien, *prima facie*, to enable the appellants to enforce their lien in equity. The answer to this is that the case made by the bill does not proceed upon such a delivery at all, but upon the mortgage and seizure under it. Besides, if the appellants could turn the proceeding into a voluntary pledge by the debtors, it would not help them, for it would violate the preference clause of the bankrupt act, as they got the goods only twelve days before the petition in bankruptcy was filed."

This case should be read in connection with *Southard v. Benner*, 72 N. Y. 424. That action was brought by the plaintiff, as assignee in bankruptcy of one Decker, bankrupt, to recover the proceeds of the sale of lumber seized by defendants before the bankruptcy proceedings, pursuant to the terms of a chattel mortgage executed to them by Decker. The trial court charged the jury that if they found it was the understanding of the mortgagor and mortgagee, at the time the mortgage was made, that the mortgagor was to go on and sell part of the lumber and use the money generally in his business, that was fraudulent in law, and that the understanding might be inferred if the defendant had permitted the sales to be made as alleged. The Appellate Court held that the charge was correct, and that such arrangement, found by the jury to have been made, invalidated the mortgage. The opinion states:

"Such an arrangement is incompatible with a mortgage designed only as security to the mortgagee. The dealing with the mortgaged property as merchandise by the mortgagor, and the sale of the same, in the ordinary course of business, as a merchant with the consent of the mortgagee, necessarily destroys the value of the mortgage as a security, and makes it only available, if for any purpose, so long as this arrangement and dealing continued to protect the property from creditors, and secure it to the mortgagor. Such a transaction is necessarily fraudulent. It hinders and delays other creditors, without securing the application of the property or its avails to the payment of the mortgage debt."

The opinion distinguishes *Frost v. Warren*, 42 N. Y. 204, where the mortgagor sold with knowledge of the mortgagee, but not pursuant to agreement with him, and notices that in *Edgell v. Hart*, 5 Seld. 213, 59 Am. Dec. 532, it had been held that, where such arrangement was included in and made a part of the written instrument of mortgage, the mortgage was fraudulent in law, and thereupon states:

"Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If



It is satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made and acted upon that in law condemns the security, and not the fact that it is proved by the instrument of suretyship, instead of by parol or in some other way. This question is considered by Judge Denio in *Gardner v. McEwen* (19 N. Y. 123), and by Judges Grover and Woodruff in *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755, and, although not expressly decided in either case, it is very conclusively shown by the reasoning of those learned judges that an agreement by which the mortgagee is permitted to deal with the mortgaged property, outside of the mortgage, and proved by parol, is equally fatal to the security as if made a part of the written mortgage."

The court further held:

"A creditor by simple contract is within the protection of the provision of the statute of frauds, declaring every conveyance or transfer of chattels, not followed by actual and continued change of possession, to be presumptively fraudulent (2 Rev. St. [1st Ed.] p. 136, §§ 5, 6) as against the creditors of the vendor or assignor; but until he has a judgment and a lien, or a right to a lien, upon the specific property, he is not in a condition to assert his rights as a creditor.

"The act of 1858 (chapter 314, p. 506, Laws 1858), however, which authorizes an assignee or other trustee of an estate of an insolvent, for the benefit of creditors and others interested, to disaffirm and treat as void all transfers in fraud of their rights, and to maintain all necessary actions for that purpose, dispenses with the necessity of any special or other lien in behalf of individual creditors; and an action by such a trustee to annul a fraudulent transfer, and to recover the property or its avails, may be brought for the benefit of simple contract creditors. An assignee in bankruptcy may maintain such an action."

The court distinguishes the *Collins Case*, 12 Blatch. 548, Fed. Cas. No. 3,007, where the defect was in filing the mortgage. The decision in the *New York Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133, also related to a failure to file the mortgage pursuant to the statute.

In connection with *Southard v. Benner*, *Brackett v. Harvey*, 91 N. Y. 214, should be considered. The suit was brought by the plaintiff, as assignee in bankruptcy of *Darrow & Co.*, to have certain chattel mortgages executed by the bankrupts to the defendants adjudged void as to creditors, and to compel the latter to account for and pay over the value of the mortgaged property alleged to have been taken and converted by him. In 1873, the defendant, lessee of a lumber yard and owner of the fixtures and stock therein, sold to one *Darrow* his interest in the lease and improvements and all the lumber. The agreement of sale provided for payments in installments, and that the purchase price should be secured by *Darrow's* notes, and by a chattel mortgage on the stock, to be renewed monthly, and that the vendor would take business notes running 60 or 90 days, to be indorsed by *Darrow*, and apply the same in payment of *Darrow's* notes as they fell due. Pursuant to contract, *Darrow* executed to the defendant a chattel mortgage with a schedule of the lumber annexed, and the same was regularly filed. The mortgages were renewed and refiled in such form as to comply with the statute relating to chattel mortgages. It was held: (1) That a chattel mortgage is not rendered void as to creditors of the mortgagor by a provision authorizing him to sell the mortgaged property for cash or for notes to be accepted by the mortgagee, and apply the receipts from the sales toward the payment of the mortgage debt.

(2) That permission to use a portion of the proceeds of sales to purchase other property does not vitiate the mortgage, where it is coupled with a condition that the property so purchased shall be brought in and subjected to the mortgage lien by a renewal of the mortgage. (3) That an agreement, although outside of the mortgage and oral simply, that the mortgagor may use a portion of the proceeds of sales for his own benefit, avoids the mortgage, but that such an agreement must be proved; a mere expectation of one of the parties is not sufficient; it must appear that it had the conscious, concurrent assent of both. (4) That although one of the renewal mortgages was given for alleged sales, the proceeds whereof were not applied, it did not appear that any of the creditors represented by plaintiff were creditors at the time the mortgage was given, so as to have an adverse lien upon or right affecting the property existing at that time; and that it was competent for the parties to the mortgage to deal with each other in accordance with the actual condition of the indebtedness. (5) That two renewal mortgages executed within two months prior to the filing of the petition in bankruptcy, pursuant to the original contract, which antedated the two months, was not an unlawful preference within the meaning of the bankrupt act, although taken with knowledge on the part of the mortgagee that the mortgagor was insolvent, in the absence of evidence that he knew that they were executed in fraud of the provisions of the bankrupt act. (6) That this contract right to a lien upon newly acquired property was confined to such as was purchased with the avails of property originally mortgaged, and that if any of the property covered by the last two mortgages was not included in the prior mortgages, and was not paid for out of such avails, as to such portion the mortgages were within the prohibition of the bankrupt act.

These decisions render the mortgages in the case at bar invalid as to the material and the houseboat. It is apparent that the plant was, when the mortgages were made, a going business, and was intended by both mortgages to continue as such. The money was advanced for that purpose. In the second mortgage there is provision in terms that until default the mortgagor shall be suffered and permitted

"To remain in the full possession, control and use of said real and personal property \* \* \* and to receive and use the tolls, income, rents, issues and profits thereof, and all moneys payable thereon and receivable or derivable therefrom, and shall likewise be suffered and permitted at all times and from time to time, as the proper management of the business of the Manufacturing Company may require, to sell, alter, exchange, and to repair, remove and replace any materials, supplies and stock, stores, machinery, tools and implements hereby mortgaged; provided always, that the security of said bonds shall not thereby be in any wise reduced or impaired."

The mortgage also contains this recital:

"Whereas it is necessary for the Manufacturing Company, in order to construct, equip, complete, finish and operate its manufacturing plant and transact its business and exercise its corporate rights, privileges and franchises, to borrow money to the extent hereinafter provided for."

The third mortgage recognizes that the mortgagor was organized and existing "for the purpose of doing a general manufacturing business," and recites that the company has, by resolution of its board of

directors, "determined to borrow from the said party of the second part for the purposes of its business the sum of eleven thousand (\$11,000) dollars."

The evidence submitted by the mortgagee states:

"That on or about the 25th day of September, 1903, the said Company being greatly in need of funds, for a working capital, your petitioner Henry H. Derr loaned and advanced to the said Company the sum of \$20,000."

There can be no doubt that the parties to both mortgages intended to permit all the stock of materials to be worked up into boats and sold, or sold in any way for the purposes of the business. To sell such stock in some form was the business of the company. It was to give substance and resources to the corporation, that it might make such sales, that the money was loaned.

The principal case is not distinguishable from *Robinson v. Elliott*, 89 U. S. 513, 22 L. Ed. 758, above considered. There the mortgage adjudged void empowered the mortgagee to sell "goods, wares, and merchandise," and supply the place thereof "with other goods," which should be subjected to the lien of the mortgage. In the principal case the very avowed object of the consideration of the mortgages was to enable the mortgagor to do that very thing, and in the second mortgage it is stated in terms. There the controversy was between the mortgagee and an assignee in bankruptcy. The parties to the present proceeding have the same relation to the property. The holding is paralleled in *Southard v. Benner*, 72 N. Y. 424, already stated. There it was held that an understanding between the parties to the mortgage, proved by the instrument itself or extrinsic evidence, that the mortgagor was to go on and sell part of the mortgaged lumber and use the money generally in his business, was fraudulent in law. The case of *Brackett v. Harvey*, 91 N. Y. 214, sustains the foregoing holdings, but holds that the facts present did not justify its application. In fact, the provision for the renewal of the mortgages, and their actual renewal before rights of the trustee in bankruptcy attached or could attach, distinguishes it from the former cases. The houseboat was a transient item of commerce, builded from a general stock of materials subject to transformation, consumption, and replenishment. The mortgage property in reference to the houseboat was shifting into new forms; first the contract for its construction, then the payment of \$22,500 on the purchase price, then the boat itself, growing or grown to completion, and, finally, the debt of the purchaser for which the mortgagors could hold the boat, until the final payment therefor, and, last of all, the payment of the debt came to replace all other species of property related to this boat. Did the mortgages automatically seize these items as they appeared, and relax their grasp save as to the last item of \$6,000? At the time of the bankruptcy the boat was completed; the purchaser had not discharged his obligation. The mortgagor was obligated to deliver the vessel; the purchaser was bounden to pay therefor. The boat was an item of merchandise created by the mortgagor to sell, which it was authorized by the very purpose, and hence consent of the mortgagees, to sell; its sale had been promised, and a large sum paid thereon. All the stock that went into it was alike free. If chattel

mortgages may lift and shift from items of merchandise devoted to sale by the intention of the mortgage, and then clasp and hold incoming property; if they may release all that passes out on the tide of commerce, and take to themselves all that returns, only to pass out again, and repeat this process through an indefinite succession of loosing and holding—it is quite evident (1) that the mortgagee and mortgagor are engaged in a commercial pursuit, wherein the former provides capital, at a fixed profit, and permits the subject of the mortgage to go forth untrammelled; (2) that such parties proclaim to those asked to lend credit on material and labor that the products of the business are free in commerce, while there is a snare ready to seize upon all these apparently free goods when creditors would take them for just debts.

As already stated, in the Roberts Case the mortgagor sold, and was permitted to sell, goods in a store; in the Benner Case he was empowered to sell lumber; in the case at bar it was contemplated that it should sell material and ships, and it was free to use and consume its stock of materials on hand for the purposes of its business. A mortgage on a pound of sugar and one on a ship should be alike invalid where the same power of disposition is given to the mortgagor. The money was loaned for the very essential purpose of vitalizing the business, so that its stock and material might be made into ships or other structures to be sold and repaired. Assume that money is loaned to a baker to enable him to conduct his business and to secure the loan, a mortgage is taken on the flour constituting the baker's stock in trade, and he is empowered to convert such flour into loaves of bread and to sell the same, would any one contend that the mortgage was an effectual lien upon either the flour or the loaves? In such case the parties constitute the material, and whatever results therefrom, articles of commerce, and the manifest intention is that they shall be sold free from the mortgage. In principle, there is no difference between material in a shipyard, authorized to be converted into boats and ships, and thereupon sold, and flour which is authorized by the parties to be converted into loaves of bread and sold. The magnitude or qualities of the article, or the structure into which it is intended that they shall enter, should not mislead the reason. The law has a common application. If articles are left with the mortgagor to sell in the course of his business and for the purposes of his business, then, under the decisions considered, the mortgage is invalid. If a rule exists, it should be applied logically.

These views lead to the conclusion that the petitioners are not entitled to the proceeds of the houseboat or the material. As regards the houseboat, it should be observed that, while the corporation held the title, the purchaser was entitled to receive it on completing the payment of the purchase price. Hence, it may be that equitably the mortgagor's interest was a chose in action, for which it held the title of the houseboat as security. Under *N. Y. Security & Trust Co. v. Saratoga G. & E. Land Co.*, 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132, and *Platt v. Sea Beach R. Co.*, 170 N. Y. 456, 63 N. E. 532, such indebtedness would belong to the mortgagor.

RUSSELL v. JONES et al.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1905.)

No. 1,898.

**TESTAMENTARY TRUSTS—VERBAL AGREEMENT OR PROMISE BY LEGATEE—EVIDENCE TO ESTABLISH.**

Conceding that a contract or promise by a legatee to make a certain disposition at his death of property bequeathed to him absolutely, which a court will enforce after his death, may be established by parol evidence, such evidence must be very clear, and the contract or promise itself must be definite and certain in its terms, so that, if not carried out, a fraud would be perpetrated upon the testator. Evidence considered, and *held* insufficient to establish such a verbal contract between a husband and wife in behalf of the wife's sister, or to show any such fraud on the part of the husband, as his wife's residuary legatee, as to authorize the court to enforce the sister's claim against his estate in the hands of his executors.

Appeal from the Circuit Court of the United States for the Northern District of Mississippi.

Tim E. Cooper, for appellant.

Jas. W. Gray and Jno. W. Fewell, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. Mary B. Russell, the appellant, was the surviving sister of Martha Bliss Warren, deceased, and her nearest of kin. The appellees are the executors of the will of John A. Warren, deceased. John A. Warren and Martha Bliss Warren were married about 1880. She had been a widow for a number of years, and had a considerable estate, which she was much interested in managing, and managed with skill. He had a larger estate, and they chose that their separate estates should be kept separate, and that she should continue to manage hers, which she did during their joint lives, keeping both the corpus and its income separate from the corpus and income of her husband's estate. She died in December, 1899, testate. In her will her husband was named as the executor, in which capacity he came into possession of her estate, and as her residuary legatee he received the greater portion of it in absolute ownership. He died March 24, 1901.

The bill in this case avers, substantially, that John A. Warren represented and promised to his wife, Martha, that if she would make a last will and testament devising to him the bulk of her estate, after giving some specific legacies to certain friends and relatives, that he would at his death, by his last will and testament, give to complainant so much of the estate as was then remaining in his hands and not spent in his comfortable, decent, and necessary support; and that his wife Martha, having confidence in her husband, and induced by these promises, executed her last will and testament, giving the greater part of her estate to him; that, but for the promises made by John A. Warren, his wife would have provided by her will for the ultimate gift of her estate to the complainant, who was her sister and nearest of kin, which fact was well known to John A. Warren, who induced and persuaded his wife

to make a will devising and bequeathing the greater part of her estate to him, upon his solemn promise and agreement to make and leave a will giving so much of said estate as should remain unexpended in his reasonable and comfortable support to the complainant; that John A. Warren received under the last will of his wife, and upon the promises hereinbefore set forth, an estate of \$30,000, which estate remained in his hands at his death, unimpaired and undisposed of, except by the gift by him to complainant of \$6,500, which estate it was the duty of John A. Warren, and by the contract and agreement with his wife he was legally and equitably bound, to bequeath to complainant, but which property, in violation of such agreement and contract, he devised to others. The bill prays that an account may be taken of the amount and value of the estate received by John A. Warren under the last will and testament of his deceased wife which remained in his hands at his death, and that a decree be rendered against the executors and trustees for the full value thereof, with interest thereon at 6 per cent. per annum from the 24th day of March, 1901, the day of the death of the said John A. Warren, and costs of court. The appellees answered the bill fully, and appellant joined issue by a general replication. The case proceeded in due order to a hearing in the Circuit Court, and that court passed the decree from which this appeal is taken, announcing therein its opinion and judgment that the complainant had failed to make a case for relief in the premises, and that she is not entitled to relief, and adjudging and decreeing that her bill and suit be dismissed out of court. The judge filed a written opinion, which the assignment of errors practically treats as a part of the decree.

The errors assigned are: (1) That the court erred in holding that the complainant by her pleadings, and evidence introduced in support thereof, sought to contradict the terms of the will of Mrs. Warren by parol, while the bill of complaint does not contradict the will, but seeks only to show a collateral parol agreement on the part of Dr. John A. Warren, the testator of the appellees, in consideration whereof the will of Mrs. Warren was executed or permitted to remain unrevoked; (4) that the court erred in giving consideration to only a part of the testimony for the complainant (specifying particulars fully); (6) that the court erred in considering incompetent and illegal testimony (specifying particulars); (11) that the evidence introduced by the complainant established the contract averred in the bill, and the will of Dr. Warren established its breach, and the court should have decreed accordingly. There are thirteen errors assigned, but they are all, we think, substantially embraced in those we have specified.

It has been said that in passing upon a case brought before an appellate court on writ of error the judge of the lower court is on trial, while in a case on appeal the case itself is on trial. With that distinction in view, and without intending the least disrespect to the very distinguished solicitor who represented the appellant in this case, we will treat his assignment of errors as a warning to us to avoid the mistakes which it appears to him the other judge has committed in the trial of this case.

It is urged for the appellant that only one question of fact is presented by the record, and that is whether the contract alleged in the

bill has been proved by the testimony. It is assumed that, if the contract is established by the testimony, the complainant is entitled to relief; if not in a court of equity, then in her suit at law for breach of contract. Her suit was brought in the state court having full jurisdiction of the whole subject, both at law and in equity, and upon removal to the Circuit Court the pleadings were adjusted to the jurisdiction of that court. The assumption just referred to embraces the assumption that such a contract may be made and may be established by parol proof. Accepting this for the present, we proceed to consider the terms of the contract as averred, and the testimony offered to support it. It is in substance averred that John A. Warren and his wife, Martha, entered into an agreement by which each was to make a will in favor of the other, with the oral agreement or understanding that the survivor should by last will and testament leave to certain relatives of the one dying first all of the property which the survivor had at the time of her or his death, and which he or she had acquired from the one dying first; that is to say, if Mrs. Warren died first, then Dr. Warren was, under the alleged agreement, to make a will leaving to the complainant all the property which he acquired through the will of Mrs. Warren and which remained in his hands at the time of his death.

The complainant offered four witnesses on whose testimony she relied to establish the contract as averred. It relates to admissions made by John A. Warren before and after the death of his wife.

Martha Plummer, who was a nurse in the sanitarium at Glen Springs, Watkins, N. Y., acted as Dr. Warren's nurse first, and then as nurse of Mrs. Warren, and, after Mrs. Warren's death, on the second visit of Dr. Warren to the sanitarium, acted as his nurse and private secretary, and when he left the sanitarium continued with him in both capacities, from May to the latter part of September, says:

"I know that Dr. Warren and his wife made their wills for each other; the one surviving the other was to have the use of their property their lifetime, and that was in the will. Then they had a verbal contract that what remained of the property—Dr. Warren's property was to go to Dr. Warren's relatives, and what remained of Mrs. Warren's was to go to Mrs. Russell; and I got that information from them, both doctor and his wife. I know that each had their separate moneys and separate property. Each one made their will, and each one willed their property to the other their lifetime. That is, if Dr. Warren died before Mrs. Warren, she was to have the use of his property her lifetime, and then at her death what remained of his property was to go to his relatives. I mean his own property—personal property that he has always had. What was obtained from his wife was only his lifetime. It was to go to Mrs. Russell, Mrs. Warren's sister."

Being asked to state her source of information, she answered:

"I was Dr. Warren's nurse, and also, might say, his private secretary, as I did all of his correspondence, and read all of his letters, and wrote all of them. And did or did not Dr. Warren himself tell you of this arrangement that existed between his wife and himself? He did. Was or was not the matter of agreement between Dr. Warren and his wife discussed by them in your presence? It was. Was it frequently discussed? Yes, frequently. I will ask you, Mrs. Plummer, to state once again, clearly and fully, the agreement made by and between Dr. Warren and his wife regarding their respective wills, as you understood the agreement from being told of it by Dr. Warren and his wife, and from hearing it frequently discussed between them? That they had made their wills in favor of each other; that Dr. Warren willed

his property and money to his wife to use her lifetime, in case he died first; and Mrs. Warren's was made the same way in favor of Dr. Warren; then at the death of one of them, say Dr. Warren, and Mrs. Warren outlived him, what remained at her death of Dr. Warren's property was to go to his heirs, and hers to Mrs. Russell; and if Dr. Warren outlived his wife, Mrs. Warren, that what remained of her property was to go to Mrs. Russell, and what remained of his to his heirs. Did Dr. or Mrs. Warren ever tell you how long this agreement or contract had existed between them? Yes, sir; they said they had made that verbal one when they made their wills. That was an understanding between them about dividing the property after the last one's death."

James K. King, a physician and surgeon, 50 years of age, residing at the Glen Springs, Watkins, N. Y., which Dr. Warren visited for his health, and where Dr. King attended him professionally, being asked:

"Please state Dr. Warren's physical condition while at the Glen Springs, general physical condition? His general condition was one of anemia and neurasthenia (nervous prostration). Please state what, if anything, you know in reference to the contract or agreement existing between Dr. Warren and his wife having relation to wills to be made by them respectively and one in favor of the other? I do not think Mrs. Warren ever told me but once about this, but Dr. Warren was always talking about money matters; but I am sure Mrs. Warren only told me once; but the doctor talked a great deal about money matters, and very frequently told me the arrangement between himself and his wife. Mrs. Warren was a patient of our lady physician, so that I did not see her except in her last illness. Mrs. Warren told me that she had made her will in favor of the doctor, and that she was to leave all her property to him, and that at her death the property went to him, and that he was to use her property jointly with his while he lived, and at his death all that was left of his property was to go to his heirs, and what was left of her property was to go to Mrs. Russell. Doctor told me exactly the same thing—that he had made his will in favor of his wife; that they had always kept their accounts to the smallest amounts separate, and at his death all his property went to her, and at her death what was left of the property, that it was to be divided so that all that belonged to her that was left of hers was to go to Mrs. Russell, and what was left of his property was to go to his heirs. State again, clearly and fully, what Dr. Warren stated to you about any contract or agreement which he and his wife had with each other in regard to their wills. The doctor stated to me many times that he and his wife had always kept their accounts separate, and that they had made their wills in favor of each other; that Mrs. Warren had made her will leaving all of her property to him—that is, the bulk of it—at her death, to be used jointly with his as long as he lived; at his death the residue of the property was to be so divided; that what was left of that belonging to her originally would go to Mrs. Russell, and all that was left of what had belonged to him originally was to go to his heirs. When was Dr. Warren at the Glen Springs upon the second occasion? Dr. Warren came the first time the 21st day of May, 1899, and went away December 20, 1899; the second visit he arrived May 19, 1900, and left August 21, 1900. Upon the occasion of Dr. Warren's second visit to Glen Springs, New York, after the death of his wife, did he say anything to you in regard to this arrangement or agreement? Yes, sir; he said the arrangements were exactly the same, but he was more depressed, and did not talk so much about anything except his poverty."

#### On cross-examination:

"What was the condition of Dr. Warren's mind when he was here the first time? Very good. He was a weak man. He was an anemic, and his nervous system was run down from lack of nourishment, but his mind was clear and active. Was he or not very talkative? He talked all the time. What did Dr. Warren tell you was the shape in which this arrangement



he had with his wife with reference to the disposition of their property? Did he say whether it was in the shape of a will or contract? It was my understanding that they had both made their wills. And that the conditions of the contract you have testified about were all contained in their respective wills? Yes, sir. Did Mrs. Warren, in the conversations you have testified about, tell you the conditions which were in her will? Yes, sir, identically the same thing."

#### Redirect examination:

"Doctor, do you undertake to state positively that Dr. Warren stated to you that his will and Mrs. Warren's will had been made? Yes, sir. Do you undertake to state positively that Dr. Warren told you that this arrangement he had made with his wife were conditions in their wills as made, or that it was an agreement in pursuance of which the wills were or to be made—a verbal agreement—and that their wills were to be made in accordance with this verbal understanding? I understood their wills were made. Did you understand that their wills set out in the body of the will this agreement between them; that the wills had been made in pursuance to this verbal agreement that Dr. and Mrs. Warren had entered into as to the disposition of their property? The talk had been long before the wills; that the wills were the outgrowth of the verbal agreement."

Percy B. Russell, a nephew of D. M. Russell and a nephew of the appellant by marriage, 41 years of age, resides in Memphis, Tenn., but spends most of his time in Mississippi, where he is engaged in the business of planting cotton. He testified in substance:

"I was at Glen Springs, Watkins, N. Y., soon after the death of Martha B. Warren. I accompanied Mrs. Mary B. Russell at the time that she made her visit to Watkins, N. Y., on her sister's death, and I saw Dr. Warren at that time at the sanitarium. Have known Mrs. Warren from my childhood; her father died some years before her death; her mother died before my birth. Mrs. Warren had just died a few hours before I reached Watkins. I accompanied Dr. Warren on his way to Mobile, Ala., with his wife's remains, going as far with him as Shilisbury, N. C., where I left him and Mrs. Russell to go on their way to Mobile with Mrs. Warren's remains. I can best tell the condition of Dr. Warren's health and his general physical condition by stating the manner in which he met me, and his appearance. When I came into his room I found him sitting on the side of the bed with a dressing robe about him, and in the most dejected attitude, and with tears in his eyes he spoke to me and told me of the great loss he had sustained, and that he was barely able to stand at that time as he was talking to me. He sank back upon the bed in an agony of tears after he had told me some things in regard to his wife's death. After I first met Dr. Warren on my arrival at the sanitarium, I went to his room; I was there a while, and then went out, and Mrs. Russell remained with him for some time—perhaps an hour, or possibly more. On my return I went back again to Dr. Warren's room, and Mrs. Russell, shortly after I went in, went out. Dr. Warren then spoke about his helpless condition; said he didn't know what he was going to do—that his wife had always helped him, but that now she was gone and he was left alone. He said that the servants he hired took his money and did little for him. I offered to do anything I could for him, and he then asked me to see about the arrangements in regard to his leaving there—in regard to the settlement of his bills, the purchase of a coffin for his wife, and anything else that was necessary to do before leaving there. I unpacked his trunks, in which he had stored his clothing and personal effects, unpacked Mrs. Warren's trunk, took down Dr. Warren's clothing from some pins or tacks, brought Mrs. Warren's clothing from an adjoining room, packed Dr. Warren's trunk and Mrs. Warren's trunk, and arranged the division of his and her personal effects under his direction, handling almost everything—you may say everything that Dr. Warren had and that Mrs. Warren had there at the sanitarium, with the exception of the clothing in which she was laid out and the clothing that Dr. Warren wore. Shortly after my re-

turning to his room after going to look after the baggage of Mrs. Russell, Dr. Warren approached the subject of his wife's property in this way: He said: 'Mary [meaning Mrs. Russell] thinks I ought to give that \$10,000 of my money to her as Bliss money, but I paid that money, and that wasn't Bliss money; that was Warren money.' I then said to him: 'Doctor, don't let's talk about these things; I know nothing about them.' He said he must talk about them. 'I want to tell you.' Then he told me all, how he had used this money to the best of his knowledge, and that he thought that he had made a good investment for his wife; and told me of some loans that he had made for her to some commission company, and how they had lost it, and how he had repaid it to her; and, says he: 'I don't think this is Bliss money; I think it is Warren money.' Shortly after this Mrs. Russell returned to the room for a moment with the nurse to give Dr. Warren some medicine, which I learned afterwards he took at very short intervals of something like an hour—first one kind, then a second kind, then a third kind. The nurse went out, and Mrs. Russell soon after followed, and again Dr. Warren broke into tears, and in a complaining manner spoke of the way in which the physicians had treated his wife; told me that he wanted to go to see her, and begged me to help him into the room where she lay. So I accompanied him to the room where his wife was laid, and that was the first time I saw her. He was so feeble in going in there that I had to give him great assistance through the hallway to the room, and upon reaching there he broke down in a pitiful wail and cried over his wife, and told me again and again of how the doctors had butchered her; told me of how he always thought he would die first, and now that she was dead he did not know what he was going to do; that he must go back to Mobile as soon as he could; that he must go right away; and I tried to show him that he could not go away at once. He wanted to go that evening. He told me that he always knew that Martha would do what she promised to do; that he had always thought that he would die first; and then asked me if I thought that he ought to give Mary the Bliss money. I tried to make him stop talking on that line of talk, but did not remonstrate with him further than to try and put him off; but he in a broken way went on and told me he was going to do just what he had promised Martha that he would do, and ended up by kneeling and praying by his wife's bed that God would direct him to do what was right. He was in such a feeble and pitiable condition that I did everything that I could do to get him to go back to his room, and, as soon as I could do so, we returned. In packing his effects he had me put Mrs. Warren's things which she had owned before their marriage, or which she had purchased herself during their marriage, into her trunk. This was not only clothing and jewelry, but trinkets of every sort. Anything that he had given her he had put into his trunk; what she had received, as he told me, from her friends or from her family or former husband, were put in her trunk. The separation, as he explained to me, was that he was entitled to what his money had bought for her; but that whatever her money had bought, or her relatives or friends had given her, should go to Mrs. Russell, or to the special bequests she had made of this or that article, but that all of the residue, out of the special bequests, were to be given to Mrs. Mary B. Russell. He said that his wife had promised him that if he died first, or before she did, that all his property should go to the Warren heirs; that they had agreed that the Warren money should go to the Warren heirs; and that the Bliss money should go to Mrs. Mary B. Russell, her sister; that he knew that Martha would do as she had promised him, and that he could not wait for anything to go to Mobile and change his will in accordance with the terms—or the promise, I should say—which he had agreed or made with his wife; that he was very feeble, and that it took a large amount of money to support him and give him nurses; that if it were not for that fact he would give Mary Martha's money now; that Martha had told him that she wanted him to give Mary the note for, I think, \$6,500, which she held against Mr. D. M. Russell; that he was bound to go, and that he could not wait at all, and that he must comply with, or fulfill, that promise. Dr. Warren told me repeatedly at the sanitarium that he and his wife had agreed that whatever one had left, the other should have the right of the property which the dying

one left, but for the use of that property which the dying one left during the life of the remaining one; but upon the death it should be returned to the Bliss family or the Warren family, as the case might be. He went on furthermore to tell me all; how it was that the \$6,500 should be given to Mary at once, because, from some objection of Mrs. Warren to handling his estate in the event of his death, they had agreed that the note for \$16,000 held by them against Mr. D. M. Russell should be given to Mr. Warren's sister—I think it was his sister; some member of the family—and that Mrs. Warren had thereupon said she was going to give to Mrs. Russell the \$6,500 note. On the occasion at the sanitarium in which he spoke to me of these matters, he spoke very freely, and, finally, the last thing before leaving him in the berth of the sleeper going south from Washington to Salisbury, where I left him, he called me and expressed himself as being grateful to me for the assistance and kindness which I had shown him, and talked with me more rationally than at any time before, and assured me that he wanted me to think well of him; that he was going to do just what he had promised to do; that he was going straight to Mobile and carry out his agreement with his dead wife, and that Mary must not think that he was going to do anything else except to carry out the agreement of which I have spoken heretofore."

On cross-examination he was asked to state exactly what the agreement was—what he (Dr. Warren) said it was.

"I think I have stated it as well as I can state it. I don't think I could state it more accurately. Well, please state it again? That whatever property either one of them died possessed of should be held in trust by the remaining one—in trust, I mean, to be used by them; but the trust to be of the nature that it was to be disposed of according to the promise upon their death, and that the residue of whatever property they might then have of this property which they inherited, the one from the other, should be given, as the case might be, to the heirs or the family of Dr. Warren or of Mrs. Warren. Is that the agreement—what he said the agreement was? What he said the agreement as told me. Let me add one word here. Dr. Warren told me so many times during that day, the evening, the morning, and the afternoon, repeated it so many times, stating the same fact in different words, that for me to repeat his exact words in regard to it would be impossible, but for me to fail to understand and to know what he intended to tell me is impossible. What I want you to do is to state exactly what your understanding of the agreement was between Dr. Warren and Mrs. Warren, which you gathered from the statements of Dr. Warren to you while he was at the sanitarium at Watkins, N. Y. I cannot state it better than I have done. I don't see how I can get at it any better. I wish you would state the agreement exactly as you understood it? That if Dr. Warren died before Mrs. Warren, Mrs. Warren to have the use during her lifetime of all of Dr. Warren's property. That if Mrs. Warren died before Dr. Warren, that Dr. Warren was to have the use of all of Mrs. Warren's property during his lifetime. That upon the death of Dr. Warren that he should leave to Mrs. Mary B. Russell whatever he had left of the property which he had received from Mrs. Warren. That upon the death of Mrs. Warren she should leave whatever she might have remaining of the property left by Dr. Warren to his heirs."

D. M. Russell, the husband of the appellant, who was examined April 8, 1903, was then 66 years of age, and resided at Jonestown, Coahoma county, Miss., testified:

"How long before the death of Mrs. Warren was it that you last saw her? About a month, November 15th and 16th, at this place, Memphis, Tenn. She came on here to attend to some business for her husband and herself—he was an invalid. State what, if anything, you know in reference to a contract or agreement between Dr. J. A. Warren and his wife having relation to wills to be made by them respectively and one in favor of the other? Mrs. Warren stated to her sister and myself that she wished us to know her business arrangements—her property (hers and her husband's)—and it was agreed between them that each should leave their property to the other, with the general un-

derstanding and agreement that on the death of the other the other should then will the property received from the other to their respective heirs; that is, the Warren money was to go to the Warren heirs, his nephews and nieces, and Mrs. Warren's to her sister. That there had been a change made, and she wanted us to know of the change. He had originally left his property to his wife, selsed to pay an annuity to his sister, Mrs. Moore. He now left Mrs. Moore the sum of \$16,000 in lieu of that annuity. She stated that she had left her property entirely to him, but she would make a change in her will and leave Mrs. Russell the note of mine for \$6,500. She stated that she had left her property entirely to Dr. Warren, without making any provision in her will, leaving it to him entirely or absolutely, so that he could have the entire use of it, and if he lived long enough to need it all she wanted him to have it, but that he would leave whatever there was to her sister at his death. That, she stated, was the mutual understanding. I asked her if it would not be best to provide for that agreement in her will; she replied: 'Dr. Warren is an honorable man, and will do as he agreed.' Where did this conversation, as to which you have been testifying between Mrs. Warren and her sister in your presence, occur? In Caston's Hotel, in the city of Memphis, Tenn. Dr. J. A. Warren was not present on that occasion? No, he was sick at the sanitarium. You say that Mrs. Warren stated on that occasion that Dr. Warren's will, as it had been drawn, leaving Mrs. Warren his estate, changed (charged?) the annuity in favor of his sister, Mrs. Moore, and that a change had been made by Dr. Warren, giving to his sister a stated sum of \$16,000 in the place of the annuity, and that Mrs. Warren, for that reason, intended to make a change in her will, giving to her sister, your wife, a certain note which you owed to Mrs. Warren for about \$6,500? Yes, she stated that it was her intention to make that change. When and where, after these conversations, was it that you saw Dr. Warren, if at all? In Mobile, about a month later. He returned with his wife's body to Mobile about December—somewhere, I think, about the 15th or 20th. What had been the condition of Dr. Warren's health for several years preceding his death? He had been an invalid. Do you know from what disease he had been suffering? Neurasthenia. He had, however, a combination of diseases, but that was given to me as the principal trouble. Dr. Master told me this. What were the manifestations of the disease of Dr. Warren which were apparent to a nonprofessional person? At times great irritable nervousness. State whether or not he required constant attention? Yes, he had trained nurses and required constant nursing. He had a trained nurse sometimes, but generally a negro who waited on him. He had nurses for several years. State whether or not you saw Dr. Warren in Mobile after the death of his wife and before her burial? I met the train at Mobile which he (Dr. Warren) and his wife's body arrived on. Dr. Warren, very shortly after reaching his boarding house, brought up the subject of his wife's property. Mrs. Russell had gone to Watkins, and had returned with Dr. Warren. He said to me, 'Dave, Mary (that is my wife) thinks that her sister left her property to her; that I was to hand it over to her.' I said, 'No, Doctor, Martha told us the agreement in reference to her property, and she does not think so.' He said, 'Well, now, I am going to have Martha's will brought here and read to you.' He said, 'So that you can see that she gave the property to me.' He had to send to Mr. Jones to get the will. Now I am giving the particulars as I remember they occurred. Some of it was that evening, and some of it was the next evening after her burial. She was buried about 11 o'clock, but he brought the question up every time it was discussed. I endeavored to keep him from discussing it, thinking it would do him injury in his condition. After Mrs. Warren's will was read, I said: 'Doctor, that is exactly as your wife told us; but she said that it was agreed between you that you were to have the use of her property, but were to make a will leaving it—whatever there was of it—to her sister on your death, just as she was to do with your property, leaving it to your heirs on her death, if she had survived.' He said, 'Yes, yes, that is right, I am going to do it,' and was extremely anxious to make a will. We endeavored to have him delay it, thinking it might injure him. He was excited and very much distressed. I had a consultation in reference to it with Mr. Winston Jones (one of the appellees). Mr. Jones

said that he believed the worry and anxiety that Dr. Warren was going through, because he stated: 'If I should die, and I am liable to at any time, as my heart is affected, Mary would not get Martha's property as it is agreed she should, but it would go to my heirs'— Mr. Jones stated that he thought the making of the will would have a less injurious effect on him than the anxiety and worry that he was going through, fearing that Mary would not get, as he termed it, 'justice'; 'her rights,' as he expressed it. I then said to Dr. Warren at that time what Mrs. Warren had stated to us in relation to her property, and said, 'Doctor, Martha said that when she got back to Mobile she would change her will, and leave my note of \$6,500 on her death, as you had made a bequest direct to Mrs. Moore.' I said, 'She is, of course, dead, and had not made that change.' He said: 'That is all right; she told me about it, and I am going to carry out Martha's wishes.' He had Mr. Winston Jones, who had charge of the papers, get the note and bring it to his room. He indorsed it over to Mary, and handed it to her. Dr. Warren admitted fully the conversation and agreement with his wife, as she had told it to her sister and myself, and made a will according to that understanding. There was a dispute, however, in regard to \$10,000. Not long after their marriage Dr. Warren wished to make a loan to J. P. Pettite of this place (Memphis, Tenn.), an old friend of his, and he didn't have the money. Mistress did have the money on hand, and he wished to loan her money. She objected because he wished to make the loan without security. He said, 'Very well, if I will be security, will that satisfy you?' She said, 'Certainly.' He made the loan, and made a similar one to Gardner and Copp under similar conditions—Gardner and Copp of New Orleans. He met a loss of \$10,000 in the two loans. He paid this money back to Mrs. Warren, as he had agreed. In the conversation prior to making this will, which he had with me in his room in Mobile, he said, 'Now, Dave, I am not going to give Mary that \$10,000, because it is Warren money,' although I pointed out to him that it was Bliss money, because he had loaned Bliss money, and he was himself responsible. With that exception in reference to that, he acknowledged fully Mary's right to her sister's property. He made a will, I think, the day following the burial. I think Mr. Bestor drew the will. By that will he bequeathed to Mrs. Russell on his death the estate which Mrs. Warren had bequeathed to him, other than the \$10,000 just referred to. He mentioned this matter to me repeatedly; first soon after getting to his boarding house that evening. He spoke of it more than once that night before he retired, and again the next morning the first thing. I am not clear in my mind whether he made his will on the evening of the burial of his wife or the morning following, but I am of the impression it was the next morning; but he was insistent. I think the agreement about making the mutual wills had existed ever since they were married. She had been a widow and had her own estate, and had charge and control of her own property. I think they entered into that agreement soon after marriage. She had spoken to me about it years before her death. I cannot state as to the time of making this agreement from what I learned from Dr. Warren and not from Mrs. Warren. Before the conversation I had with Dr. Warren at the time of his wife's death, he had discussed the matter with me, not in the early part of their marriage, but a few years afterwards, visiting me on the plantation—I had bought out Dr. Warren's planting interests, his half—we were owners of the property together; I had bought it out and made cash payments, and gave him my note for \$16,000 for the balance. We had hard times with an overflow for three years in succession. He was explaining to me in a business way. He said, 'Dave, don't be uneasy about that note, for I am not going to press you, and if I should die my estate all goes into Martha's hands.' He then spoke about the agreement. He said, 'You know she won't press you.' He said later that he did not want the money, and asked me to keep it and use it. It was in relation to that that Mrs. Warren came here. I objected to paying 8 per cent. interest, as I could get money at a lower rate. She took up the old note, and I gave a new note at 6 per cent. I knew from what Dr. Warren said at these anterior periods how the wills were to be drawn, and that the general arrangement was the same which existed when Mrs. Warren died, with the exception of the annuity. There was a direct bequest to Mrs. Moore. I will say that Dr. Warren

has always discussed all of these matters freely with me; we became intimate friends, as well as being connected by marriage."

On cross-examination:

"Mr. Russell, when was this agreement or contract that you have testified to, that Mrs. Warren stated had been made between her and her husband, Dr. Warren— When was this agreement made? She didn't give the positive date; just stated it as a fact. She didn't tell me when they made the change in relation to the bequests. The only change was in the leaving of the annuity which had been left to Dr. Warren's sister, Mrs. Moore—changing it—leaving my note of \$16,000 to Mrs. Moore, and the balance to go into her hands as long as she lived; and that she had made a like agreement, but that it had been made since she last saw me. When had she last seen you? I cannot now recollect. Was it a year? Yes, about two or three years. I don't remember when I had seen her before that. Was it more than three years? I would not be willing to swear to any particular time. I cannot recollect now; I recollect very distinctly that we were at Grand Briar, White Sulphur, when she went over this entire agreement between herself and the doctor. This agreement that you have testified to, that she said that she had with Dr. Warren—that was here in Memphis? Yes, sir. This agreement that she had with her husband had been changed from a former agreement? Yes, sir. You don't know when the former agreement was made? No, sir; I cannot state about that. I wish you would state now in detail the exact agreement—exactly what the agreement was? She told me that she had willed all of her property to Dr. Warren for his use during his lifetime; that she left it to him absolutely, with the agreement and understanding that if she died first he would then make a will leaving on his death her property to her sister, Mrs. Russell, and that he had agreed the same way to leave all of his property to her, and she was to leave it to his heirs when she died. As I understood, you testified in your direct examination that Dr. Warren had by his original will—by some prior will—left all of his property to his wife, but an annuity to Mrs. Moore, but that that had been changed, and that, instead of leaving the annuity to Mrs. Moore, he had left her by his will \$16,000? I think she said my note—it was \$16,000 then. While she was here I paid part of the principal, leaving \$16,000. You don't know when that change was made? I do not. As I said, she explained this to me in relation to my business about this note. What was it you said that Mrs. Warren stated in reference to changing her will and leaving to you, or to Mrs. Russell, the note of \$6,500? She said, after making these statements about the change by Dr. Warren: 'I think that as he has made this bequest, that I ought to leave Mary a direct bequest, and when I go back to Mobile I will leave your note of \$6,500 on my death.' But she never got to Mobile. You say that when you met Dr. Warren in Mobile after the death of Mrs. Warren, that he was very nervous? Very nervous, very much wrought up, carrying on, and almost hysterical at times; was blaming the doctors, and saying that they had killed her; that she ought never to have died. He said that it was merciless, and that he would kill the doctors—going on at a fearful rate—and then he would go back to the subject of this property. How long did that last, that condition of Dr. Warren? He was calmer after he had made the will. He was in a very bad condition, and, as near as I know, he was in a very wretched condition all of his days—the remainder of his life. He got so, I think, that he went out but little. You say that after the will had been drawn by the lawyer, whoever he was, Dr. Warren handed it to you to read? Please state as near as you can the language of the will which referred to the bequest to Mrs. Russell? I would not undertake to state the language, but my recollection is clear that it complied with the agreement that had been discussed. It complied with the agreement that Mrs. Russell should be given the property of her sister, with the exception of the \$10,000."

Daniel P. Bestor testifies:

"That he knew Dr. John A. Warren and Mrs. Martha B. Warren both very well; in fact, intimately. That he had known Mrs. Warren as far back as he

could recollect when he was a child, and had known Dr. Warren for about 25 years. That he had professionally represented Dr. Warren in only two matters prior to the death of his wife; one was advising him in regard to a claim he had against Francis Cox and Atwood Violet of New Orleans, and the other was in reference to a loan to F. S. Parker and wife, and taking a mortgage on some property in Mobile which they owned to secure the loan. He does not recollect representing him in any other legal matters, except writing his will. He wrote Dr. Warren's last will and the codicil (which were probated); he also wrote a will for Dr. Warren in the latter part of December, 1899. That he had never written a will for him previous to that time. That his recollection of the provisions in the will that he wrote in 1899, so far as Mrs. Russell was concerned, is that he willed to her all property that he would leave, or that would turn out over \$45,000 or \$46,000."

Winston Jones, one of the appellees, testified:

"That on January 16, 1900, Dr. Warren requested him to come to see him and bring all of the papers of his and Mrs. Warren's, and he got me to have made out for him from his papers and Mrs. Warren's papers an inventory of all the property that he had and all the property that Mrs. Warren had. We discussed the items as we went along, and we made out a full inventory as Dr. Warren dictated and requested to be done. In the memoranda of his own individual matters he had this memoranda put in: 'Amount due me by M. B. Warren, being the amount I paid her for her loss in the Pettite matter.' He stated that this had always been the understanding between himself and Mrs. Warren: that if he outlived her that she was to pay him back this money. I have also heard Mrs. Warren and Dr. Warren discuss the matter between them, and it was so understood by and between them. The next item: 'Amount due me by Mrs. M. B. Warren, \$2,000, being the amount which I gave her my check on Brown Bros. for.' He told me that she owed him this amount of money, \$2,000, which he had given her a check for on Brown Bros. The value of Dr. Warren's estate at the time of his death, including Mrs. Warren's estate, was in the neighborhood of \$50,000. Dr. Warren died March 24, 1901."

By request of appellant's counsel, this witness attached to his testimony the inventories to which he had referred, in which we find these amounts set down as belonging to the estate of Dr. Warren:

Cash with Winston Jones & Co.....	\$ 5,904 19
Cash with Brown Bros.....	1,055 11
Note of D. M. Russell.....	16,000 00
Note of Parker and wife.....	8,000 00
Interest on same.....	560 00
Note of George Winston.....	6,000 00
Amount due me by Mrs. M. B. Warren, being the amount I paid for her loss in the Pettite matter.....	6,500 00
Amount due me by Mrs. M. B. Warren, being amount for which I gave her my check on Brown Bros.....	2,000 00
<b>Total.....</b>	<b>\$46,019 30</b>

We also find set down, as having constituted the estate of Mrs. Martha B. Warren, items (which need not be specified) aggregating at par value \$26,702.86, embracing shares of stock put down at \$600 and one note at \$300, which the witness Jones testifies were worthless. Exhibit D, attached to this testimony, presents a statement dated March 12, 1900, purporting to give the items of Dr. J. A. Warren's estate, aggregating at that time the sum of \$39,760.03, embracing items of securities on the margin of which Dr. Warren has indorsed, "From M. B. W.," aggregating \$13,077.18. The will of Dr. Warren that was pro-

bated was executed April 16, 1900. The eighth paragraph of this will was in words and figures as follows:

"At the time of my death if there should be anything left out of the money or property which I received under the will of my wife, after deducting \$2,000 for which I gave her my check on Brown Brothers & Co., and the Pettitts money or notes amounting to \$6,500; and the notes and mortgage which I gave Mary B. Russell on the 25th of December, 1899, amounting to \$6,500, and the F. S. Parker mortgage and notes for about \$9,120.00; then I give and bequeath such amount so remaining and so derived from my wife's estate, to Mrs. Mary B. Russell, if she be living at the time of my death; but this legacy is based on the condition that my estate which I own at the time of my death shall be worth at least \$46,000, and if it should be below said sum, then this legacy shall be void and of no effect; but if my estate shall be worth more than \$46,000 at the time of my death, then so much of my estate as is above \$46,000 shall go to Mrs. Mary B. Russell, the sister of my deceased wife; and this legacy is based on the further consideration that if Mrs. Russell should die before I do, then this special legacy shall be of no force and effect."

On February 26, 1901, J. A. Warren executed a codicil to this will, revoking and annulling the said eighth paragraph to said will, and devised his estate to others.

The will of Martha B. Warren, which was probated, bears date the 13th day of May, 1895. Besides special bequests and directions about administration, which need not be copied, it provides:

"And to my sister, Mrs. Mary Bliss Russell, of Coahoma County, Mississippi, I give and bequeath my diamond ring set in black enamel, and a topaz ring set around with pearls, a silver pepper box which came from our great-grandparents; also the certificate of membership of our grandfather, William Leorrett, in the society of the Cincinnati, signed by General Washington and General Knox; and also the two china dishes coming from our grandmother. As my said sister has a handsome estate of her own, I make no further bequest to her than of these specific articles, just above enumerated. Third—The rest and residue of all my estate, real and personal, and in action, of which I may die seized and possessed or in any wise entitled to, I give, bequeath and devise unto my beloved husband, John A. Warren, to be absolutely his and in fee."

In reference to this will, the witness Harry Pillans testifies:

"I reside in Mobile, Ala., and am a lawyer; have been engaged in the practice some 33 years. I knew Mrs. Martha B. Warren and Dr. John A. Warren during their lifetime, not intimately, but very well indeed, Mrs. Warren being an intimate friend of some near friends of mine. I wrote a will for Mrs. Warren; the one that was probated, and a copy of which is shown me. I was one of the witnesses to that will; it was executed in my office. Mrs. Warren came into my office and said to me that she, having an estate of her own, wished to make a will, and wanted me to draw it; that Dr. Warren had a lawyer, but she preferred to have her own. She instructed me as to the disposition she desired should be made of her estate by the contemplated instrument, and left me to prepare it, which I did, I think, within the day of her call, or perhaps the next day, and notified her to come back to the office, and she did so. She then read and considered the will as drafted, said that it met with her instructions, and she then desired me to call witnesses in order that she might execute it at once. I called my partner, Mr. Hanaw, and he and I witnessed the will. I see there is a codicil to the will bearing the same date as the will. I do not recollect any particulars about this codicil being added, and could only draw the conclusion that this was an additional instruction given by her at the time she read over the will. I will add here that she asked me to retain the will in my safe until her death, in order that it might be preserved safely. I sealed it up in an envelope, which I indorsed, stating what was inside of it, and locked it up in a cash box in my safe,



where it remained until I learned of the death of Mrs. Warren, when I communicated, I think to Dr. Warren, who was ill at Mrs. Hodgson's, the fact that I had this will. I think she came alone on both occasions to my office. I am pretty well satisfied that Dr. Warren did not come with her."

Thus far we have proceeded on the assumption that such a contract as appellant avers and has sought to prove may be made and may be established by parol proof. The solicitor for the appellant contends with urgency and force that we are not concerned here with the question of the validity of limitations of a remainder over of real estate, where the first devisee takes the fee with power of disposition in fee, touching which, in *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. Ed. 1089, which was a case where real estate was sought to be reached, it was held that such limitation over would be void, as being inconsistent with the devise of the fee. That if the contract between Dr. and Mrs. Warren had been embodied as a limitation in the will of Mrs. Warren, and had related to real or personal estate in the state of Alabama, it would have been a good limitation under the statutes of that state (quoting sections 1046-1049 of the Code of Alabama of 1896), which sections have frequently been before the Supreme Court of Alabama, and have been construed in numerous cases (which he cites) and declared applicable to real and personal property. That the rule, therefore, announced in *Howard v. Carusi*, is abrogated by the Alabama statute, to the extent that the estate remaining unexpended at the death of the first taker passes by the will, although at common law the limitation would be void as derogating from the estate first given. But (he continues) the present case does not depend upon the validity or invalidity of limitations appearing in the face of the deed. Where such limitations have been held void as inconsistent with the estate, it has been done under rules of construction, and not because such limitations were illegal or contrary to public policy; that one may contract to leave the whole or any part of his own estate to a particular individual by will is too well settled by English and American authorities to be doubted. If there was a conflict in the authorities, it is settled in Alabama that such a contract can be made; and he cites *Bishop's Heirs v. Bishop's Adm'r*, 13 Ala. 475; *Barrell v. Hanrick*, 42 Ala. 60; *Moore v. Campbell*, 102 Ala. 445, 14 South. 780.

In the last of these cases, *Moore v. Campbell*, we find it stated that:

"The principle that a parol trust may be ingrafted upon a devise or bequest after probate of the will was declared in *Bishop's Heirs v. Bishop's Adm'r*, 13 Ala. 475, and followed in *Barrell v. Hanrick*, 42 Ala. 60. We are not aware that the question has arisen since in this state. The doctrine has found support in other states (citing cases). We do not feel at liberty to depart from the rule, inasmuch as the statute of wills was re-enacted in the same language after the rendition of these decisions, and it is not necessary to the decision in this case; but there are so many objections to its application to wills, we feel justified in pointing out some of them, that the legislative department may make statutory provision in the matter, if in its wisdom it sees proper to do so. We confine what we have to say to the statute of wills."

After a somewhat protracted and animated discussion of the subject, the opinion says further:

"But call it what you will, and argue as you may, a parol trust ingrafted upon a written bequest by parol testimony, by the decree of a court, after the

death of the testator, is pro tanto the establishment of a parol will for the testator."

In Wall's Appeal, 111 Pa. on page 471, 5 Atl. 224, 56 Am. Rep. 288, in reference to a kindred though not identical case with the one before us, we find this language:

"Claims of this nature against dead men's estates, resting entirely in parol, based largely upon loose declarations, presented generally years after the services in question were rendered, and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done. We cannot too often repeat the caution we have so frequently uttered on this subject, and we feel that the present occasion is one that demands both their repetition and their application."

In an earlier kindred case in the same court, *Graham v. Graham's Executors*, 34 Pa., we find on pages 480 and 481 this language used by Judge William Strong (afterward associate justice of the Supreme Court):

"The temptation to set up claims against decedents, particularly such decedents as have left no lineal heirs, is very great. It cannot be doubted that many such claims have been asserted which would never have been made known had it been possible for the decedent to meet his alleged creditor in a court of justice. Not unfrequently we witness a scramble for a dead man's effects, disreputable to those engaged in it, and shocking to the moral sense of the community. Such claims are always dangerous, and when they rest upon parol evidence they should be strictly scanned; especially where an attempt is made, under cover of a parol contract, to effect a distribution different from that which the law makes, or that which the decedent has directed by his will, should it meet no favor in a court of law. Even if such a contract may be enforced, it can only be when it is clearly proven by direct and positive testimony, and when its terms are definite and certain."

In *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53, where a trust was sought to be established by a letter of instructions from the testator to the legatee who drew the will, the judge, in delivering the opinion on the question we are now considering, referring to previous cases cited and discussed by him, said:

"All along the line of discussion it was steadily claimed that a plain and unambiguous devise in the will could not be modified or cut down by extrinsic matter lying in parol or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched, that it was not at all modified, that the property passed under it; but the law dealt with the holder for his fraud, and out of the facts raised a trust *ex maleficio*, instead of resting upon one as created by the testator."

Earlier in the opinion it was said:

"If, therefore, in her letter of instructions the testatrix had named some certain and definite beneficiary capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary, and enforce it, if needed, on the ground of fraud. Equity acts in such cases, not because of the trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetuate a fraud upon the deviser which equity will not endure."

In *Moran v. Moran* (Iowa) 73 N. W. 620, 39 L. R. A. 207, 65 Am. St. Rep. 443, it is said:

"That there are authorities to the effect that when a testator, because of the fraud of a devisee, is induced to make a devise on the representation by

the devisee that he will take the devise in trust for another who was the real object of his bounty, equity will enforce the trust, is not to be questioned (citing several cases). Numerous other cases could be cited, but it is not important to do so. In these cases—and if there are exceptions we have not noticed them—equity has interfered to enforce a trust on the ground of fraud, in the practice of which the devisee has by his acts or silence prevented the testator from, or led him to avoid, making provision in his will which he intended; and the cases cited were not for the construction of the wills, but to declare a trust on the fraudulent acts by which the making of the will was prevented. The cases do not attempt to change the wills or to construe them, but to fix obligations because of the acts of the devisee."

In a very learned note by the annotator to the report of the case of *Gore v. Clarke* (S. C.) 16 S. E. 614, 20 L. R. A. 465, it is stated:

"The general rule of law with regard to promises made to a testator is that, if one induces a testator not to insert a provision in his will in behalf or for the benefit of another, by promises or assurances that the promisor, whether he be the heir, personal representative, devisee, or residuary legatee will see to and carry out the testator's intention with regard to such party, it is fraud in such promisor, after the decease of such testator, to refuse to carry out the promise which imposed a legal duty upon him, that the courts of equity will compel him to fulfill and perform."

Counsel for the appellant thinks that it is idle to attempt to meet the current of the testimony for the complainant if the witnesses are to be credited, and that, to save Dr. Warren from a breach of contract, the court below was willing to presume that all of the witnesses for the complainant were guilty of perjury, and the complainant herself was asserting a baseless claim. It does not so appear to us. The complainant may honestly believe that she has a just claim against the estate of the appellees' testator, and the testimony she has offered may in some measure tend to show some kind of an understanding or agreement between Dr. Warren and his wife, resting in parol, while at the same time, to men accustomed to the administration of justice, and trained in the application of the rules by which right is sought in the courts, that testimony may appear wholly inadequate to establish the appellant's claim. The declarations of Mrs. Warren, except so far as they have been shown to have been clearly made known to Dr. Warren and assented to by him, are not competent evidence against the appellees. This record may not show, and it is only just to say that in our opinion it does not show, any ground for the slightest suspicion that any one of the witnesses who have testified in this case approach to or look toward the commission of perjury. But in the field of inquiry appropriate to the use of human testimony the area occupied by willful perjury, which is incapable of generating any belief, and which bounds this field on one side, is far removed from the opposite boundary, where are impartial witnesses, with natural faculties and training for the accurate perception of the truth and the accurate communication of it, whose testimony commands belief; and throughout the intermediate area there are elements of differing degrees of force which go to affect the weight of the testimony of witnesses whose character for truth and veracity is above suspicion. The nurse and the physician testified in reference to their understanding of what Dr. Warren had said on

the subject involved in this inquiry. Their testimony, so far as it tends to show any agreement between him and his wife, tends to show agreements differing substantially in their terms the one from the other. They differ also as to the time when the arrangement of which they speak had been made. The nurse says it was at the time they made their wills; the physician says that he understood from Dr. Warren that the conditions of the agreement between himself and his wife were all contained in their wills; that "the talk" had been long before the wills; that the wills were the outgrowth of the verbal agreement. It seems to us that this testimony, so far as it affects the appellant's case, is nugatory, and we are left with the testimony of D. M. Russell, and of his nephew, Percy Russell. We have inserted their testimony at great length, and it seems clear to us from D. M. Russell's testimony that he could not, in the condition in which he found Dr. Warren after the death of Mrs. Warren, have stated to him so clearly the declarations which Mrs. Warren had made to the witness and his wife that Dr. Warren could have understood it with sufficient distinctness to be charged with its admission by what he said or what he omitted to say. We should bear in mind that within a few hours after the death of Mrs. Warren, and within one hour after appellant had reached the place where her sister's body lay, there was developed between her and Dr. Warren a contention and an antagonism of thought which showed either that Mrs. Russell had not understood Mrs. Warren, or that she failed to convey distinctly to Dr. Warren's mind what Mrs. Warren had said; because it is clear from the testimony of Percy Russell that Dr. Warren then thought that the appellant was claiming that his wife had told her that the agreement between him and his wife was that the appellant should get all of the Bliss money immediately upon her sister's death, and that in the amount she was to get should be included the \$10,000 of Mrs. Warren's money which had been loaned at the instance of Dr. Warren, and for which he had stood security, and which, being lost, he had repaid to his wife during her lifetime. So strongly was this impression made upon the mind of Dr. Warren by his interviews with the appellant at Glen Springs, and during their journey from Glen Springs, that he insisted on talking about it continually to Percy Russell from the time they left Glen Springs until they parted at Salisbury, and almost the first words Dr. Warren said to D. M. Russell on their meeting at Mobile were: "Dave, Mary thinks that her sister left her property to her; that I was to hand it over to her. Well, now, I am going to have Martha's will brought here and read to you, so that you can see that she gave the property to me." When D. M. Russell told the doctor that Martha had said that when she got back to Mobile she would change her will and leave the note for \$6,500, on her death, to her sister, Dr. Warren replied: "That is all right. She told me about it, and I am going to carry out Martha's wishes." And he sent at once for the note, indorsed it, and handed it to Mrs. Russell. The next day, or the day after, he did have a will prepared, and the evidence shows that it provided that Mrs. Russell should take upon his death all of his estate that then exceeded \$15,000 or \$46,000. Three weeks after

that he caused to be prepared an inventory of his estate, embracing in it \$8,500 due from Mrs. M. B. Warren, and showing a total of \$46,019.30. On March 12th he took another account of stock, in which he includes in the list of his property assets received from M. B. Warren amounting to \$13,077.18. One month later he made the will which was probated, and provided in it that at the time of his death, if there should be anything left out of the money or property which he had received under the will of his wife, after making deductions therefrom which he specified, so there should remain \$46,000, then so much of his estate as exceeded that sum should go to the appellant, if she were then living. It is thus evident that, from the first hour his mind came to act on this subject after the death of his wife, his understanding was that he had an estate of \$46,000, the corpus of which he was not required to invade as long as the bequest which he received from his wife was sufficient to meet his expenses. He expected his death to occur at any moment. He lived on, however, for more than a year, in great distress of body and depression of spirits, brooding over his poverty, and did not talk so much about anything except his poverty. Twenty-six days before his death did occur, he made the codicil revoking the eighth paragraph in his will, and devised his estate to others. He was not present when his wife had made her will five years before her death, and it is certain that he never saw that will until after her death. He and she had left Mobile and had arrived at Glen Springs in May, 1899. Leaving him at the sanitarium there, she went to Memphis, Tenn., to attend to some business for her husband and herself, with her brother-in-law, who owed Dr. Warren over \$16,000, and owed her \$6,500, both on note and mortgage. In the settlement which she then made she received from her brother-in-law, for Dr. Warren, a cash payment which reduced the amount of that debt to \$16,000. It had been bearing 8 per cent. interest, but she reduced the rate of interest to 6 per cent., and extended the loan, taking a new note, dated November 14, 1899, due six years after date, with interest payable annually. It was in connection with this settlement that Mrs. Warren explained to her brother-in-law and to the appellant that Dr. Warren had by a prior will left all of his property to his wife, charging it with an annuity in favor of his sister. Mrs. Moore, and that that had been changed and, instead of leaving an annuity to Mrs. Moore, he had now left her the \$16,000 note. After making these statements about the change that had been made by Dr. Warren in his will, Mrs. Warren said to the witness and his wife: "I think that as he has made this bequest that I ought to leave Mary a direct bequest, and when I get back to Mobile I am going to leave her your note for \$6,500 on my death." This indicates beyond question that the change to which it refers had been made after they left Mobile in May, and we learn from the testimony of Percy Russell that the change in Dr. Warren's purpose was made to meet the wishes of his wife. This witness says that he (Dr. Warren) "went on furthermore to tell me all"—how it was that the \$6,500 should be given to Mary at once, because from some objection of Mrs. Warren to handling his estate in the event of his death, they had agreed that the

note for \$16,000 held by them against Mr. D. M. Russell should be given to Dr. Warren's sister, and that Mrs. Warren had thereupon said she was going to give to Mrs. Russell the \$6,500. Much stress is laid upon the fact that, immediately upon the death of Mrs. Warren, Dr. Warren was urgent to hasten home that he might make his will. If he had a written will in existence at the time of his wife's death, or at any time previous to that, no one who ever saw it has so testified in this case. He was childless; his domicile was in the state of Alabama; his estate consisted wholly of personal property in Alabama and Mississippi. It was not necessary during the lifetime of Mrs. Warren for Dr. Warren to have a written will in order to secure the purpose which the proof most strongly shows that these devoted spouses had—that the survivor should enjoy in fee simple both estates, and would make proper provision, testamentary or otherwise, for the rightful disposition of what remained at his or her death. Section 1462, Code Ala. 1896; section 1545, Ann. Rev. Code Miss. 1892. Assuming that their minds were in accord on this subject, we can almost feel the touch of the resentment in the tone of her reply when her brother-in-law asked her if it would not be best to provide for that agreement in her will. We can understand, also, why it was that he kept the assets of his own estate, as far as he is shown to have done so, separated from that which he had received by the bequest of his wife; and it is not difficult to understand how, when from causes of shrinkage not shown his whole estate had settled to a level not much above \$46,000, he felt that the \$6,500 which he had handed to the appellant while his wife's body was yet unburied was full satisfaction of the pious duty which his knowledge of his wife's wishes imposed upon him. He is shown to have been an honorable man, and one who would do what he had agreed to do.

We make one more quotation from the note in *Gore v. Clarke*, supra:

"There must, however, in every case be a promise proven to the satisfaction of the court, which the court will enforce against the testator's estate in the hands of the promisor, of which the latter is enjoying the benefit. There may be suspicions of the deceased's intentions to provide by will, and such suspicions may operate upon the minds of those taking to induce them to consider themselves bound in honor and conscience to perform those intentions, but neither at law or in equity can such a promise be fulfilled or enforced without some proof of it."

Whatever may have been "the talk" of Dr. Warren and his wife, the evidence in this case is not sufficient to show such a verbal contract between them, or to show any such fraud on his part, either willful and actual, or constructive, as to require or permit a court of equity or of law to enforce the appellant's claim against Dr. Warren's estate in the hands of the appellees.

The decree of the Circuit Court is affirmed.

**BUSTER et al. v. WRIGHT, United States Indian Inspector, et al.**

(Circuit Court of Appeals, Eighth Circuit. March 7, 1906.)

No. 2,147.

**1. CREEK NATION—PERMIT TAX—CHARACTER—VALIDITY.**

The permit tax of the Creek Nation is the annual price fixed by its laws for the privilege of conducting business within its borders which it offers to noncitizens. The payment of the tax conditions the exercise of the privilege; but the latter, and hence the former, is optional with each noncitizen.

Prior to the Creek agreement of March 1, 1901, this tax was valid, and the Secretary of the Interior, the Indian inspector, and Indian agent had authority to enforce the laws which prescribed it.

**2. EXECUTIVE OFFICERS—DUTY TO ENFORCE LAWS—NECESSITY OF WRIT OR PROCESS.**

The duty of enforcing laws is primarily imposed upon executive officers. Such officers charged with the duty of enforcing an injunctive law may prevent, without other writ or process than the law itself and their commissions of office, and it is their first duty to prevent, its violation where they can do so without infringing the rights of those who threaten to break it, and no man has any personal or property right to violate a valid law. It is only when executive officers renounce or fail to discharge their primary duty in such a case that an appeal to the courts to enforce such a law may be successfully made.

**3. SAME.**

The rule of an executive department may be due process of law. A lawful rule made by the chief of an executive department to which the enforcement of a law is intrusted, which appoints a subordinate for the purpose, and imposes upon him the duty of enforcing the law, is sufficient process of law to authorize him to prevent its violation in cases where he can do so without infringing upon any personal or property right of those who threaten to break it.

**4. CREEK NATION—PERMIT LAWS—SECRETARY OF THE INTERIOR AND INDIAN AGENT MAY PREVENT UNLAWFUL BUSINESS OF NONCITIZEN IN ORDER TO ENFORCE THEM.**

The legal effect of the laws of the Creek Nation prescribing permit taxes is to prohibit noncitizens from conducting business in that nation without paying them.

The Secretary of the Interior and his subordinates, the Indian inspector and Indian agent, may lawfully close the business of noncitizens within that nation who refuse to pay their permit taxes, and prevent the continuance of that business until they are paid, for the purpose of preventing the continuous violation of those laws.

**5. SAME—NOT AVOIDED BY CREEK AGREEMENT OF MARCH 1, 1901.**

Neither the Creek agreement ratified by the United States March 1, 1901 (chapter 676, 31 Stat. 861, 866, §§ 10-16), nor the establishment of town sites within the territory of that nation, nor the sale of lots therein to occupants who were not citizens of that nation, nor the organization of towns and cities thereon, withdraws such town sites, lots, their purchasers or occupants, from the territorial or governmental jurisdiction of the Creek Nation, or exempts them from its laws, or withdraws them from the jurisdiction and authority of the Secretary of the Interior and his subordinates to close the unlawful business of those noncitizens who refuse to pay their permit taxes, for the purpose of preventing the continued violation of the laws which prescribe them.

**6. SAME—NOT AVOIDED BY ACT PROHIBITING DEPORTATION FROM INDIAN TERRITORY.**

The provision of the act of May 27, 1902 (chapter 888, 32 Stat. 259), which prohibits the deportation of persons in lawful possession of land

in any town site in any town or city in the Indian Territory, was not intended to and it did not repeal or annul the permit laws of the Creek Nation, nor withdraw from the Secretary of the Interior and his subordinates their authority to close the business of noncitizens who refuse to pay their permit taxes, in order to prevent the continuance of a violation of those laws.

**7. PRACTICE—FORMER DECISION OF INFERIOR APPELLATE COURT—LAW OF CASE.**

The former decision and decree of the Court of Appeals of the Indian Territory, which was not then reviewable because it was not final, is not the law of the case in this court upon an appeal from a subsequent final decree, which first presents to this court for review all the proceedings of the case from its inception.

**8. APPEAL—A RIGHT DECREE ENTERED FOR A WRONG REASON.**

Where a former decision of an inferior court erroneously reverses the dismissal of a bill upon a demurrer to it, and, after answer, upon the same facts, the final decree of the same court affirms such a dismissal, that decree should not be reversed, because it is in legal effect the decree which should have been affirmed upon the demurrer to the bill. A right decree for a wrong reason is not reversible.

(Syllabus by the Court.)

Appeal from the United States Court of Appeals in the Indian Territory.

For opinion below, see 82 S. W. 855.

This is an appeal from a decree of the United States Court of Appeals for the Indian Territory, which affirmed a dismissal for want of equity of a suit brought by O. W. Buster and others, who were not citizens of the Creek Nation, to prevent J. George Wright, Indian inspector of the Indian Territory, J. Blair Shoenfelt, the Indian agent for the Union agency, Guy P. Cobb, the tax collector for the Creek Nation, and John West, Indian police, officers of the United States, from stopping the business of the complainants, and from reporting them for deportation from the Indian Territory unless they paid the taxes for the privilege of doing business within the Creek Nation prescribed by the laws of the Creeks. Their bill was filed on August 23, 1901. They alleged in it that they were merchants in the town of Wagoner; that the defendants had demanded of them payment of their permit taxes prescribed by the laws of the Creek Nation, and had threatened to close their places of business, and to report them to the Secretary of the Interior for removal from the territory, unless they paid them; that they had stocks of merchandise; that they would suffer irreparable injury if their places of business were closed; that by the terms of the Creek agreement of March 1, 1901, the lands within the corporate limits of the town of Wagoner had been set apart for a town site, had been surveyed, platted, and appraised; that they resided in this town; that they were the owners and occupants of the improvements in which they were doing business; that the land upon which these improvements were located had been appraised and listed to them for purchase, and that they intended to buy it. The prayer of their bill was for an injunction against the defendants to prevent the performance of the acts they threatened.

A demurrer to this bill was sustained, and the bill was dismissed. The decree of dismissal was reversed by the Court of Appeals of the Indian Territory, and the case was remanded for farther proceedings. Upon the filing of the mandate the defendants answered that in the year 1900 the national council of the Creek Nation passed an act which was approved by the President of the United States, and which provided that all persons who were not citizens of the Creek Nation who wished to engage in business therein should pay to the United States Indian agent at Union agency, for the benefit of the Creek tribe, the annual permit taxes which were there specified, quarterly in advance, except where those taxes were based upon the cost of goods offered for sale; that in the case of goods offered for sale the tax should



be one-half of 1 per cent. of the first cost of all goods thus offered; that the Secretary of the Interior, on November 4, 1898, made and published certain rules regarding the collection of revenues in the Indian Territory, section 18 of which provided that it should be the duty of the Indian agent to collect, under the supervision of the United States Indian inspector for the Indian Territory, all rents, permits, revenues, and taxes of whatever kind or nature that might be due or payable to the Creek Nation; that the Attorney General of the United States had informed the secretary in September, 1900, that it was his duty to remove all persons from that nation who were members of classes forbidden by treaty or law, and who were without permit or license, and to close all business which required a license that was being carried on there without one; and that the defendants, under the acts of Congress and the treaties of the United States, and pursuant to the regulations and direction of the Secretary of the Interior, were proceeding to prevent the complainants from continuing to carry on their business in the Creek Nation without paying the permit taxes required by the laws of that nation for the exercise of that privilege.

After the filing of this answer the parties stipulated that the averments of the bill were true, and the case was submitted to the trial court for decision upon the bill, the answer, and this stipulation. That court again dismissed the bill, and that decree of dismissal was affirmed upon appeal by the Court of Appeals of the Indian Territory. *Buster v. Wright*, 82 S. W. 855.

Napoleon B. Maxey, Thomas H. Owen, and William T. Hutchings, for appellants.

David P. Dyer, for appellees.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The permit tax of the Creek Nation, which is the subject of this controversy, is the annual price fixed by the act of its national council, which was approved by the President of the United States in the year 1900, for the privilege which it offers to those who are not citizens of its nation of trading within its borders. The payment of this tax is a mere condition of the exercise of this privilege. No noncitizen is required to exercise the privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other. Thus, without entering upon an extended discussion or consideration of the question whether this charge is technically a license or a tax, the fact appears that it partakes far more of the nature of a license than of an ordinary tax, because it has the optional feature of the former and lacks the compulsory attribute of the latter.

Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place beyond debate the propositions that prior to March 1, 1901, the Creek Nation had lawful authority to require the payment of this tax as a condition precedent to the exercise of the privilege of trading within its borders, and that the executive department of the government of the United States had plenary power to enforce its payment through the Secretary of the Interior and his subordinates, the Indian inspector, Indian agent, and Indian police. *Morris v. Hitchcock*, 194 U. S. 384, 392, 24 Sup. Ct. 712, 48 L. Ed. 1030; *Crabtree v. Madden*, 4 C. C. A. 408, 410, 413, 54 Fed. 426, 428, 431; *Maxey v. Wright*, 3 Ind. T. 243, 54 S. W. 807;

*Maxey v. Wright*, 44 C. C. A. 683, 105 Fed. 1003; 18 Opinions of Attorneys General, 34, 36; 23 Opinions of Attorneys General, 214, 217, 219, 220, 528. The executive department of the government of the United States is proceeding pursuant to these decisions and opinions to prevent noncitizens of the Creek Nation from exercising this privilege of trading within the borders of that nation without paying the permit taxes by closing their places of business in cases in which they refuse to pay them, and the complainants ask the courts to stay the hands of the officers of that department by their writs of injunction. They contend that all the authority of the Creek Nation to charge noncitizens who have purchased lots in town sites within that nation under the provisions of the Creek agreement ratified by the United States on March 1, 1901, permit taxes for the privilege of trading upon those lots or sites and all the power of the executive department of the United States to prevent such noncitizens from thus trading without the payment of these taxes have been withdrawn by the Creek contract of March 1, 1901 (chapter 676, 31 Stat. 861, 866, §§ 10-16), and by the provision of the act of May 27, 1902, making appropriations for the Indian Department, that "it shall hereafter be unlawful to remove or deport any person from the Indian Territory who is in lawful possession of any lots or parcels of land in any town or city in the Indian Territory which has been designated as a town site under existing laws and treaties" (chapter 888, 32 Stat. 259). It may not be unwise, before entering upon the discussion of this proposition, to place clearly before our minds the character of the Creek Nation and the nature of the power which it is attempting to exercise.

The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. Neither the authority nor the power of the United States to license its citizens to trade in the Creek Nation, with or without the consent of that tribe, is in issue in this case, because the complainants have no such licenses. The plenary power and lawful authority of the government of the United States by license, by treaty, or by act of Congress to take from the Creek Nation every vestige of its original or acquired governmental authority and power may be admitted, and for the purposes of this decision are here conceded. The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.

Originally an independent tribe, the superior power of the republic early reduced this Indian people to a "domestic, dependent nation" (*Cherokee Nation v. State of Georgia*, 5 Pet. 1-20, 8 L. Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a Constitution modeled after that of the

United States, exercised legislative, executive, and judicial functions within its territorial jurisdiction for more than half a century. The governmental jurisdiction of this nation was neither conditioned nor limited by the original title by occupancy to the lands within its territory. That original Indian title was the property of the Osages. It was extinguished, and a patent was issued and delivered by the United States to the Creek Nation, which conveyed to it the title to the lands within its territory by metes and bounds "so long as they shall exist as a nation and continue to occupy the country hereby assigned to them." Chapter 148, 4 Stat. 411; 7 Stat. 366, 414. This power to govern the people within its territory was repeatedly guarantied to the Creek tribe by the United States. By the treaty of March 24, 1832 (7 Stat. 368, art. 14), the United States agreed that "the Creek country west of the Mississippi river shall be solemnly guarantied to the Creek Indians, nor shall any state or territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them." By the treaty of August 7, 1856 (11 Stat. 703, art. 15), and of June 14, 1866 (14 Stat. 788, art. 10), this guaranty was reiterated. Founded in its original national sovereignty, and secured by these treaties, the governmental authority of the Creek Nation, subject always to the superior power of the republic, remained practically unimpaired until the year 1889. Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe of all its judicial power, and curtailed its remaining authority until its powers of government have become the mere shadows of their former selves. Nevertheless its authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries guarantied by the treaties of 1832, 1856, and 1866, and sustained by repeated decisions of the courts and opinions of the Attorneys General of the United States, remained undisturbed.

What, then, are the provisions of the Creek agreement of 1901 by which counsel for the complainants insist that the Creek tribe has divested itself of the power to prescribe these terms? They are that town sites were to be laid out within the territorial limits of the Creek Nation, that the lots therein were to be appraised, that noncitizens who occupied these lots were to be permitted to purchase them for one-half of their appraised value, that all lots in such town sites might be sold to purchasers without regard to citizenship, and that upon the payment of the purchase price each vendee should receive a deed from the principal chief of the nation, approved by the Secretary of the Interior. It is said that the sale of these lots and the incorporation of cities and towns upon the sites in which the lots are found authorized by act of Congress to collect taxes for municipal purposes segregated the town sites and the lots sold from the territory of the Creek Nation, and deprived it of governmental jurisdiction over this property and over its occupants. But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal

ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners. The establishment of town sites and the organization of towns and cities within the limits of this Indian nation present no persuasive reason why any other rule should prevail in the measurement of its power to fix the terms upon which noncitizens may conduct business within its borders. The theory that the consent of a government to the incorporation and existence of cities upon its territory or to the conveyance of the title to lots or lands within it to private individuals exempts the inhabitants of such cities and the owners or occupants of such lots from the exercise of all its governmental powers, while it leaves the inhabitants of other portions of its country subject to them, is too unique and anomalous to invoke assent.

Another argument is presented in support of the claim that the owners and occupants of these lots and town sites are withdrawn from the jurisdiction of the Creek Nation. The general rule of law announced in *Bates v. Clark*, 95 U. S. 204, 205, 208, 24 L. Ed. 471, that all the original Indian country remains such until the Indian title to it is extinguished, and no longer, "unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case," is cited, and it is insisted that whenever a lot or tract of land was purchased of the Creek Nation, and either its title or its right of occupancy to that tract was extinguished, the governmental jurisdiction of that nation over that tract and over its owner and occupant, the application of the laws of the United States relating to intercourse with the Indians, and the authority of the Secretary of the Interior, were likewise extinguished, because that lot or tract was no longer a portion of the Indian Territory. But the case before us falls not under the rule, but under the express exception to the rule, set forth in the opinion cited. The rule applies to the extinguishment of the original Indian title by occupancy. The case under consideration involves the extinguishment of no such title. The rule governs cases in which a different rule is not made applicable by treaty or by act of Congress. Many treaties and many acts of Congress imperatively invoke a different rule in the case in hand—the rule that the governmental power of a nation is not limited to the occupants of the lands in its country which the nation itself owns, but extends to all the inhabitants of its territory. The Creek Nation never held the original Indian title by occupancy to any of its country. It held its territory under a patent from the United States and under an act of Congress which expressly provided that it should be the country of the Creeks "so long as they shall exist as a nation and continue to occupy" it. They still exist as a nation, and they still continue to occupy that country, notwithstanding the fact that those who are noncitizens of their tribe hold the title to and occupy isolated lots and tracts of land therein. Over this country the treaties of 1832 (7 Stat. 368, art. 14), of August 7, 1856 (11 Stat. 703, art. 15), and of June 14, 1866 (14 Stat. 788, art. 10), guaranteed the full jurisdiction of the government

of this tribe so far as the acts of its government should not be violative of the Constitution and laws of the United States. The laws enacted by its national council and the judgments of its courts when properly proved have been accorded the same faith, credit, and effect by the courts of the United States that were accorded to the laws of the states and the judgments of their courts. *Mehlin v. Ice*, 5 C. C. A. 403, 56 Fed. 12; *Standley v. Roberts*, 8 C. C. A. 305, 314, 59 Fed. 836, 845. And the Creek agreement of 1901, to which counsel appeal for exemption from the jurisdiction of the government of the Creek Nation, expressly provides that "the tribal government of the Creek Nation shall not continue longer than March 4, 1906, subject to such further legislation as Congress may deem proper," which is, in effect, a contract that it shall continue, and that it shall exercise until that time over all persons within the limits of the territorial jurisdiction assigned to it by the act of May 28, 1830 (chapter 148, 4 Stat. 411), the treaty of March 24, 1832 (7 Stat. 366), and the patent issued to it pursuant thereto, every governmental power it then possessed of which it has not been deprived by the agreement of 1901 or by some subsequent act of Congress. The treaties and agreements between the United States and the Creek Nation under which title from the United States and jurisdiction to govern its country within the limits of its patent were guaranteed to it, the acts of Congress, and the decisions of the courts which have respected and sustained that jurisdiction, clearly take this case out from under the general rule that the extinguishment of the original Indian title by occupancy removes land from the Indian country, and converge with compelling force to convince the mind that neither the establishment of town sites nor the purchase nor the occupancy by noncitizens of lots therein withdraws those lots or the town sites or their occupants from the jurisdiction of the government of the Creek Nation from the application of the laws of the United States to the intercourse of the citizens and noncitizens of that tribe, or from the authority of the Secretary of the Interior, of the Indian inspector, and of the Indian agent under those laws.

This conclusion becomes irresistible when the situation of the parties at the time the Creek agreement of 1901 was made and all the provisions of that contract are carefully considered. The act of June 28, 1898 (chapter 517, 30 Stat. 495, 500, 516), had provided for the organization of municipal corporations, the selection of town sites, and the appraisement and sale of lots therein to those who were not citizens of the Indian nations. Purchasers of such lots who were not citizens of these tribes had claimed that their purchases withdrew their lots from the Indian country, and exempted their occupants from liability to pay the permit taxes of the tribes, and the Attorney General of the United States had held that this claim was unfounded; that, "if the Indian title to the particular lots sold had been extinguished, and conceding that the statute authorizes the purchase of such lots by an outsider, and recognizes his right to do so, the result is still the same, for the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation, nor does it authorize him to do any act in violation of the treaties with such nation"; that merchants and traders who had purchased or were oc-

cupying such lots were liable to pay the permit taxes of the tribe, and that, if they failed or refused to do so, the power was still vested in, and the duty was still imposed upon, the Secretary of the Interior to close their business. 23 Opinions of Attorneys General, 214, 217, 219, 220. Pursuant to this decision the civilized tribes were charging, and the Indian agent was collecting, taxes from noncitizens engaged in business in these nations. It was under this state of facts that the United States and the Creek Nation made the agreement of 1901. Did they intend by that agreement that the Creek Nation should thereby renounce its conceded power to exact these permit taxes? Both parties knew that this power existed, and the United States, by the act of its President approving the law of the Creek national council, and the Secretary of the Interior by enforcing it, had approved its exercise. The subject of these taxes was presented to the minds of the contracting parties and was considered during the negotiation of the agreement, for that contract contains express stipulations that cattle grazed on rented allotments shall not be liable to any tribal tax (chapter 676, 31 Stat. 871, § 37), and that "no noncitizen renting lands from a citizen for agricultural purposes as provided by law, whether such lands have been selected as an allotment or not, shall be required to pay any permit tax" (chapter 676, 31 Stat. 871, § 39). But they made no provision that noncitizens who engaged in the mercantile business in the Creek Nation should be exempt from these taxes. As the law then in force required such noncitizens to pay such taxes, as both parties were then aware of that fact and considered the question, and as they made no stipulation to abolish these taxes, the conclusive presumption is that they intended to make no such contract, and that the power of the Creek Nation to exact these taxes, and the authority of the Secretary of the Interior and of his subordinates to collect them, were neither renounced, revoked, nor restricted, but that they remained in full force and effect after as before the agreement of 1901.

The next argument of the complainants is that the only lawful method for the enforcement of the law prescribing the permit taxes was the removal of those who violated it from the Indian Territory under section 2149 of the Revised Statutes; that the use of this method has now been prohibited by the provision of the act of May 27, 1902, which forbids the removal of any person from the Indian Territory who is in lawful possession of any lot in a town site in any town or city in that territory (chapter 888, 32 Stat. 259); and that the law prescribing the permit taxes has been thereby repealed or annulled, and the authority of the Secretary of the Interior and of the Indian agent to enforce it has been revoked. The correctness of the major premise of this syllogism is not conceded. The executive department of the government, under the advice and pursuant to the considered opinion of the Attorney General, had held, nearly two years before the act of 1902 was passed, that there was another way of enforcing this law—that is to say, by stopping its continued violation by closing the business of its violators (23 Opinions of Attorneys General, 219, 220); a holding which the Supreme Court subsequently quoted with apparent approval in *Morris v. Hitchcock*, 194 U. S. 384, 392, 24 Sup. Ct. 712, 48 L. Ed. 1030. The opinions of the officers of the legislative and executive de-

partments of the government upon the proper interpretation of the laws respecting subjects specially intrusted to them for management and disposition, while not controlling upon the courts, are entitled to great deference and grave consideration, especially when they are founded upon an opinion of the chief of the department of justice, and these views should not be disregarded or overruled unless it clearly appears that they are erroneous. *Deming v. McClaughry*, 51 C. C. A. 349, 351, 113 Fed. 639, 641; *Deweese v. Smith*, 45 C. C. A. 408, 414, 106 Fed. 438, 445.

It is said, however, that the closing of the business of the breakers of this law is a violation of the fifth amendment of the Constitution, in that it deprives them of life, liberty, or property without due process of law. The legal effect, however, of the law prescribing the permit taxes is to prohibit noncitizens from conducting business within the Creek Nation without the payment of these taxes. Every noncitizen who continues to trade after his refusal upon reasonable demand to pay his permit tax is a continuous violator of that law. He has no personal or property right to violate that or any other valid law. Hence the mere stoppage of that violation, the mere closing of his unlawful business and the prevention of its further continuance in the Creek Nation until he pays his tax, impinges upon no right of life, liberty, or property which he possesses.

Another objection to the prevention of the continuance of the unlawful business is that the Indian inspector, Indian agent, and Indian police have no warrant, writ, or process to close such a business. To this contention there are two answers: (1) That no process but the law, the treaties, the acts of Congress, and their commissions of office are necessary to warrant the executive officers of a government in preventing a violation of any law where that prevention impinges upon no personal or property rights of him who seeks to break it; and (2) that the law which imposes upon them the duty to collect the taxes and the rule of the Secretary of the Interior which imposes the duty upon the Indian agent to enforce this law and collect the taxes furnish sufficient process to warrant him in preventing the violation of the law. There is a wide difference between that prevention of the violation of a law which restricts no personal or property right of him who threatens to break it, and the infliction of a penalty provided for its violation which involves the seizure of the person or the property of the offender. The prevention of an unlawful business is of the former, the deportation of one who conducts it from the country is of the latter, character. The general structure of our government imposes the duty of enforcing the laws primarily upon its executive officers. A large portion of all legislation is injunctive. It forbids, and prescribes a penalty for the violation of, the inhibition. The purpose of such legislation is not the infliction of the penalties, but obedience to the law. Hence officers charged with the enforcement of such laws may lawfully interpose to prevent their violation without special writ or process where interposition infringes no personal or property right of those who seek to break them. A sheriff or a policeman who perceives one about to kill or maim another, to burn his house, to steal his property, or to do any other act prohibited by the laws of the land, which it is his duty to enforce,

is not required to wait in futile idleness until the laws have been broken in order that the prescribed penalties for their violation may be inflicted, even though those penalties are the only means specifically prescribed by the laws for their enforcement. The laws themselves and his commission of office vest in him the authority, and impose upon him primarily the duty, to prevent their violation, and thus to enforce obedience to them. He may lawfully do, and it is his duty to do, this without further warrant or process, where such action will not impinge upon the lawful rights of those who threaten the violation. Mobs gather, and threaten to destroy life and property. The laws and the commissions of their office are ample process of law to warrant mayors, Governors, the President, and all executive officers of city, state, and nation to gather their forces, if necessary, to surround the threatened persons and property, and to protect them against attack. Indeed, this is the primary duty of the executive department of the government, and it is only after executives renounce or fail to discharge this duty that an appeal may be successfully made to the courts for relief. Since in the case at bar the Indian inspector, the Indian agent, and the Indian police were the executive officers of the United States, charged with the enforcement of this law, which in legal effect forbade noncitizens to conduct business in the Creek Nation without the payment of these permit taxes, these officers had ample power, and it was their duty, without special writ or process, to prevent the continuous violation of that law by stopping the unlawful business until the taxes were paid.

Nor were these officers without special order or process sufficient in law, if such were necessary. The authority to exact license fees and taxes is a legislative power. Their levy and collection are ministerial acts ordinarily intrusted not to the courts, but to executive officers. And the legislative body which has the authority to impose the taxes is also vested with the power to designate the officers who shall collect them. *Crabtree v. Madden*, 54 Fed. 426, 430, 4 C. C. A. 408, 412; *Meriwether v. Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197; *Peirce v. Boston*, 3 Metc. 520. The national council of the Creek Nation and the President designated by the law which conditioned the right of a non-citizen to do business in that nation with the payment of the permit tax the United States Indian agent of the Union Agency to collect the tax, and directed that upon a refusal to pay it the offender should be reported to the proper authorities for removal. This law of the Creek Nation was in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation. The Constitution of the United States, which was extended over the Indian Territory by act of Congress (chapter 182, 26 Stat. 81), declares (article 2, § 3) that the President "shall take care that the laws be faithfully executed." The act of May 28, 1830 (4 Stat. 412, § 6, and Rev. St. § 2114), provided that it shall and may be lawful for the President to cause such tribe or nation (referring to the Creek Nation among others) to be protected in their new residence against all interruption or disturbance from any other tribe or nation, or from any other person or persons, and to have general superintendence over them. The treaty of 1856 (11 Stat. 704, art. 18) contains the agreement that "the United States shall protect the Creeks \* \* \* from ag-



gression by the other Indians and white persons not subject to their jurisdiction and laws." The Secretary of the Interior is empowered to direct and supervise all the public business of the United States relating to the Indians. Rev. St. § 441 [U. S. Comp. St. 1901, p. 252]. "Each Indian agent shall within his agency manage and superintend the intercourse between the Indians, agreeably to law; and execute and perform such regulations and duties not inconsistent with law as may be prescribed by the President, the Secretary of the Interior, the commissioner of Indian affairs, or the superintendent of Indian affairs." Rev. St. § 2058. In November, 1898, the Secretary of the Interior adopted and published a regulation to the effect that it was and should thereafter be the duty of the Indian agent whose acts are challenged in the case at bar to collect under the supervision of the Indian inspector of the Indian Territory permits and taxes due to this Indian tribe as provided by its laws. This regulation was the order or mandate of the secretary to this inspector and agent to enforce the law of the Creek Nation which prohibits the conduct of business of noncitizens within that nation without the payment of their permit taxes, and it constitutes a legal writ and due process of law to warrant them not only in receiving the taxes if paid, but also in closing the unlawful business of the offender, and stopping the continued violation of the law, if the payment of the taxes is refused. Judge Shiras, discussing the meaning of the term "legal writ or process," found in section 5398 of the Revised Statutes [U. S. Comp. St. 1901, p. 3655], declares the rule upon this subject with his accustomed clearness in these words:

"Whenever, by the provisions of the Constitution, or of a treaty made in pursuance thereof, or of an act of Congress, the executive department of the government is charged with the performance of some duty or obligation, and, to secure due performance thereof, it becomes necessary that certain action be taken, and the executive department, acting through the proper channel, issues a written order or mandate requiring the doing of the appropriate act, and directing a proper person to execute such mandate or command, such a writing is, in my judgment, a legal writ, within the meaning of the section of the statute now under consideration." *U. S. v. Mullin* (D. C.) 71 Fed. 682, 688; *In re Neagle*, 135 U. S. 1, 63, 10 Sup. Ct. 658, 34 L. Ed. 55.

The result is that there was no error in the view of the Attorney General and of the Secretary of the Interior that the latter and his subordinates had authority to close the business of noncitizens who refused to pay the permit taxes fixed by the laws of the Five Civilized Tribes, and that the deportation of the offenders was not the only method available for the enforcement of these laws. The conclusion necessarily follows that the prohibition of the deportation of noncitizens from the Indian Territory by the act of 1902 neither repealed nor annulled the permit laws of the tribes, nor deprived the Secretary of the Interior and the defendants of the authority to enforce them by preventing their violators from continuing their unlawful business after they had refused to pay the taxes.

The correctness of this conclusion is placed beyond doubt by a brief consideration of the circumstances under which the act of 1902 was passed, and the terms of the provision for deportation. The Attorney General and the secretary had held, as we have seen, that the latter had

authority not only to deport, but to close the business of, offenders, to stop the violation of these laws. The natural—the direct—way to strike down these permit taxes and to annul these laws was to provide in simple words that the taxes should no longer be exacted, or that the laws should no longer be enforced. But the act of 1902 contains no such provision. It does not refer to or mention the permit taxes in any way whatever, and it does not limit its prohibition of deportation to those liable to pay such taxes, but extends it to every person in lawful possession of a lot in a town site established under the acts of Congress in a town or city in the Indian Territory, whether he was liable to pay such taxes or not. The only rational inference from this legislation is that Congress never had any purpose to annul the laws of the tribes prescribing their permit taxes, or to prevent their enforcement by the passage of the deportation act of 1902, and that that act had no such effect.

The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns, and that the Secretary of the Interior and his subordinates may lawfully enforce those laws by closing the business of those who violate them, and thereby preventing the continuance of that violation.

This case has been considered and the result in it has been reached upon the assumption that since this suit was commenced the complainants have purchased and paid the entire consideration for the lot or lots in the town of Wagoner which they occupy—an assumption which we are assured by their counsel is in accordance with the fact—and in the assurance that, since the deportation of the complainants from the territory has been prohibited by the act of 1902, the defendants will not attempt to remove them. This course has been pursued at the request of counsel to prevent a multiplicity of suits in view of the fact that many controversies conditioned by similar facts are said to exist.

There are, however, other reasons why the decrees of the courts in the Indian Territory in this case are not reversible. Those decrees must be judged not by the facts or faiths which were not disclosed or were not in existence when they were rendered, but by the facts presented in the record before them and before us. The facts relative to the title of the complainants which that record presents are these only: that they were on August 23, 1901, the owners of improvements on lots in the town of Wagoner which had been appraised and listed to them, and which they intended to buy; that they were exercising the privilege of conducting mercantile business in that town without paying the permit taxes due from them under the Creek laws; and that the defendants were about to close their business, and to report them to the Secretary of the Interior for removal from the territory. There was no error in the dismissal of the bill and the refusal of the courts to enjoin the defendants upon that state of facts, because those facts disclosed no extinguishment of the title of the Creek Nation, and no withdrawal of the lots or of the town site from the Indian country, even if the general rule cited in *Bates v. Clark* were applicable to these lands, and be-

cause at the time the defendants threatened to close the business of the complainants and to report them to the secretary for removal from the territory the prohibition of deportation contained in the act of 1902 had not been enacted, and the defendants had lawful authority both to stop their business and to deport them from the territory. Rev. St. § 2149; 23 Opinions of Attorneys General, 219, 220; *Morris v. Hitchcock*, 194 U. S. 392, 24 Sup. Ct. 712, 48 L. Ed. 1030. Moreover, the bill itself disclosed all these facts, and the United States Court for the Northern District of the Indian Territory rightfully sustained a demurrer to it and dismissed the bill as early as August 27, 1901. That decree should have been affirmed. But upon an appeal the Court of Appeals of the Indian Territory erroneously reversed and remanded the case for further proceedings. Upon receipt of its mandate the defendants answered, and upon this answer and a stipulation that the averments of the bill were true the trial court again dismissed the bill, and that decree has now been affirmed by the Court of Appeals of the Indian Territory. Objection is made that the trial court erred, and that its final decree should have been reversed because that court did not obey the mandate and follow the first decision of the Court of Appeals of the Indian Territory as the law of the case. Conceding, without considering or deciding, that the trial court fell into an error here, and that for that reason the Court of Appeals of the Indian Territory should have reversed the second decree of dismissal, nevertheless its decree of affirmance is not reversible in this court because it effects the right and the inevitable result. The first decree of the Court of Appeals, which reversed the decree that sustained the demurrer, was not reviewable by appeal, because it was not a final decree. When appeal was taken to this court from the second decree of the Court of Appeals of the Indian Territory, which affirmed the decree that dismissed the bill upon the merits, all the proceedings from the inception of the suit became subject to review in this court for the first time. As prior to this time this court had never had the opportunity to review the first decision of the Court of Appeals of the Indian Territory, that decision was not the law of the case in this court. *Morgan v. Thompson*, 59 C. C. A. 672, 124 Fed. 203. That decision was erroneous. It was a reversal, and it should have been an affirmance. If we should now reverse the decree of dismissal which has been rendered, it would only be to direct the entry of a decree of dismissal in the same terms upon the demurrer. As a decree which has the same effect has already been entered, it will not be disturbed. A right decree for a wrong reason is not reversible.

The decrees below must be affirmed, and it is so ordered.

**DAVENPORT v. SOUTHERN RY. CO. et al.**

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 547.

**REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—JOINT ACTION FOR TORT.**

A complaint in an action against a nonresident railroad company and certain of its servants, residents of the state, to recover for the death of a person, caused by acts of the servants committed in the course of their employment, although not by express order or in the presence of any officer of the company, but which acts are charged to have been negligent, willful, reckless, and malicious, does not state a separable cause of action which renders the cause removable by the railroad company alone, under the decisions of the Supreme Court, when it is alleged that the injury occurred through the joint and concurrent negligence of the defendants.

[Ed. Note.—Separable controversy ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

Purnell, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

For opinion below, see 124 Fed. 983.

H. J. Haynsworth (Haynsworth, Parker & Patterson, on the brief), for plaintiff in error.

T. P. Cothran, for defendant in error.

Before GOFF, Circuit Judge, and PURNELL and McDOWELL, District Judges.

McDOWELL, District Judge. This action was instituted in a state court of South Carolina, and was removed to the United States Circuit Court for the District of South Carolina by the nonresident defendant, the Southern Railway Company. A motion to remand was overruled, and at the trial a verdict for the defendant was directed, and judgment entered accordingly. The complaint reads as follows:

**COMPLAINT.****STATE OF SOUTH CAROLINA, COUNTY OF GREENVILLE.****IN COURT OF COMMON PLEAS.**

William Davenport, as administrator of the estate of Emma Davenport, deceased, plaintiff, against Southern Railway Company, Richard Joel and William Jones, defendants.

The plaintiff, complaining against the defendants, alleges:

(1) That the defendants Richard Joel and William Jones are residents of the county and state aforesaid.

(2) That the defendant Southern Railway Company is a corporation duly chartered under the laws of the state of Virginia, and is the owner of and operates a certain line of railway in the state of South Carolina, extending from the city of Greenville by the town of Piedmont to the city of Columbia, which railway was formerly known as the Columbia & Greenville Railroad. And the Southern Railway Company is engaged in the business of a common carrier on said railroad, and has an office in the county and state aforesaid.

(3) That at Piedmont, in the county and state aforesaid, there are located the mills and mill village of the Piedmont Manufacturing Company. That

said mill village is quite populous, containing several thousand inhabitants. That the lands on which the said mills and village are situate are owned by the Piedmont Manufacturing Company, and extend to within a few feet of the station of the Southern Railway Company at said place.

(4) That many years ago a spur or side track was constructed from the main line of said railroad at a point near the station at Piedmont to a point near the mills of the Piedmont Manufacturing Company, a distance of about one mile; the said spur or side track extending along and over the lands of the said Piedmont Manufacturing Company. That the said Southern Railway Company does not own the land or the right of way over which the said spur or side track extends, but is maintaining the said track, running its cars thereon as licensee, and was and is without exclusive rights thereto. That the said spur is seldom used, and only for the purpose of hauling freights to and from the said mill. That no locomotive is kept at the station at Piedmont, and that the said spur or side track is used only at such times as there happens to be a freight engine at said station.

(5) That a short distance from the said mills, and near the center of the town of Piedmont, the said spur or side track crosses a deep hollow or valley over which is a long trestle, some thirty feet high. That a plank walkway extends along said trestle from one side to the other, and this has been habitually used as a public walkway on which the people of the town of Piedmont, including men, women, and children, some of them being of very tender age, have been accustomed immemorially to travel, to wit, for the space of more than twenty years, as plaintiff is informed and believes. This fact was well known to the defendants. And that the Southern Railway Company has made no objection to such use, and has taken no steps to prevent the same, and has acquiesced therein.

(6) That Emma Davenport, late of the county and state aforesaid, was the wife of William Davenport, and that they, with their children hereinafter named, resided in the town of Piedmont; and that the said William Davenport, together with his daughter Ida and his son John Allen, were in the employ of the Piedmont Manufacturing Company; and that the said family resided in and rented one of the tenement houses in Piedmont belonging to said Piedmont Manufacturing Company, which was situate on the opposite side of the said hollow from the mills of the said company, and were entitled to use the said walkway.

(7) That on the morning of January 31, 1903, while the said William Davenport and his said two children were at work in the mills of the Piedmont Manufacturing Company, the said Emma Davenport had occasion to go from her house to that portion of the town lying near the said mills, and she took her little boy, Mack, a child of five years of age. That in doing so, she, in pursuance of the usual custom and practice of the said people residing in said village, walked with her son along the plankway over the said trestle. That she had nearly reached the opposite side of the trestle, when she suddenly saw a hand car heavily loaded with cross-ties coming from behind a bend in a deep cut only a short distance away, and approaching her with great speed. That, realizing her inability to reach the end of the trestle towards which she was going in time to escape the hand car, and that her only chance of escape was to retreat to a bench or safety place near the middle of said trestle, she gathered her child in her arms, and ran back toward said safety place, thus endeavoring to escape the hand car. That just before she reached the said safety place she was struck by the hand car and violently thrown from the trestle with great force, her child being still in her arms. That she fell to the ground below, a distance of 30 feet, and her skull was broken, and her shoulder and collarbone and chest crushed in; from which injuries she suffered great pain and died shortly thereafter.

(8) That the defendants Richard Joel and William Jones were section hands in the employ of the Southern Railway Company at and near Piedmont, and in pursuance of their employment they had previously carried the said hand car from a point on the main line over the said spur or side track across the trestle to a point near the mills of the Piedmont Manufacturing Company, and had there loaded the same heavily with cross-ties. That in returning they pushed the said hand car to a point where it struck a downgrade leading

towards said trestle, and at that point they negligently and recklessly turned loose said hand car, and without getting on the car, or taking any precautions whatever to control and direct its movements, and without any warning or notice whatever, and without taking any steps to see that the track was clear and that no one would be endangered, they let the said car go forward with great speed and violence, and that in its unrestrained course it ran upon and killed the said Emma Davenport. That the point where the hand car was turned loose was some three hundred feet, more or less, from the trestle, and the view of the trestle being shut off by the sides of a deep cut, through which the spur or side track passed, and in doing so bends; so that the said Emma Davenport could not see the said car until it was very near to her, and the defendants gave her no notice of her peril until it was too late to escape.

(9) That the conduct of the defendants in turning loose the said hand car loaded with cross-ties in the midst of the said town of Piedmont, and in allowing it to rush uncontrolled across the said trestle, which they well knew was habitually used by the employes of the said mills and their families, including women and children, and without taking any steps to see that the way was clear, was reckless, willful, and malicious, and in total disregard of the safety of the public, and that this was the proximate cause of the death of the said Emma Davenport.

(10) That the defendants, in the handling of the said car as aforesaid, and in allowing it to escape and kill the said Emma Davenport, were negligent.

(11) That the death of the said Emma Davenport occurred through the joint and concurrent carelessness, negligence, recklessness, wantonness, and willfulness of the defendants as aforesaid.

(12) That the said Emma Davenport left surviving her husband, William Davenport, and her five children, Ida Davenport, who was fourteen years of age; John Allen Davenport, eleven years of age; Geneva Davenport, eight years of age; Mack Davenport, five years of age; and Lillie, an infant of eight months. That by the death of the said Emma Davenport this plaintiff has been deprived of a devoted wife, and her said children have been deprived of the care and attention of a devoted mother. That they have been damaged by the death of the said Emma Davenport as aforesaid in the sum of twenty thousand (\$20,000) dollars.

(13) That the plaintiff, William Davenport, has been duly appointed administrator of the estate of Emma Davenport, deceased, by the probate court for Greenville county, and now brings action for the benefit of her husband and children as aforesaid.

Wherefore the plaintiff prays judgment against the defendant for the sum of twenty thousand dollars, and for the costs of this action.

Haynsworth, Parker & Patterson, Plaintiff's Attorneys.

May 9, 1908.

It has been for many years a gravely disputed question whether a complaint setting out a misfeasance committed by a servant in the course of his employment, not in the presence of, and not by the express command of, the master, resulting in an injury to a third person, states a case of joint tort. The overwhelming weight of authority among the subordinate federal courts is to the effect that it does not. See 18 Ency. Pl. & Pr. 230, 231; Warax v. Cincinnati R. Co. (C. C.) 72 Fed. 647; Hukill v. Maysville R. Co. (C. C.) 72 Fed. 753; Landers v. Felton (C. C.) 73 Fed. 311; Helms v. N. P. R. Co. (C. C.) 120 Fed. 389; Free v. W. U. Tel. Co. (C. C.) 122 Fed. 309; Bryce v. Southern R. Co. (C. C.) 122 Fed. 709; Gustafson v. Chicago R. Co. (C. C.) 128 Fed. 85; Amer. Bridge Co. v. Hunt, 130 Fed. 302, 64 C. C. A. 548. Among the state courts there is much authority for either view. There is, so far as we are advised, no statute in South Carolina specifically giving a joint right of action in all cases of torts by servants. The common-law rule adopted by the courts of that state is that the identification of master and serv-

ant is so complete that when both are liable the liability may be enforced in a joint action, at least in cases (such as we have here) where the act of the servant (*Hukill v. Maysville R. Co.* [C. C.] 72 Fed. 753; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437) is a misfeasance (*Schumpert v. Southern R. Co.*, 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802, and cases there cited).

The recent case of *Southern R. Co. v. Carson*, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907, even if earlier opinions of the Supreme Court did not lead to such result, seems to us to make it imperative that this court reverse the trial court, and direct that this cause be remanded to the state court.

In *Southern Railway Co. v. Carson*, *supra*, the plaintiff, a citizen of South Carolina, while employed by the Southern Railway Company as a flagman, was sent in between two cars to make a coupling. While in this position the injury to the plaintiff happened, as is alleged in the complaint, by reason of the "joint and concurrent carelessness, negligence, and recklessness of the defendants," the railway company and the engineer and conductor of the train. The action was brought in a South Carolina state court. The two employé defendants were citizens of that state, and the railway company a citizen of Virginia. No effort to remove the case to the federal court was made. The jury brought in a verdict against the railway company alone, judgment in accordance therewith was entered, and an appeal taken to the State Supreme Court, which affirmed the judgment of the lower court. On writ of error to the Supreme Court of the United States, it was argued that a verdict could not legally have been rendered against the company alone, because, if it had been sued alone, it would have had the right of removal. The Chief Justice said:

"The right of removal depends on the act of Congress, and the company not only, on the face of the pleadings, did not come within the act, but it made no effort to assert the right."

And then follows, *inter alia*, the often-quoted statement:

"A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is \* \* \* whatever the plaintiff declares it to be in his pleadings."

So far as can be discovered from the report of the Carson Case, the plaintiff's pleadings did not differ in any essential respect from the complaint in the case at bar.

It is unnecessary to state our understanding of the rule intended to be laid down by the Supreme Court, to be gathered from the Carson Case; *Chicago R. C. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055; *Railway Co. v. Dixon*, 179 U. S. 140, 21 Sup. Ct. 67, 45 L. Ed. 121; *Powers v. C. & O.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, and the earlier cases there cited. It is sufficient to say that any possible interpretation of that court's meaning leaves us with a ruling under which this case must be remanded to the state court.

1. Let it be assumed that the Supreme Court gives its adherence to the doctrine that the identification of master and servant is so complete

that a statement of facts showing that a misfeasance by a servant was committed in the course of his employment, although not in the presence of, and not by the express order of, the master, is a statement of a joint tort. On this assumption, there was clearly no right of removal here. The complaint states facts showing that the relation of master and servant existed, and that the tort was committed by the servants in the course of their employment. If the facts stated showed a joint tort, as they do under this rule of law, there was, of course, a joint liability, and no right of separation by any defendant.

2. Let it be assumed that the Supreme Court intended that in states holding the above-stated doctrine the federal courts in such states should follow the rule of the state courts. *Helms v. N. P. R. Co.* (C. C.) 120 Fed. 389, 398. On this assumption, the federal trial court erred, in that it did not follow the settled doctrine of the South Carolina Court of Appeals. See *Schumpert v. Southern R. Co.*, *supra*, and cases there cited.

3. Let it be assumed, as was suggested by Judge Hanford (*Creagh v. Equitable Ins. Co.* [C. C.] 88 Fed. 1, 3), that the Supreme Court gives its adherence to the doctrine heretofore followed in the subordinate federal courts—holds that want of joint liability may be used as a defense in the state court, but denies that the want of joint liability gives a right of removal, or, in other words, denies that a misjoinder of causes of action is matter to be considered on a motion to remand. *Dougherty v. Yazoo R. Co.*, 122 Fed. 205, 58 C. C. A. 651; *Fogarty v. So. R. Co.* (C. C.) 123 Fed. 973; *Dougherty v. Atchison* (C. C.) 126 Fed. 239, 240. On this assumption, of course, the case at bar should be remanded to the state court.

4. Let it be assumed that the Supreme Court intended that a mere allegation, in the nature of a conclusion of law, to the effect that there was concurrent negligence or a joint tort—even where the facts stated show, under the doctrine of the subordinate federal courts, that there was no concurrent negligence and no joint tort—makes a case which is not removable. On this assumption, also, the case must be remanded. We think the facts stated in the complaint at bar fail to show a case of joint tort, under the doctrine of the lower federal courts. But paragraph 11 does, by way of a conclusion of law, allege that the death of the intestate occurred through the joint and concurrent negligence of the defendants. It is generally true that ambiguities in pleadings are to be construed against the pleader, but there is no room for doubt here as to the pleader's intent in the use of the word "defendants." He did not mean merely the two servants. He meant all the defendants. There was no sufficient reason for charging that the negligence was "joint and concurrent" if the pleader referred only to the two servants. The facts already stated showed that the act complained of was jointly committed by the two servants. And there was good reason for making this allegation if the pleader referred to all the defendants.

It follows that we must reverse, and direct that the cause be remanded to the state court. No consideration has been given the instruction of the trial court to find for the defendant. The lower federal court had no jurisdiction to try the case on its merits.

**Reversed.**



PURNELL, District Judge (dissenting). I cannot concur in the conclusion reached by the court, for the following reasons:

Suit was instituted in the court of common pleas for Greenville county, S. C., for \$20,000 damages on account of the death of Emma Davenport at Piedmont, S. C. The action was brought against the Southern Railway Company and Richard Joel and William Jones, employes of said company; the complaint charging that the deceased was knocked off a trestle by a loose hand car loaded with cross-ties, negligently, recklessly, and willfully permitted to escape by said employes. Within due time the defendant railway company filed its petition for removal of the United States Circuit Court for the District of South Carolina, which was granted. Plaintiff filed notice of motion to remand the case to the state court, which motion was heard and refused. On October 22, 1903, the case was tried before a jury. At the close of plaintiff's testimony the court directed a verdict for the defendant. From the judgment entered upon this verdict plaintiff appealed.

The facts developed in the testimony for the plaintiff are substantially as follows: At Piedmont, a station on the defendant's railroad, there is a large cotton mill about a mile from the station. There is a spur track leading from the station to the mill, for the most part upon the land of the cotton mill, but laid under an arrangement between the mill and the railway company by which the track is kept up by the railway company, and its trains operated thereon as the shipping necessities of the mill require—not on any schedule, but irregularly. At the time of the year at which the killing occurred—being the busy season—trains are run over the spur several times during the day. On this spur track there is a trestle about 200 yards long and 30 feet high. Between the rails a plank is laid from one end of the trestle to the other. Over this trestle factory operatives were accustomed to walk daily, though there was a street and path almost as convenient. There had been signs up, warning people not to use the trestle, but these had disappeared, and there were no such signs at this time. Beyond the trestle from the station there is a sharp ascending grade, and a curve to the right through a cut and grove of trees. Further on is the wastehouse of the cotton factory, not visible from any part of the trestle. On January 31, 1903, the defendants Richard Joel and William Jones had been sent by the section foreman with a hand car to get a load of cross-ties from near the wastehouse. After loading the hand car with cross-ties, the said employes started to push the hand car over a grade in the direction of the trestle. As it reached the highest point of the grade, the car escaped from their hands and started down the grade towards the trestle. The said employes attempted, but were unable, to overtake the car. At this moment the deceased, with her little boy, was upon the trestle, going in the direction of the mill. She saw the car, turned to escape to a safety booth, but was overtaken, knocked from the trestle, and died from injuries received. The boy escaped, practically unhurt.

Two questions are raised by the exceptions, i. e.: Did the Circuit Judge properly refuse the plaintiff's motion to remand? And did the Circuit Judge properly direct a verdict for defendant company?

Where the right of removal depends upon the existence of a separable controversy, the question is to be determined by the condition of

the record in the state court at the time of the filing of the petition to remove, and the cause of action is whatever the plaintiff declares it to be. *C. & O. R. R. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Gableman v. Peoria, etc., Ry.*, 179 U. S. 337, 21 Sup. Ct. 171, 45 L. Ed. 220; *Powers v. C. & O. Ry.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. This being held to be the rule, it is all-important to determine what was the case as made by the declaration in the state court—not to imagine anything, as plaintiff in error asks the court to do in the brief. In my view, this has been correctly done by the learned judge in his analysis of the complaint, as follows:

"It will be observed that the only charge against the Southern Railway Company is because of the acts of these agents of it, and of them alone, committed in the absence of any official or of any other agent of that company; that the acts of these agents are characterized as reckless, willful, and malicious. Indeed, the whole charge of the complaint seems to be for the acts of these two men, Joel and Jones. After stating that these two men had control of the car, the complaint, in the ninth paragraph, says 'that the conduct of the defendants [these two men] in turning loose the said hand car, and in allowing it to run loose, was reckless, willful, and malicious.' In the tenth paragraph it says 'that the defendants, in handling the car as aforesaid [that is, these two men], and in allowing it to kill plaintiff's intestate, were negligent.' And in the eleventh paragraph it says 'that the death of plaintiff's intestate occurred through the joint and concurrent carelessness, negligence, recklessness, and willfulness of the defendants as aforesaid.'"

The Circuit Judge then holds that the controversy is separable upon three grounds: (1) The liability of the master for the negligent act of a servant is one imposed by the policy of the law, and does not present a case of joint and concurrent tort. (2) For a simple negligent act of the servant the master is not responsible to a third person. (3) The respective liabilities of master and servant for the willful tort by the servant, without direction, participation, or ratification on the master's part, are different, and do not therefore present a case of joint and concurrent tort.

In the many cases cited in the able brief of counsel for plaintiff, it will be noted the defendants joined were joint tort feorsors, so alleged, and in *C. & O. Ry. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, the case most relied on in all cases of this nature, the same is true, and the Supreme Court distinctly holds, on the authorities cited by the Chief Justice, who delivered the opinion. In all of the cases where removal was refused it was held that it was not a separable controversy, because the complaint charged concurrent negligence. In the case at bar the complaint, taking all the allegations to be true, does not make out such a case as is contemplated in the line of decisions cited. In the case of *Powers v. C. & O. Ry.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, the motion to remove was denied, on the express ground that the complaint stated a joint liability, and it would not be removed, because the defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but cannot deprive the plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. This is putting the case of the plaintiff in error as strongly as it can be put under

the decisions. The case is so ably disposed of in the opinion of the Circuit Judge who heard the case below, found in the record, that I am constrained to adopt the following as my opinion:

"There are clearly in this complaint two controversies. One against the Southern Railway Company, because of the negligence of its servants; the other against these servants themselves, because of their own recklessness, willfulness, and malice. The controversy with the Southern Railway Company is because of the acts of its agents, for which the policy of the law makes it responsible. That with these individuals is upon their own personal responsibility for their own reckless, wanton, and malicious act. The Southern Railway Company is responsible to third persons for the negligence of its agents. But for the negligence merely, these agents are not responsible to third persons. *Ewell's Evans on Agency*, 438. Negligence is negative in its character. It is the omission to perform some duty. *Milwaukee, etc., Ry. v. Arms*, 91 U. S. 489, 23 L. Ed. 374. It implies nonfeasance, and is contradistinguished from misfeasance. To make the agent responsible to third persons, there must be some positive act of wrong on his part. The whole doctrine is clearly stated in *Story on Agency* (9th Ed.) §§ 308, 309: 'We come, in the next place, to the consideration of the liabilities of agents to third persons in regard to torts or wrongs done by them in the course of their agency. \* \* \* And the distinction ordinarily taken is between acts of misfeasance or positive wrongs, and nonfeasance or mere omission of duty by private agents. The master is always liable to third persons for the misfeasance and negligence and omissions of duty of his servant in all cases within the scope of his employment. So, there, the principal in like manner is liable to third persons for the like misfeasance, negligence, and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases when the tort is of such a nature as that he is entitled to compensation. The agent is also liable to third persons for his own misfeasance and positive wrongs. But he is not liable to third persons for his own nonfeasance or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal.'

"In an action against a principal for the acts of his agent, he is liable not only for acts of negligence, but also for willful and malicious acts done in the course of his employment. *Andrews American Law*, 860, quoting *Chicago, etc., v. West*, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380, and other authorities. In such an action the principal is liable only for compensatory damages. *Vicksburg & M. R. R. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257. But it is not responsible in punitive or vindictive damages or smart money unless the principal participated in the wrongful act of its agents, expressly or impliedly, by its conduct authorizing or approving of it either before or after it was committed. *Lake Shore, etc., v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. 'A corporation, like a natural person, may be held liable in exemplary or punitive damages for the acts of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation. So a railroad corporation cannot be charged with punitive or exemplary damages for the illegal, wanton, or oppressive conduct of a conductor of one of its trains to a passenger.' *Id.* There is nothing in this complaint which measures up to these requirements as against the Southern Railway Company. Indeed, in the acts complained of, and in its mode of stating them, the averments of the complaint wholly negative the idea that the corporation could have participated. Before the corporation can be held to the same responsibility as Joel and Jones, the two other defendants, it must be averred and proved that their wanton, willful, and malicious acts were done by its authority.

"But the plaintiff, not content with his claim against the Southern Railway Company and his right to obtain compensation, seeks also damages at the hands of Joel and Jones for wanton, willful, and malicious conduct. His remedy as against them is different, far more extensive, and requiring a different judgment. There is thus a controversy with the Southern Railway Company separable from that with the other defendants, and the cause is removable."

On the facts stated, and they are in substance all the facts developed in the testimony, would the court have permitted a verdict for plaintiff to stand? If not, then there is no error in directing a verdict. *R. R. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Commissioners v. Clark*, 94 U. S. 278, 24 L. Ed. 59; *Thompson v. Southern Ry. Co.* (C. C.) 113 Fed. 890; *Patton v. Southern Ry.*, 111 Fed. 712, 49 C. C. A. 569; and numerous other authorities. This doctrine is settled.

Most of the reported cases refer to public crossings, or tracks used as a highway, but it will be noted this spur does not fall under either head. Trains were not run on it regularly, but frequently at irregular hours. The track was the property of the railway company, which it had the legal right to use at any and all times. Plaintiff's intestate had no legal right on the track or the trestle. Notices had been posted warning people not to use the track as a walkway, though said notices were down, and had been for a considerable time. The section master, it was shown, had even slowed up his car on the trestle to allow a party walking to get by or reach the safety booth. It was much more convenient for many of the operatives living in the village to pass to and from their homes to the mill by crossing the trestle, but in doing so they used the track with knowledge of the danger. The railway company, while objecting, as evidenced by the fact that warning notices had been posted, did not churlishly refuse to permit them to do so. Perhaps there was good reason for this. At all events, it appears to be the fact. Under such circumstances, plaintiff's intestate was, if not a trespasser, at best a mere licensee to whom the railway company owed no duty except to refrain from willful injury. There is no evidence of such willful injury. *Elliott on R. R.'s*, 1740; *Louisville & N. R. R. Co. v. McClish*, 115 Fed. 273, 53 C. C. A. 60. If this be so of a regular track, how much more is it of a spur track over which trains are operated irregularly, especially when this is known to the community. The mere fact that persons living in the neighborhood of a railroad track have become accustomed to use it to walk upon without objection on the part of the railroad does not alter or change the duty of the railroad to such persons. It would indeed be a harsh rule which would protect from accident and give damages to those who, with tacit permission, for private convenience, go on the property of another without being invited or required to do so. There is, however, abundant authority for the rule laid down by the Supreme Court of South Carolina in *Haltiwanger v. R. R. Co.*, 64 S. C. 7, 41 S. E. 810, that if one voluntarily goes upon the track of a railroad company which is in daily, and sometimes hourly, use for the transportation of its trains, without legal authority, he becomes a trespasser.

Only the case as to the Southern Railway Company was removed and on trial, and there is no evidence of willful or wanton injury or negligence as to it to support a verdict for damages. A careful examination of the record discloses no error, hence the judgment of the Circuit Court should be affirmed. For the reasons stated, I dissent.

## MEMPHIS CONSOLIDATED GAS &amp; ELECTRIC CO. v. LETSON.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1905.)

No. 1,356.

**1. ELECTRIC LIGHT COMPANIES—INJURY TO CUSTOMER—NEGLIGENCE—INFERENCE.**

Where a customer of an electric light company was killed, while turning on a light in the house, by the crossing of the primary and secondary wires at the transformer in the street, the jury, in the absence of explanation, may infer negligence from the happening of the accident, though the wires were properly installed, but the court is not required to say whether it should be presumed.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, § 11.]

**2. SAME—CONTRIBUTORY NEGLIGENCE.**

The question of what kind of a cord was connected with an electric light in a house, in turning on which a customer of the electric light company was killed, is immaterial on the question of contributory negligence, where any kind of a cord that might have been used could not have prevented the accident.

**3. WRONGFUL DEATH—DAMAGES—EVIDENCE OF EARNING CAPACITY.**

In the absence of better evidence as to the earning capacity of deceased, in an action for negligent killing, evidence of what he spent on his family is admissible, though this may be overcome by evidence that he derived it otherwise than from his earnings.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 88.]

**4. SAME—INSTRUCTION.**

An instruction, in an action for the damages resulting to the widow and children of deceased from his death, as authorized by the statutes of Tennessee, *held* to keep within the rules and fairly set forth the elements to be considered, as determined by the Supreme Court of that state in construing such statutes.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

E. E. Wright, for plaintiff in error.

Bell, Terry & Bell, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On May 19, 1903, J. J. Letson, a resident of Memphis, Tenn., was instantly killed by an electric shock received while turning on a 16 candle power incandescent lamp in the basement of his house. The lamp was a portable one, being attached to a cord. The deceased had been, since September 7, 1901, a patron of the Memphis Consolidated Gas & Electric Company, which had contracted to furnish him, for illuminating purposes, with a current of 104 volts to supply twenty 16 candle power incandescent lamps. Such a current is not regarded as dangerous to human life. Under the method in use, this harmless current was obtained by passing the initial dangerous current of approximately 2,300 volts from the primary wire into a transformer located on a pole in the street near Mr. Letson's house, where it was reduced to 104 volts and transmitted into the residence by the secondary wire. An examination made shortly after the accident disclosed the fact that the primary wire had become crossed

with the secondary wire on the outside of the transformer, the insulation had worn off, an electrical contact or "cross" had been established, and the current of approximately 2,300 volts was being transmitted directly into the residence without passing through the transformer at all. This current was of such deadly intensity that no method of insulation ordinarily used in residences would protect one attempting to use it for lighting purposes. Mr. Letson, having occasion to use the lamp, seized it at the socket and turned the button, and the current passed through his body, killing him instantly. A neighbor who was present and attempted to release him was shocked and slightly burned. The suit was brought under the Tennessee statute by the widow, on behalf of herself and infant son. The electric company was charged with negligence in permitting the deadly current to pass into the residence of the deceased. The jury returned a verdict for \$13,750. We shall consider such of the assignments of error as seem material. They may be grouped under three heads: First, those relating to the charge of negligence, and the nature of the proof required to sustain it; second, those growing out of the defense of contributory negligence; and, third, those concerning the measure of damages.

1. The declaration charged the defendant in three counts with negligence in permitting a dangerous and deadly current of electricity to pass into the house of the plaintiff's intestate: First, by negligently installing its wires (in connection with the transformer) and defectively insulating them, so that the primary and secondary wires were permitted to come into contact; second, by so negligently conducting its electric light plant as to permit such current to so pass; and, third, by so negligently conducting itself that, by means of defective wiring, insulation, and apparatus, it permitted such current to so pass. The defendant denied any negligence, averring that the accident was due to the negligence of the plaintiff's intestate. The testimony of the plaintiff conclusively showed that the cause of the accident was the contact or "cross" between the primary and secondary wires, and tended to show that this was due to the defective installation of the transformer, the wires being improperly located with reference to one another, and one left so loose that it naturally crossed the other. The defendant attempted to meet this by showing it had installed the transformer in the usual and proper way, that used by other electric light companies and regarded by experts as safe; but here it stopped. Conceding that the "cross" existed, it made no effort to explain how it happened, or to show that some cause for which it was not responsible had brought about the contact. Obviously, the "cross" was in itself a negligent condition of the wires, because it exposed customers within reach to the risk of serious, and probably fatal, injury. Such being the nature of the testimony, the court charged the jury as follows:

"You may also and you should look at the fact that the accident occurred, the fact that the wires confessedly did come together, and cause this accident, as the fact and circumstance in this case in determining whether there was any negligence. It is not sufficient in itself— Well, I don't say that— It is for you to say whether or not, from the nature and character of this accident, from the nature and character of these structures, from the condition and circumstances that surrounded the particular cause of happening of the accident, was, of itself, sufficient to infer negligence in the original

structure. It may or may not. It is a question for the jury to determine, and you are to look at the happening of the accident as a fact in the case, just as you look at all the other facts, the opinion of the expert witnesses, the description of the structure by the people who made it, the description as it was found at the time of the accident and immediately afterwards, and you are to take the fact that the accident did happen, along with all the other facts and circumstances, and say whether or not it is a proper and reasonable inference to draw from the accident itself that it was negligently constructed, or whether the accident was of such a character that the contact might have taken place without any negligence in the original construction and maintenance of the wire.

"Now, I am going to illustrate that point to you by telling you of an experience of my own in relation to this question. I was sitting on the same bench in the trial of a case with Mr. Justice Brown, now of the Supreme Court of the United States, when he was a district judge, and the question came up as to when a jury, or a trier of the facts, or a court, in submitting a question to the jury, would be forced to infer from the accident itself that there had been negligence, and illustration was made of two railroad trains upon a single track coming into collision. I made the suggestion that that was of itself conclusive evidence of the fact that there was negligence somewhere for which the company was liable to the passengers; that two trains could not come into collision on the track of a railroad company without negligence on the part of the company somewhere, no matter whether we know where it was or not. Mr. Justice Brown said he did not agree to that, because he said some third party might come and throw a switch in such a way that the company would not be liable for it. That is one way it might happen. There might be such a structure of the grades that a train might get away without negligence on the part of the company, and might run away and go downgrade and go on the track and make it, and he went on to suggest certain contingencies that might happen that would show that it was not a conclusive evidence of negligence that the collision had taken place. Now, we had that suggestion here by one of the witnesses in relation to this accident. He said somebody might have climbed on this pole and put his wires together, and it is not impossible to imagine that some enemy of Letson that wanted to kill him might go up there and put them together just for the very purpose of killing him. But, gentlemen of the jury, you are not to determine the question from mere imagination of what might have been done. There must be in the proof itself some suggestion of such a contingency as would relieve the inference of negligence that you might otherwise draw from the happening of the accident itself.

"It is the duty of the defendant company, where an accident happens from which the jury would be forced to infer negligence, it is the duty of the defendant company to show to you such facts and circumstances as would show that, notwithstanding that negligence, notwithstanding that inference, there was in this particular case such circumstances as would relieve the accident of the inference that you would otherwise draw about the negligence. I don't mean that the burden of proof is on the defendant company to show that it was guiltless of negligence; that is not what I mean. The burden is on the plaintiff to show that it was guilty of negligence; but you, in determining this question, as to how much importance you are to attach to the accident itself as proof of the negligence, you are to look at whether or not the facts and circumstances of the case have shown anything to indicate that the accident could have happened without negligence; for instance, if a great storm had been shown, a cyclone, or a wind blowing that had disarranged these wires, that had disarranged the cross-arms, that had brought the poles and structures together through some violent, through some extraordinary and unusual, wind and storm, and things like that. If that was indicated in this proof, you would be justified in saying that the happening of the accident didn't indicate it."

The charge is criticised, first, because it applies the rule of *res ipsa loquitur*, and, second, because it does not, but leaves the jury free to do as it sees fit—apply the rule or not. It is urged that the rule is not

applicable, but if it is, the court must say so, and not leave the matter to the jury. This criticism does not appeal to us. We think the court dealt generously with the defendant. No rigid rule of presumptive guilt was applied, but after the inferences naturally to be drawn from certain facts had been explained, the jury was left free to determine, from all the circumstances of the case, whether the defendant had been guilty of negligence or not. This was not a case where the court was obliged to say whether, from the mere fact of the accident, negligence should be presumed. In *Kearney v. London, etc., Ry. Co.*, L. R. 6 Q. B. 759, it was held that negligence might be inferred from the fact that a brick fell from the pier of a railroad bridge without any assignable cause. The brick struck and injured the plaintiff, who was passing along a highway underneath the bridge. This presumption was based upon the duty of the railroad company to keep the bridge in repair, and to inspect it from time to time to ascertain whether the brick work was secure. But, in the present case, the cause of the "fall of the brick" is shown. It was the "cross" between the wires that sent the deadly current into the house. The wires were out of repair. The contention of the company amounts to this: that if the wires were properly installed it cannot be held responsible for their being out of repair, unless it is proved they got out of repair through its fault. But this loses sight of the duty of the company not only to make the wires safe at the start, but to keep them so. They must not only be put in order, but kept in order. The obligation is a continuing one. The safety of patrons and public permits no intermission. Constant oversight and repair are required and must be furnished. Customers who contract for a harmless current to light their houses are entitled to rely on such inspection and repair as will effectually guard them against a dangerous current. They cannot guard themselves. Any attempt to do so would expose them to immediate peril. They must take and use the current on trust, relying upon the protection of the company. In view of this, when a deadly current enters a customer's house and kills him, it is not too much to call upon the company to explain the existence of the defect which caused the tragedy. If attributable to some force which the company could not foresee and guard against, it should not be held culpable. But an unexplained defect is a blamable one. A company which, for purposes of gain, creates or carries a deadly current, must take care of it, and if it gets away because the wires are out of order, and enters a residence and kills a customer without any fault on his part, negligence is presumed, and the company is bound to exculpate itself. *Griffin v. United Electric Light Co.*, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; *Clarke v. Nassau Electric R. Co.* (Sup.) 41 N. Y. Supp. 78; *Dwyer v. Buffalo General Electric Co.* (Sup.) 46 N. Y. Supp. 874; *Wolpers v. Electric Light & Power Co.* (Sup.) 86 N. Y. Supp. 845; *Fitzgerald v. Edison Electric Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217; *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Clements v. Electric Light Co.*, 44 La. Ann. 695, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Hebert*



v. Lake Charles, etc., Waterworks Co. (La. 1903) 35 South. 731, 64 L. R. A. 101; Denver Electric Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39; McLaughlin v. Louisville Electric Light Co., 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; City of Owensboro v. Knox's Adm'r, 76 S. W. 191, 25 Ky. Law Rep. 680; Gilbert v. Duluth General Electric Co. (Minn. 1904) 100 N. W. 653; Newark Electric Light & Power Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; May v. Burdette, 9 Q. B. R. 101; Fletcher v. Rylands, L. R. 1 Ex. 265, 279; Scott v. Docks Co., 3 Hurl. & C. 596; Kearney v. London, etc., Ry. Co., L. R. 6 Q. B. 759, 762.

2. The defendant contended that the plaintiff's intestate was guilty of contributory negligence in using, in connection with the portable lamp which he was turning on when killed, a cord such as is ordinarily used in residences for pendent lights, and which had not been inspected before the current was turned on. The current was turned on September 7, 1901, and the accident occurred May 19, 1903. The inspection of fixtures was made by one Cleary. The testimony was conflicting upon the point whether this portable light was inspected or not, and the court submitted the question to the jury. Cleary testified, under objection, that the kind of cord used on this lamp was in common use in Memphis for that purpose. It was conceded that it would carry safely a current of 104 volts, which was all that was contracted for, and, anyhow, the testimony was all to the effect that such a current was harmless to human life. The proof also made it clear that, no matter what kind of cord had been used, the current of 2,300 volts would have been fatal to Mr. Letson when he grasped the lamp the way he did and turned on the light. In view of this, the action of the court relied on for reversal (if it was erroneous, which it is unnecessary to determine) could have had no effect upon the verdict, and hence was harmless.

In Denver Electric Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39, a young man, while turning on an incandescent light in his father's house, received a shock which seriously injured him. This resulted from a defect in the transformer, whereby a dangerous current was carried into the house. Respecting the effort of the company to show that the plaintiff turned on the light improperly, and thus by his negligence contributed to his injury, the court said (page 307, 31 Colo., page 39, 73 Pac.):

"The fact that the interior fixtures may have been out of repair cannot relieve the company of the responsibility it owes to the public, and owed to the plaintiff, to not permit a deadly current of electricity to enter the house, if within its power to prevent.

In Gilbert v. Duluth General Electric Co. (Minn. 1904), 100 N. W. 653, the plaintiff's intestate was killed while turning on an electric light in his bathroom. His death was caused by an excessive current which entered the house by a "cross" between the primary and secondary wires, so the case was similar to that before us. Respecting the contention that the house fixtures were defective, and therefore the deceased was guilty of contributory negligence, the court said:

"We are of the opinion this contention cannot be sustained. House fixtures are not constructed with a view of connecting wires with death-dealing cur-

rents. It appears from the record secondary wires ordinarily carry a voltage of but 100, or one-fifth the amount of a deadly current, and one twenty-second part of the voltage which the evidence tends to show passed over the wire in question and through the body of the deceased. The deceased was not an electrical expert, and, unlike appellant, he was not engaged in a business which charged him with special knowledge in the premises. We cannot say he was guilty of negligence in not anticipating that primary and secondary wires might become crossed in the streets, and that it was his duty to take precautions to guard against danger therefrom."

Under the charge, which it is unnecessary to quote, the jury may have found either that the cord had been inspected and approved, or, if not, that it would have made no difference whether it or another kind of cord was in use; in other words, that the nature of the fixture had nothing to do with the accident; that the deadly current would have killed Mr. Letson when he came in contact with the brass cap of the lamp, no matter what kind of cord was attached.

3. The remaining assignments relate to the testimony admitted and the charge given respecting the measure of damages. The deceased was a contractor, 39 years old, of good habits, industrious, devoted to his family, and what is called a "good provider." He left a widow, and a son about nine years old. No witness was introduced who was able to state just what his income was, but testimony was admitted tending to show his occupation, his industry, and his mode of life, from which it appears that he was in the habit of spending on his family between \$2,000 and \$2,500 a year. It is urged this was error, but we do not think so. The testimony was admitted in default of better proof of his earning capacity. If a man's income is limited to his earnings, if he spends only what he earns, then, when you show what he spends, you furnish data for estimating what he earns, and that was what was done, and the best that could be done, in this case.

Many exceptions were taken to the charge of the court. It was not brief, neither is counsel's criticism. We have carefully read and considered both. It seems that the Supreme Court of Tennessee has not always been consistent in its construction of the statutes regulating actions of this kind. From time to time it has modified and altered its views; so it was deemed necessary, in the recent case of *Davidson v. Severson*, 109 Tenn. 572, 72 S. W. 967, to review elaborately its many decisions, for the purpose of ascertaining and stating clearly and concisely what the law now is. Counsel agree that the court below differed from both of them in a view he expressed of the nature of the action, but counsel for the plaintiff below insists the error was favorable to the defendant. We agree to this. It is unnecessary to repeat all that was said generally on the subject of damages. The material inquiry is whether the court laid down the right rules for the guidance of the jury, correctly stating the elements of damage to be considered. We think the charge, taken as a whole, stated the law properly, with entire fairness to the defendant. Portions which, detached from the context, might seem to be misleading, are qualified or corrected by what succeeds. Thus, early in the charge, the court made a quotation from the case of *Baltimore & Potomac Railroad Co. v. Mackey*, 157 U. S. 72, 93, 15 Sup. Ct. 491, 39 L. Ed. 624, which the defendant below insists amounted to an instruction that the jury might consider the de-

pendence of the beneficiaries on the deceased, for the purpose of enhancing the damages. But later, when the court came to lay down the rules, the jury was pointedly instructed that the plaintiff and her son were only entitled "to such a fair and temperate sum of money as would compensate them for the loss of the husband and the father." All sentimental considerations were carefully excluded, and the jury was restricted to an estimate of a pecuniary compensation for the pecuniary loss they had sustained. Under the Tennessee statute, the widow and son were entitled to recover the damages resulting to them from the death of the husband and father. The measure of this was the value to them of the life lost. Estimated in money, it was what his life was worth as a prospective producer of money, and, under the charge as given, it was worth no more in that sense to the widow and son than it would have been to the estate; indeed, if anything, it was worth less. Counsel for the plaintiff in error, after quoting the rules laid down in *Davidson v. Severson*, says:

"The rules referred to for the determination of the pecuniary loss to the widow and children embrace only the pecuniary value of the life of the deceased, to be determined upon the consideration of his expectancy of life, his age and condition of health and strength, his capacity for earning money through skill in art, trade, profession, occupation, and business, and his personal habits as to sobriety and industry; all modified, however, by the fact that the expectancy of life is at most only a probability based upon experience, and also by the fact that the earnings of the same individual are not always uniform."

Conceding this to be a fair summary of the law as it stands, we content ourselves, for purpose of comparison, with quoting the language complained of, believing it kept well within the rules and fairly set forth the elements to be considered:

"Obviously there are no such scales with which a jury may measure the damages to a widow and son for the loss of the husband and father. Sentimentally considered, and if you were allowed to fix any damages to assuage their mental sufferings by reason of the loss, there is not money enough in the banks to pay such damages. But the law does not allow you to proceed upon any such theory. It is simply a pecuniary compensation for the pecuniary loss they have sustained. But the jury is not left without some guidance of facts to enable them to determine what would be fair, reasonable, and temperate compensation. There is the age of the plaintiff to begin with. The law does not allow you to take a pencil and tablet and calculate by multiplication the amount of his yearly income by the number of years of his expectancy. Now the proof here is that this man was 39 years old, and you, as men of ordinary affairs, will know about how long a man 39 years old may be expected to live. Now it would be quite an easy thing, if Mr. Letson was satisfactorily proved to have earned \$2,000 or \$2,500 a year, to take a tablet and set down and count up how many years he had left of his life expectancy, and multiply that by 2,000, and find that sum of money. But obviously that is not just, because Mr. Letson may sometimes not earn his \$2,000. He may be sick sometimes. As he grows old he may have less earning capacity, and there are thousands and thousands of contingencies that come up which will make it utterly impossible for you to say that he will uniformly during that whole time earn \$2,000 or \$2,500 a year; and therefore the law does not allow you to start out with a calculation of that kind, any more than it allows you to sit down and say, each one of you, how much you think he ought to have, and add it together and divide it by 12. That is a mathematical calculation that the law does not allow because it is a mathematical calculation, because the nature of the case is such that you cannot very well set down and find on one side the debit and on the other side the credit, and render a verdict accord-

ingly. 'You can't, from the nature of the circumstances and inquiry, determine what you are to start with on one side, and what you are to deduct on the other side; and therefore the law only allows you to look at this question of damage and expectancy as a substantive fact in the case, to see what kind of man he was, whether young or old, and what was the value of that particular man in life. And then it allows you to look at his earning capacity in the same way. What was his capacity in business? what kind of money did he earn? and what kind of man was he about earning money? so as to determine, the best you may, the value of his particular life to his widow and son. Such multiplication as that does not afford, and the jury is not allowed to use it as, a basis of their calculations at all, for the reason that it is impossible, on the other side, to estimate by calculation any deductions for loss of time at work, by sickness, or any contingencies of human life, that prevent a man from earning every day of his life all that his earning capacity would justify. Therefore it is that all the use you can make of the expectancy is that a man of Mr. Letson's age would live about 29 or 30 years. Of course, if he were older or if he were younger, other conditions being equal, you could not give the widow and children of an old man who was nearer the grave the same sum of money that you would a younger man. Next, the Supreme Court of the United States mentions the man's health, which, of course, is an important element in the proof, as an unhealthy and sickly man's life would not be worth as much to the widow and children in a pecuniary sense as the life of one who was in good health. The next is the element of his strength and his capacity to earn money. You take into consideration the man's earning capacity. In determining that, of course, the amount of money that he does earn, if it is in proof before you, is an important element of consideration; but it is not necessary that he should show a fixed income in order to show an earning capacity. It is what he is capable of earning that enters into the calculation, rather than what he actually earns in fact. What he actually earns in fact may be a demonstration of his earning capacity, and yet it may be more than he actually earns. It is not impossible that his fair and reasonable earning capacity might be less than he earns, in fact, under exceptional circumstances—such as favoritism, for instance. So the jury looks to the man's strength and earning capacity as an element in their calculation. In determining this question, you may look at any fact or circumstance in the proof that tends to show what it was. Some objection has been made in this case that no earning capacity has been shown except by showing the mode of living, and it is said that the man may have been living on other people's money and not on his earnings, because it is said that he had recently gone through the bankruptcy court, showing that he was a man who had been in debt. All these circumstances you are to consider for what they may be worth in your opinion in determining what the man's earning capacity was to support his wife and children. If he did, as a matter of fact, support his wife and children in a particular style, you may consider that fact in determining what his earning capacity was. If you should see that he got the money from other sources than from his own efforts and his own earnings or income, that would be a matter also to be determined. But in the absence of proof that he had other sources of income from which to support his family, you would be authorized, I should think, to infer from the fact that he supported his family in a particular style that his earning capacity was equal to that task, in making this estimate of damages to be allowed his widow and son. Certainly what they have lost by his death is that which they received through his life. And, then, you may look to his family, in its condition of dependence upon him, if such was a fact. So, gentlemen of the jury, you look to all the facts and circumstances in this man's condition, such as those which have been indicated, and similar circumstances that may appear in the proof, whatever they are, and estimate, as best you may, the value of the man's life to his widow and son."

The judgment is affirmed.

## WICOMICO COUNTY COM'RS et al. v. BANCROFT.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 516.

**1. RES JUDICATA—PERSONS CONCLUDED BY JUDGMENT—BONDHOLDERS OF RAILROAD COMPANY.**

A question as to the liability of the property of a railroad company to taxation, decided in a suit to which the company was a party, is not res judicata as against holders of mortgage bonds of the company, previously issued, where no one representing the mortgage interest was a party.

**2. TAXATION—SUIT TO ENJOIN ENFORCEMENT—INTEREST OF COMPLAINANT.**

A holder of mortgage bonds of a railroad company has such an interest in its property as entitles him to maintain a suit to enjoin its illegal taxation, where a proper showing is made of the refusal of the mortgage trustee to prosecute such suit.

[Ed. Note.—Persons entitled to injunction restraining, or damages for wrongful enforcement of, tax, see note to *Bayles v. Dunn*, 54 C. C. A. 550.]

**3. SAME—STATUTORY EXEMPTION OF RAILROAD COMPANY—EFFECT OF REORGANIZATION UNDER MARYLAND STATUTE.**

Code Md. 1888, art. 23, §§ 187, 188, which provide that on the sale of any railroad under a mortgage the purchaser shall be authorized to form a corporation to own and operate such railroad, which shall "possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, and in respect to the real and personal property appertaining to the same which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale" under its charter or any statute of the state, are broad enough to pass to the reorganized company an exemption from taxation for a term of years conferred upon the original company by a special statute, the word "immunities" being an apt term to express the intention of the Legislature that an exemption from taxation should be included in the rights vesting in the new company.

**4. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF STATUTES.**

A federal court is not bound to follow the construction placed upon a state statute by the local courts in a suit involving rights under the statute which accrued prior to such construction.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 957.

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hite v. Hite*, 29 C. C. A. 553.]

**5. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT—EXEMPTION FROM TAXATION.**

Where, by special act of the Legislature of a state, a railroad company is exempted from state, county, and municipal taxation for a term of years, such grant creates a contract between the state and the company, and those who subsequently become its creditors or succeed to its rights, which is impaired by the state, within the inhibition of the federal Constitution, by the taxing of the company's property by the local authorities under the general powers conferred on them by statute.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 303.]

**6. TAXATION—EXEMPTION OF RAILROAD—CONSTRUCTION OF STATUTE.**

A railroad company authorized by its charter to build a road between two terminal points on a designated route was by special act granted an exemption from taxation on its property for a term of years after completion of its road. It was also authorized generally by the same

act to build or acquire by purchase other lines of road. *Held*, that the property exempted from taxation was limited to the road built under its charter and such other property as was necessary for its operation.

Appeal and Cross-Appeal from the Circuit Court of the United States for the District of Maryland.

For opinion below, see 121 Fed. 874.

Jas. E. Ellegood, for appellants.

N. P. Bond (Bond & Robinson, on the brief), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

PRITCHARD, Circuit Judge. This is a cross-appeal from a decree of the Circuit Court for the District of Maryland, rendered in a cause wherein a certain bondholder of the Baltimore, Chesapeake & Atlantic Railway Company is plaintiff and the county commissioners of Wicomico county, of the state of Maryland, are defendants. The suit is brought to restrain the defendants from levying taxes on the mortgaged property represented by the bonds and from enforcing the payment of taxes by a sale of the property. It appears from the admitted facts in the case that the corporation was formed to build a line of railroad from Eastern Bay, in Talbot county, to the town of Salisbury, in Wicomico county. It also appears the corporation obtained from the Legislature of Maryland an act enlarging its powers and granting it certain privileges and immunities. The act in question is chapter 133, pp. 210, 211, of the Laws of Maryland of 1886, and the sections of the act which more particularly relate to the issues in this case are Nos. 2, 4, and 5, which are as follows:

"Sec. 2. And be it enacted, that said corporation shall have perpetual existence, and its franchise, property, shares of capital stocks and bonds shall be exempt from all state, county or municipal taxation for the term of thirty years, accounting from the date of the completion of said road between the termini mentioned in its charter."

"Sec. 4. And be it enacted, that the said Baltimore & Eastern Shore Railroad Company, aforesaid, shall have power to unite, connect and consolidate with any railroad company or companies, either in or out of this state, so that the capital stock of said companies so united, connected and consolidated (respectively), may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy, under and by virtue of their respective charters.

"Sec. 5. And be it enacted, that the Baltimore & Eastern Shore Railroad Company shall have power to lease or purchase and operate any railroad or railroads, either in or out of the state, for the purpose of carrying on their business, and any other railroad company in this state shall have the right to lease or sell its railroad or other property to the said Baltimore & Eastern Shore Railroad Company."

The Baltimore & Eastern Shore Railroad Company, in compliance with the provisions of the act, proceeded to construct the road between the termini in its charter, which it completed in August, 1891, and also in June, 1890, purchased all the property of the Wicomico & Pocomoke Railroad Company, which was duly conveyed to it by deed. The

Wicomico & Pocomoke Railroad Company consisted of a line of road about 30 miles in length, extending from Salisbury to Ocean City, and, with the line of railroad complete, the Baltimore & Eastern Shore Railroad consisted of a line of road about 90 miles in length from Eastern Bay to the Atlantic Ocean. After the Baltimore & Eastern Shore Railroad Company had acquired the Wicomico & Pocomoke Railroad it mortgaged the whole of its property to secure an issue of \$1,600,000 of mortgage bonds at par value. This mortgage describes the property as follows: "All and singular the entire line of railroad of the party of the first part (The Baltimore & Eastern Shore Railroad, situate, lying and being in the state of Maryland, between Broad Cove, Eastern Bay, Talbot county, and Salisbury, in Worcester [sic] county), and extending from said termini through the counties of Talbot, Caroline, Dorchester and Wicomico, in said state, and also all the line of railroad from Salisbury, Wicomico county, and Hammock Point, in Worcester county, in said state, which said last mentioned railroad comprised the railroad of Wicomico & Pocomoke Railroad Company, an entire distance of about ninety miles," and also steamboats, docks, piers, rolling stock, etc.; and the rights, privileges, franchises, and immunities, and exemptions, including the "immunity and exemption from taxation granted to, conferred and bestowed on the party of the first part." This mortgage was foreclosed in 1894, by a decree of the Circuit Court for the District of Maryland, and the purchaser of the said mortgaged property at the sale thereof organized a corporation under the name of the Baltimore, Chesapeake & Atlantic Railway Company, under the provisions of sections 187 and 188 of article 23 of the Code of Maryland of 1888, which provisions are as follows:

"Sec. 187. In case of the sale of any railroad situated wholly within this state, or partly within this state and partly within an adjoining state, or the District of Columbia, heretofore or hereafter made by virtue of any mortgage or deed of trust, whether under foreclosure or other judicial proceedings, or pursuant to any power contained in said mortgage or deed of trust, the purchaser or purchasers thereof, or his or their survivor or survivors, representatives or assigns, may, together with their associates, if any, form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, or such portions thereof, as may be situated within this state, by filing in the office of the Secretary of State a certificate of the name and style of such corporation, the number of directors," etc.

"Sec. 188. Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or that part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of this state, or the laws of any other state in which any part of such railroad may have been situated, not inconsistent with the laws of this state."

Pursuant to the foregoing provisions of the Code of Maryland, the purchaser and his associates duly filed a certificate forming the Baltimore, Chesapeake & Atlantic Railway Company. The complainant contends that the Baltimore, Chesapeake & Atlantic Railway Company, as mortgagor, is entitled to all the property, franchises, and immunities purchased as aforesaid at foreclosure sale with the same immunity and freedom from taxation as the same was held by the Balti-

more & Eastern Shore Railroad Company, under the provisions of Act 1886, p. 209, c. 133.

In determining the question of jurisdiction the court held that diverse citizenship gave it jurisdiction, and in passing upon the preliminary questions the learned judge said:

"The questions with regard to the jurisdiction of this court were heretofore considered on a demurrer, and it was held that the diverse citizenship gave the court jurisdiction; that the allegation that the trustee under the mortgage was a nonresident of the state of Maryland, and refused to proceed in this behalf except on conditions with which the complainant was unable to comply, were sufficient to give complainant a standing to file his bill. It was further held complainant, claiming under the mortgage, was not bound by the judgment against the railway company, to which no one claiming under the mortgage was a party, and the complainant was therefore not estopped as by *res adjudicata*."

This ruling of the court is sustained by a number of decisions. A mortgagee is not bound by any proceedings against his mortgagor which were instituted subsequent to the execution of the mortgage, unless he was a party thereto. *Keokuk & W. R. R. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; *Campbell v. Hall*, 16 N. Y. 575; *Carroll v. Goldschmidt*, 83 Fed. 510, 27 C. C. A. 566. While it is true that certain suits were instituted in the courts of Maryland, one of which was between the Baltimore, Chesapeake & Atlantic Railway Company, mortgagor, and the mayor and city council of Ocean City, and the other between the mayor and plaintiff, yet complainant was not a party to either of these suits. Complainant is the holder of 20 bonds of the face value of \$1,000 each, secured by a mortgage made by the Baltimore, Chesapeake & Atlantic Railway Company to the Atlantic Trust Company of New York, long prior to the institution and final adjudication of the cases in the courts of Maryland. The interest of complainant, therefore, is of such a character as to entitle him in a court of equity to seek the relief to which he claims to be entitled under the allegations contained in the bill. *The Balt. Trust & G. Company v. Balt. (C. C.)* 64 Fed. 153; *Barnes v. Kornegay (C. C.)* 62 Fed. 671; *Mercantile T. & Dep. Co. v. Tex. Ry. (C. C.)* 51 Fed. 529.

We now come to consider the question as to whether complainant is entitled to the relief sought in the bill, and in order to determine this question it is necessary to consider the provisions of sections 187 and 188 of article 23 of the Code of Maryland of 1888. It was clearly the intention of the Legislature to provide means by which corporations that became insolvent or otherwise embarrassed could be reorganized and continued under the provisions of the charter which originally brought them into existence. These sections were evidently framed for the purpose of providing for emergencies like the one presented in this case. There is a general inclination on the part of state legislatures to grant immunities to railroads and other corporations with the view of encouraging the development of the particular section of country through which they are to be constructed. To undertake to build a short line of railroad in most sections of the country is a precarious one, to say the least of it, and, in the absence of aid by subscription or immunity from taxation, instances are very rare where in-



dividuals are willing to embark in such hazardous enterprises. In the present case the Legislature of Maryland seemed to adopt this policy, and in order to secure the construction of a road granted certain privileges, franchises, and immunities to the Baltimore & Eastern Railroad Company for a period of 30 years; but it seems, with all the encouragement and aid which had been given this company, it was unable to stem the tide, and as a result its property was sold under foreclosure, and was purchased by the Baltimore, Chesapeake & Atlantic Railway Company. That the Legislature had the power to exempt from taxation the Baltimore & Eastern Shore Railroad Company at the time it was incorporated is unquestioned, and, such being the case, it clearly had the right to provide by statute, as it did in this instance, the means by which the exemption from taxation granted to the Baltimore & Eastern Shore Railroad Company should be extended to any company which might undertake to rehabilitate such original corporation in the event of its becoming insolvent. Did the sale of the property of the Baltimore & Eastern Shore Railroad Company, under the decree which directed the foreclosure of the mortgage, and which undertook to pass the rights, privileges, and franchises granted to said company, have the effect of exempting from taxation the property thus acquired by the purchaser at such sale? In the case of the Chesapeake & Ohio R. R. Co. v. Miller, 114 U. S. 185, 5 Sup. Ct. 813, 29 L. Ed. 121, the court held the original company was exempt from taxation. In that case there was a sale, as in this instance, of all the property, rights, and franchises of the road, and there was also a legislative enactment which provided that the new company should succeed to such franchises, rights, and privileges as would have been passed by the first company but for such sale. The Supreme Court, in discussing this question, said:

"There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption. As was said on this point in *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860: 'Much confusion of thought had arisen in this case and in similar cases from attaching a vague and undefined meaning to the term "franchises." It is often used as synonymous with "rights, privileges, and immunities," though of a personal and temporary character; so that, if any of these exist, it is loosely termed "franchise," and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchises to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as a part of the property of the company; the latter is personal, and is incapable of transfer without express statutory directions.' Here there is no such express statutory direction. Nor is there an equivalent implication by necessary construction. There is nothing in the language itself, nor in the context, nor the subject-matter of the legislation, nor the situation and relation of the parties to be affected, which indicates that a grant of an exemption from taxation to a particular railroad corporation, or to a class of such, was in the contemplation of the legislature."

In *Memphis R. R. Co. v. Com'rs*, 112 U. S. 609, 617, 5 Sup. Ct. 299, 302 (28 L. Ed. 837), after citing a number of decisions to the same effect, the court said:

"According to the principles of those decisions, the exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor."

In view of the authorities bearing on this question, it is clear that the exemption from taxation granted to the Baltimore & Eastern Shore Railroad Company by its charter was not assignable, and that a sale of its property did not, under such charter, carry with it an exemption from taxation. We are therefore called upon to decide as to whether the word "immunities" in section 188 is sufficient in its nature to exempt the new company from taxation. There are a number of cases wherein companies have been organized and the courts have been asked to decide whether the legislative grant authorizing the transfer of rights, privileges, and franchises to the company thus organized had the effect of exempting such corporations from taxation; but the courts have in most instances held that the use of these terms did not give the new companies exemption from taxation. In the case of *Phoenix Ins. Co. v. Tenn.*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660, it was held that, where the word "immunity" was omitted in the last legislative grant the words "rights and privileges" did not exempt the company from taxation. In that case the court said:

"The word 'immunity' expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described as an 'immunity' than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption."

In passing upon this question it is necessary to ascertain the legislative intent as contained in section 188, and an examination of that section leads us to the conclusion that the Legislature fully understood the force and effect of the different terms used therein. In construing section 188 as affecting the rights of the Baltimore, Chesapeake & Atlantic Railway Company which was organized under its provisions, we are of opinion that the word "immunities" was placed in said section for the purpose of exempting from taxation any and all companies thus reorganized which had been granted exemption from taxation by the Legislature in the first instance. In view of the decisions we are forced to the conclusion that the word "immunities" is an apt expression in the present instance, and must be construed to mean exemption from taxation.

The court, in dealing with this question, was not bound to follow the rule of construction adopted by the state court, inasmuch as the organization of the Baltimore, Chesapeake & Atlantic Railway had been consummated, and its bondholders had entered into a contract with the state of Maryland by which it was agreed that in consideration of the construction of said road said company was to be exempt from taxation for a period of 30 years from the date of the completion of the same, and all rights of the bondholders had accrued prior to the rendition of

the decisions of the court of Maryland; and in view of the fact that the purchasers had formed the Baltimore, Chesapeake & Atlantic Railway Company under the provisions of sections 187 and 188 of article 23 of the Code of Maryland of 1888 and the bonds of complainant had been issued and secured by the mortgage dated September 1st, anterior to the decisions of the Court of Appeals of Maryland. The Supreme Court of the United States in the case of *Burgess v. Seligman*, 107 U. S. at page 33, 2 Sup. Ct. at page 21 (27 L. Ed. 359), said:

"The federal courts have an independent jurisdiction in the administration of state laws co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled it is the right and duty of the federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

The charter granted by the state of Maryland, amendments thereto, and section 188 of the Code of that state, constitute a contract between the state and the railroad company by which, among other things, "immunity" from taxation is offered as a consideration or inducement to secure the construction of the railroad between the points mentioned in the charter, and, as such, becomes a part of the contract between the state and the railroad company; and the bondholders by virtue of their interest in the original corporation are entitled to this exemption. The demand on the part of the county commissioners of Wicomico county is in the nature of a legislative act, and is therefore in violation of article 1, cl. 10, of the Constitution of the United States, which provides "no state shall pass any law impairing the obligation of contracts." We think that the Legislature, by the enactment of section 188, intended that such property as was necessary for the operation of the original railroad should be exempt from taxation as enjoyed by that company at the time of the completion of the road. The three classes of property conveyed by the foreclosure sale, as set forth in complainant's brief, are as follows:

"(A) Property formerly belonging to the Baltimore & Eastern Shore Railroad and forming a part of the line built by it under its charter power to construct a road between Eastern Bay and Salisbury.

"(B) Property formerly owned by the Baltimore & Eastern Shore Railroad and acquired by it under its purchase of the Wicomico & Pocomoke property.

"(C) Property at no time owned by the Baltimore & Eastern Shore Rail-

road, but acquired by the Baltimore, Chesapeake & Atlantic Railway Company subsequent to its organization. This class consists mainly of steamboats and wharf property."

In considering this subject in the case of Baltimore, Chesapeake & Atlantic Railway Co. v. Ocean City, 89 Md. 89, 97, 42 Atl. 922, the court, among other things, said:

"The act of 1886 provided for the building and working of a railroad from the shores of Eastern Bay, in Talbot county, to Salisbury, in Wicomico county, passing through the counties of Talbot, Caroline, Dorchester, and Wicomico and it is quite clear, we think, that it was only such property as is necessary for the operation of this road that the Legislature intended to exempt from state, county, and municipal taxation for the term of thirty years from the date of the completion of the road. It means the railroad and its property mentioned in the act, and none other."

We are therefore of opinion that only such property as is mentioned in class "A" is entitled to exemption from taxation under the provisions of section 188.

After carefully considering the authorities bearing on the several questions raised, we are of opinion, for the reasons stated, that there is no error. Therefore the judgment of the circuit court is affirmed.



**COMMONWEALTH ROOFING CO. v. NORTH AMERICAN TRUST  
CO. et al.**

(Circuit Court of Appeals, First Circuit. February 28, 1903.)

No. 562.

**1. RECEIVERS—EFFECT OF APPOINTMENT—RIGHTS OF BUILDING CONTRACTOR.**

While the appointment of a receiver for the property of a corporation may entitle one engaged in the performance of a building contract with the corporation to treat such contract as abandoned as of the date of the receiver's appointment, he is also entitled to a reasonable time before electing to do so for the purpose of ascertaining what may be done by the parties in interest or the receiver with respect to completion of the work.

**2. SAME—SCOPE OF RECEIVERSHIP—INTERESTS PROTECTED.**

When a receiver of specific property has been appointed by a court of competent jurisdiction, his appointment is for the benefit of all concerned, and the status of the property and all interests are preserved as of the date of the appointment, subject to a disposition of all the same by the chancellor on due and reasonable application in respect thereto, or by subsequent proceedings in the event that the receiver is discharged, or of other contingencies which result in a dismissal or restoration of the property.

**3. SAME—EFFECT ON MECHANICS' LIENS—TIME FOR ENFORCEMENT.**

Pub. St. N. H. 1901, c. 141, provides for mechanics' liens, which shall continue for 90 days after the services are performed or the materials are furnished, and by section 17 that "any such lien may be secured by attachment of the property upon which it exists at any time while the lien continues." A contractor for the furnishing of labor and materials in the construction of buildings for a corporation had completed one contract, and was engaged in the performance of another, when a receiver for the property was appointed by a federal court in a suit to foreclose a mortgage thereon. The order authorized the receiver to elect within six months whether to affirm, ratify, or continue any existing contract.

It was thought that the corporation would be able to discharge the receivership, and complete its buildings, and go on with its business, and efforts were made to that end, but were unsuccessful, and the work was not resumed. Thereafter, and about four months after the appointment of the receiver, the contractor, by leave of the court, attached the property, and submitted its claims for liens to the court in the receivership suit. *Held*, that it did not lose its right to liens under either contract by its failure to attach within the statutory 90 days, the intervention of the receivership having rendered such attachments ineffective and unnecessary; and that the court appointing the receiver, the application to it having been seasonable, was bound on equitable principles to preserve and protect the contractor's liens without regard to proceedings elsewhere, having drawn to itself the administration of the property.

Appeal from the Circuit Court of the United States for the District of New Hampshire.

Edo E. Mercelis, for appellant.

Charles E. Hotchkiss (John Kivel, Julien T. Davies, and Charles K. Allen, on the brief), for the North American Trust Company and receivers.

Before COLT and PUTNAM, Circuit Judges, and LOWELL, District Judge.

PUTNAM, Circuit Judge. This case involves the construction, application, and effect of the Public Statutes of New Hampshire of 1901, c. 141, §§ 10, 16, and 17, as follows:

"Sec. 10. If a person shall by himself or others, perform labor or furnish materials to the amount of fifteen dollars or more, for erecting, altering or repairing a house or other building or appurtenances, by virtue of a contract with the owner thereof, he shall have a lien thereon, and on any right of the owner to the lot of land on which the house, building or appurtenances stand."

"Sec. 16. The lien created by sections 10, 11, 12, 13 and 14 of this chapter, shall continue for ninety days after the services are performed or the materials or supplies are furnished, unless payment thereof is previously made, and shall take precedence of all prior claims except liens on account of taxes.

"Sec. 17. Any such lien may be secured by attachment of the property upon which it exists at any time while the lien continues, the writ and return thereon distinctly expressing that purpose, and such attachment shall have precedence of all other attachments made after such lien accrued, unless founded on a prior lien."

On April 20, 1903, the North American Trust Company filed in the Circuit Court for the District of New Hampshire against the White Mountain Paper Company a bill to foreclose a mortgage given by the paper company to the trust company, and duly recorded before the transactions with the Commonwealth Roofing Company involved in this appeal. It is not necessary that we should undertake to determine for all purposes the full breadth of the mortgage, because it is not questioned that it covered the land and buildings in issue here. Subsequent to the filing of the bill, though on the same day, the Circuit Court appointed a receiver in the way customary in federal courts in foreclosure suits. The appellees raise some question with reference to the extent of this order, but this is immaterial, because the order certainly barred any proceeding against the land and buildings in any court, except after consent given by the chancellor in the foreclosure suit.

The Commonwealth Roofing Company claims liens, under the statute which we have quoted, for labor and materials furnished in the construction of buildings on the mortgaged land under two contracts with the White Mountain Paper Company. One of these contracts had been completed on April 3, 1903; the other had been only partially completed when the receiver was appointed. It cannot be questioned that the order appointing the receiver so far put into his control the assets of the White Mountain Paper Company as to disenable it from making payments on the contracts and from proceeding on the one which remained uncompleted. But the court, in the order appointing the receiver, provided that nothing contained therein should be construed as a ratification, affirmance, or continuance of any contract made by the paper company, unless the receiver should expressly elect to make such affirmance, ratification, or continuance, and that the receiver should be entitled to six months from the date of the order to exercise such election as to any contract which continued in effect for six months or more. This emphasized the fact, which is easily inferred from the record, as we will see, that all parties hoped, at least for the time being, that the paper company would be able to adjust its affairs and resume its work. It cannot be questioned that under the settled rules the roofing company became entitled to treat the contract as abandoned as of the date of the appointment of the receiver, but, of course, entitled to delay a reasonable time before declaring an abandonment on its part, for the purpose of ascertaining what would ultimately be determined on as to the resumption of work. *Florence Mining Company v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Jones on Liens* (1888) vol. 2, § 1438. Moreover, the case is the usual one: a corporation, whose transactions are large and involved, with reference to which, on the appointment of a receiver, coming, as such appointments often do, suddenly and unexpectedly, all parties concerned require time to ascertain their various positions, and to determine whether they must resort to legal remedies, and, if yes, what they should be. Under the circumstances the roofing company cannot be charged with laches according to the rules of equity, in that it did not proceed immediately, or within the short space of 90 days named in the statute, to enforce its liens under either of its contracts.

It should be observed that the statute which we have quoted makes no requirement, as do the statutes of some states, to the effect that giving or filing a notice is a condition precedent to the creation of a lien. What might be the effect of such a requirement we have no occasion to consider. It was also determined in *Pike v. Scott*, 60 N. H. 469, that the statutory lien is not so limited that, in the case of a continuing contract, the 90 days run *de die in diem* from the time of each item of labor or material, and that they run from the time the last materials or the last labor were furnished or done. We also think that we are justified by various expressions in this opinion and in the statute in holding that at the time the order appointing the receiver was made the roofing company had existing liens for the labor and materials done or furnished prior thereto under each

contract. Its liens were at that time not merely inchoate, but complete, and attached to the property in question as then existing rights. Section 17 provides that the lien "may be secured by attachment of the property on which it exists at any time while the lien continues." Whether this word "may" is to be construed as permissive only, leaving open to the creditor other methods of enforcing liens, or whether it is absolutely restrictive, we have no occasion to determine. The result of it all is that, when the order appointing the receiver was entered, the roofing company had complete liens, though they might afterwards be lost by a failure to comply with the statute. We thus describe the precise nature of its liens without intending to express any opinion with reference to inchoate liens, as we have no occasion at present to do so.

On July 1, 1903, the receiver notified the roofing company that money could not be raised, and the plant would not be completed. Thereafterwards, on August 25, 1903, the roofing company petitioned the Circuit Court for, and obtained, leave to attach for the purpose of securing its liens under the two contracts. It also asked to be allowed to intervene in the foreclosure litigation so far as might be necessary for their protection and enforcement. Leave to attach having been granted, on the same day it sued out its writ and did attach as provided by the statute. Referring to the facts and considerations already stated, it cannot be questioned that under the circumstances it exercised its option to abandon the contract within a reasonable time in the view of the chancery courts and their rules as to laches; and the only point made is that the statutory 90 days run from the 4th day of April, when the last materials and labor were furnished or done, and that the statutory period is controlling, notwithstanding the intervening appointment of a receiver.

Afterwards, on January, 4, 1904, pursuant to the petition of the Commonwealth Roofing Company for leave to intervene to which we have already referred, it filed an answer in the pending proceedings, claiming its liens, and praying that the Circuit Court should determine the priority thereof, and for such other and further relief as to that court should seem just. Thereupon, in accordance with the usual practice under such circumstances, by which the court appointing a receiver may assume jurisdiction to inquire about and determine all liens and priorities, the Circuit Court appointed a master to ascertain what liens, if any, existed, and the extent and amount thereof, and particularly to hear and determine the material questions raised by the roofing company. The master duly made a report, to which no exceptions were taken by any party other than the roofing company. Its exceptions, so far as they are substantial, relate to questions of law; so that, for all further facts which we need, we assume those stated by the master to have been correctly found. He gives the details of the contracts to which we have already referred. He also states the material facts in reference to the mortgage then in process of foreclosure. He refers to the fact that the work at the plant was stopped in December, 1902, on account of the weather and the incomplete condition of the building; also to the fact that nevertheless materials which were intended to

enter into the construction of the buildings, as called for by the contracts, were delivered on the premises as late as April 4, 1903. He states that in May negotiations were pending to such an extent that the prospect was that the affairs of the corporation would soon be adjusted, and funds provided to pay the bills and complete its mill; that on June 15, 1903, the appellant learned that the parties seeking to put the paper company on its feet were still looking over its property with the expectation of going on and completing the plant, but that on July 1, 1903, as already stated, the receiver notified the roofing company that the necessary money could not be raised, and that the plant would not be completed. He ruled as a matter of law that it was necessary, in order to preserve the liens, that attachments should have been made within the statutory 90 days after the furnishing of the last material, which, as we have said, was on April 4th; and that the appointment of the receiver did not do away with this necessity.

The master then finds the amount due on the completed contract, and the amount remaining unpaid on the uncompleted contract at the time the receiver was appointed, the details of which we need not state; and he rules, in effect, that the liens were lost. The exceptions of the roofing company to the master's report were duly heard by the court and disallowed, and the report was confirmed, and a decree entered accordingly, whereupon this appeal was seasonably taken.

In regard to the uncompleted contract, there has been some discussion before us as to the probable effect of the negotiations in enlarging, even at the common law, the statutory period, and also as to the question whether that period might not be held to run from the time when a suit at law could have been commenced on the contract for the recovery of the amount finally to come due thereon. Reference has been made in this connection to *Freeto v. Houghton*, 58 N. H. 100, and *Kendall v. Pickard*, 67 N. H. 470, 473, 32 Atl. 763, which contain some observations favorable to the roofing company in these particulars, although not decisive. In the view we take of this appeal, it is not necessary to consider these topics.

We have already said there were existing, complete liens on April 20, 1903, when the receiver was appointed. As we have further said, whatever may have been the extent of the authority given the receiver, it expressly covered the property against which these liens are claimed; and therefore, from the time of his appointment, any attempt to proceed against that property for their effectual enforcement would have been invalid, and a contempt of the Circuit Court, unless with the consent of that court. Moreover, even if that court had, within the statutory 90 days, given leave to proceed by a suit at common law, as provided by statute, it would have held its hand on the judgment thus obtained, and have permitted the liquidation of it only in such manner as it might itself direct when the judgment was obtained. Furthermore, as was done in this case, notwithstanding leave had been given to attach, and either with or without such leave, the Circuit Court, on the application of the lienor, or on the application of any other party interested in the litigation, might have



proceeded to investigate and adjudicate with reference to all the rights of the lienor, and to give such remedy as the equity of the case might advise. In other words, by appointing the receiver of the property upon which the lien attached, the Circuit Court assumed the control thereof and of the lienor, and stood in its path; and, having assumed such control, it also, on settled principles, assumed the obligation to do equity, and to protect the lienor so far as it had any just rights in the premises. Therefore, on the broad rules of equity, the chancellor, having thus interposed his authority, was bound, on the application of the lienor, as on the applications of other parties in interest, to consider the question of its rights, and to preserve the same, without regard to proceedings elsewhere, which the court might or might not approve, and without regard to any formalities, required by statute or the common law, subsequent to the order appointing the receiver, which also it might or might not permit. It is in consequence of this that we find in the authorities such general expressions as the following:

"The appointment of a receiver does not divest the property of prior existing liens, but affects them only in the manner and time of their enforcement." "While the property is in the possession of the receiver, the right to enforce the lien is suspended, because the property is in the custody and control of the court." *Beach on Receivers* (2d Ed. 1897) 194.

"Wherever property subject to a lien has been brought within the domain of a court of equity, and a receiver of that property is appointed, whatever rents and profits the receiver gets into his hands will be dedicated, along with the corpus of the fund, to the satisfaction of the lien, after paying taxes, interest, and the like burdens." *Id.* 318.

In considering these broad propositions, we pass by the class of cases where an appointment constituted nominally a receivership, but really a trusteeship for winding up the assets of a corporation, partnership, or joint-stock company, so that, necessarily, the court must dispose of all the assets, and marshal them according to existing liens, and where, moreover, rulings were specifically made in view of that fact. We, however, find support for our positions in an opinion rendered in behalf of the Supreme Court, which evidently has relation to receivers for whatever purpose appointed. In *Davis v. Gray*, 16 Wall. 203, 217, 218, 21 L. Ed. 447, Mr. Justice Swayne, speaking in behalf of the court regarding a receiver, says:

"The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties."

He also says that the receiver is "required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties to the litigation"; and that "he is not appointed for the benefit of either of the parties, but of all concerned." Again, he observes:

"A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution."

In the present case, notwithstanding leave had been given to proceed by writ of attachment, the Circuit Court, as we have already said, properly took jurisdiction of, and passed upon, the claims of the appellant. How can it be deemed necessary that, in order that a lien existing when a receiver is appointed should be satisfied, proceedings should be taken by writ of attachment, when, after all, the court which appoints the receiver has the power to treat such proceedings as futile? This question is answered by the broad rule which we have stated. The just conclusion is that, when a receiver of specific property has been appointed by a court having competent jurisdiction, the status of the property and all interests are preserved as of the date of the appointment, subject to a disposition of all the same by the chancellor on due and seasonable application in reference thereto. Mr. Justice Swayne's expression to the effect that such an appointment has been said to be an equitable execution is of peculiar force in this respect.

It is to be observed at this point, however, that our propositions do not go to the extent of maintaining that a court which has appointed a merely interlocutory receiver, as was the case here, is always required to adjudicate finally questions of liens, and provide for their satisfaction. This, in view of the interlocutory nature of the proceedings, the court may or may not do, according to the equities and necessities of the case; but, in the event the receiver is discharged, or in the event of other contingencies which render it suitable that the court should not go through to the conclusion, it is bound in some way, on due application, to preserve the essential rights of the parties as they existed when the receiver was appointed.

It is also to be observed that, while it follows from what we have said that the action of the chancellor in regard to rights existing at the time a receiver is appointed, including statutory liens, is not positively restricted by any specific provisions of the common law or the statutes with reference to methods and times of procedure, yet in this as in all other matters he must regard the rules of laches peculiar to equity. Unless protected by some general or special order made in discharging property from the custody of receivers, liens and other privileges may then be lost. Also, while the property remains under the control of the chancellor, unless relief is prayed for promptly, the progress of the estate may have so developed that an equitable estoppel will have arisen. But in the present case, under the circumstances we have explained, no claim can be made that any party has suffered by the delay, or that there was any delay as to either contract which was unreasonable. Therefore we conclude that under all the circumstances relief should have been granted to the Commonwealth Roofing Company, and that, as to this, the essential circumstances as to both contracts are the same.

Various incidental questions, however, arise, which are reserved for further consideration by the Circuit Court, and are not to be regarded as prejudiced by our judgment on this appeal. Among these is the effect of the provision of the uncompleted contract with reference to payment in bonds of a percentage of the amount coming due under it, if there is such a provision. Also, there may arise

a question whether either lien is in gross against all the buildings referred to in the record, or whether the amounts owing for supplies and labor are to be distributed in due proportion among them, and, if yes, on what rules, or in what method. Also, there stands for consideration the peculiar phraseology of the New Hampshire statute, found in the tenth section thereof, which may, perhaps, be so construed as to give the Commonwealth Roofing Company liens on only the right of redemption of the White Mountain Paper Company as to the mere land, but to give it liens superior to the mortgage on some or all of the buildings. Also, all questions of interest and costs, and of the methods of procedure to be adopted by the chancellor to enforce the liens, remain to be disposed of. On all these we express no opinion, our conclusion being limited to the single point that the liens have not been lost, but should be enforced by the Circuit Court, notwithstanding any lack of compliance with the statute with reference to the time or method of procedure.

We should, perhaps, observe, in conclusion, that decisions have been pressed on our consideration, pro and con, which arose in connection with proceedings under the bankruptcy statutes of the United States. These decisions are conflicting, and not authoritative for Courts of Appeals. They cannot stand in the way of the fundamental rules of equity which we have stated. Moreover, there may be a broad distinction arising out of the fact that, while property in the hands of a receiver is in custodia legis, the same is not ordinarily true in a proper sense with reference to the assets of a bankrupt estate. As to such assets, the ordinary rights of litigation are usually preserved, and parties having claims of any kind may govern themselves accordingly.

The decree of the Circuit Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with our opinion passed down this day, and neither party recovers costs of appeal.

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STANDIFORD et ux, v. THOMPSON.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1905.)

No. 549.

**1. VENDOR AND PURCHASER—CONSTRUCTION OF INSTRUMENT—CONTRACT OF SALE OR OPTION.**

Where an instrument purporting by its terms to be a contract for the sale of the coal underlying certain land was signed only by the owner of the land, and was thereafter referred to in all communications between the parties and in assignments of the instrument, and treated by all parties connected with the matter, as an option only, it will be so construed.

**2. SPECIFIC PERFORMANCE—CONTRACT ENFORCEABLE—OPTION TO PURCHASE COAL LANDS.**

Defendant, who was the owner of land underlaid with coal, executed a paper by which he agreed to sell the coal to one R. It provided that unless a first payment should be made by a date named, or as soon thereafter as the title should be examined and accepted, the agreement should be considered as rescinded. R. was acting as a broker in obtaining op-

tions for a company which sent defendant a written acceptance of the option, but did not make any payment at the time stipulated, nor when the abstract had been approved, and subsequently became insolvent and abandoned the purchase. About 18 months after the agreement, R. obtained an extension agreement signed by himself and defendant, but not under seal, by which the time was extended to a day fixed, and R. agreed that, if payment was not made by such time, he would surrender the "option" and all other papers. Such payment was not made, but several months thereafter R. transferred his rights to complainant, who demanded a conveyance, which was refused. *Held*, that the agreement was merely an option, and time was of its essence, not only by its terms, but in view of the nature of the property, and that, under the facts shown, a court of equity would not decree its specific performance by defendant after the property had increased in value.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling.

Nelson C. Hubbard (Hubbard & Hubbard and W. A. Hook, on the brief), for appellants.

William H. Hearne, for appellee.

Before PRITCHARD, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

BRAWLEY, District Judge. This is an appeal from the Circuit Court of the United States for the Northern District of West Virginia, from an order and decree in a cause wherein the above-named appellants were defendants, and appellee plaintiff, in which the court adjudged "that the plaintiff Josiah V. Thompson is entitled to the specific performance of a contract dated the 11th day of January, 1900, for the sale of certain coal underlying the lands of said John Standiford, in the bill and proceedings mentioned, which contract was made by the said John Standiford to C. V. Riley, and by the said C. V. Riley transferred and assigned to the plaintiff herein."

Standiford and his wife, who will be hereafter referred to as the defendants, owned in fee simple a tract of land situated in Marshall county, W. Va., containing about 253 acres, underlaid with bituminous coal; and on January 11, 1900, he entered into an agreement with C. V. Riley whereby he agreed to sell and convey to said Riley, his heirs and assigns, all the underlying coal in and under the tract of land therein described, for which Riley agreed to pay \$12 per acre for each and every acre, as follows: 25 per cent. in cash, and balance in three equal annual payments. He further agreed to furnish a complete abstract of title, and a general warranty deed, clear of all incumbrances, when the first payment was made, and the other secured by mortgage. The concluding words of this agreement are:

"It is expressly understood and agreed that if the first payment aforesaid is not made on or before the first day of October, 1900, or as soon thereafter as the title shall be examined and accepted by the party of the second part [Riley] or his heirs or assigns, this agreement shall be considered as rescinded and no party shall be bound thereby."

Standiford was a farmer residing in that county, and it appears that C. V. Riley was by occupation a farmer, but engaged also in the coal business and the selling of coal lands; and it appears that he and one

McCombs were engaged in getting options upon coal lands in that section, in the interest of the Viola Coal Company, and that he obtained options on about 34 tracts of land for that purpose. On September 25, 1900, the Viola Coal Company sent to Standiford a written acceptance, service of which was acknowledged on that day, of which the following is a copy:

"We hereby accept under an agreement made for our benefit the option granted by you to C. V. Riley on the 11th day of January, 1900, of all the coal underlying your property, said to contain 253 acres, the same as set forth in the option above mentioned. Our corps of engineers will survey your property to ascertain the acreage, and we will at once inform you as to the result and furnish a plat of the same, by which you can ascertain the accuracy and correctness of the survey. You will please prepare an abstract of your title that the same may be examined and approved by our attorneys."

Standiford furnished an abstract of his title to the firm of Riley & Ritz, of which firm T. S. Riley, a brother of C. V. Riley, was a partner.

The Viola Coal Company was a corporation of \$50,000 capital, of which \$5,000 was paid in, and it contemplated the building of a railroad through these lands, but nothing seems to have been done in furtherance of this purpose. It was stated at the hearing that it was insolvent, and the bill of complaint charges that "the said Viola Coal Company, for some cause or reason unknown to your orator, did wholly fail to complete and carry out its said contract for the purchase of the said coal and coal rights and privileges made with the said C. V. Riley as aforesaid"; and there was a meeting of the farmers who had given options to Riley about the middle of June, 1901, at which Riley was present. One of the parties at the meeting says:

"The meeting was called to consider what they would do. Mr. Riley had promised them their money, you know; and they wanted to see whether the Viola Coal Company was gone, and what had become of them. Riley had this extension paper, and he read that; and then he stated that he would give the farmers their money against the 1st of October, or surrender the paper, as free as he would set down and eat a meal."

The extension paper referred to is as follows:

"This agreement made this 26 day of June, A. D., 1901, between C. V. Riley of the first part and the undersigned parties who heretofore gave options on their coal to the first party of the second part: whereas, the first party now holds options upon the coal of the second parties, and under said options surveys have been made of what is known as the Viola Block, in Webster and Sand Hill Districts, and the said first party desiring further time to complete the sale of said block; it is, therefore, agreed between the first and second parties hereto that in consideration of the second parties extending the time until the first day of October, 1901, the first party agrees that if he or his assignees are not ready to make payment as provided by the options on the last mentioned date, that he will surrender to the second parties said options, and all papers in his possession connected therewith, and release the second parties from all claim and damages by reason of such options."

This paper was signed by C. V. Riley and by John Standiford and seven or eight others. When the 1st of October had passed, and Riley had failed to carry out his agreement, or surrendered the options as agreed, other meetings of the farmers interested were held, at one of which a committee was appointed to consult a lawyer as to whether

they were still bound by their agreements; and this committee consulted Mr. Holt, an attorney of Moundsville, who, in a written opinion, advised them that the options had expired. Some time during the autumn, T. S. Riley, the brother of C. V. Riley, and attorney for him and McCombs, had negotiations with the plaintiff, who resided at Uniontown, Pa.; and on September 27th plaintiff agreed, in a message over the telephone, to take some of the tracts of land on which these parties had options, leaving out about 1,000 or 1,500 acres of the lands lying on the south, which did not bound on his lands. These negotiations culminated in a written agreement of date February 14, 1902, accepted by plaintiff February 21, 1902, whereby he agreed to accept the coal on a subjoined list, aggregating something over 3,000 acres; "settlements and payments to commence in June, 1902." Standiford's name appears last on this list, but the list did not embrace all the tracts on which Riley and McCombs had options; there being, as stated above, about 1,000 or 1,500 acres which he declined to take. Another meeting of the farmers was held November 11th, at which J. M. Ritz, the law partner of T. S. Riley, and representing Thompson, the purchaser, was present.

One of the witnesses who attended this meeting testifies that Ritz "went on to tell them that the coal was sold, and wanted the people to wait for a test well, and stated that the coal was sold subject to the test; and we people would talk in and interrupt him, you know, about telling him that coal was not sold at all, and then he would go ahead and say, 'Oh, yes, it was sold;' and he says, 'If it did not prove satisfactory, we ain't going to ask the party to take the coal;'" and again he said that he had "sold the coal, provided the test well proved out satisfactory, 'and, if it did not,' he said, 'I ain't going to ask the man to take it.'" This same witness, who was one of the parties who had given an option to Riley, says that shortly thereafter he went to Hearn, the attorney for Thompson, carrying with him his abstract of title and deed, and inquired if Thompson was going to take his coal. Hearn told him that his name was not on the list, but perhaps he might hear from him later; and it appears from the testimony that Hearn, as Thompson's attorney, had begun some time about the end of October to pay for some of the lands which Thompson had agreed to buy. The test well was drilled and completed some time in January, and, as already stated, Thompson on February 21, 1902, agreed with McCombs and Riley to accept the coal covered by their options, the list of which was attached to the agreement. Meantime Standiford, acting on the advice of the lawyer consulted by the committee above referred to, and believing himself free to do so, gave an option on his coal in his coal lands to W. H. Hook, January 8, 1902, at \$15 per acre; and on March 8, 1902, C. V. Riley sent a notice to Standiford to present his abstract and deed to W. H. Hearne, Esq., attorney for J. V. Thompson, at his office, at Wheeling, W. Va., as soon as convenient, so that they can be examined and passed upon by him, and that his coal would be "taken up and paid for under the terms of your option to me dated 11th day of January, 1900, and extension thereof." The record shows that on September 28, 1900, there was "an agreement between Charles V. Riley and Edgar A. Holmes, acting for and in behalf of the Viola Coal Com-

pany," reciting that Riley being the "owner of certain options aggregating about 2,800 acres in coal lands," etc., "and is desirous of selling the same to the Viola Coal Company, Holmes, acting in behalf of that company, engages to purchase the same at a fixed price of \$15.00 per acre." It further shows that on October 9, 1901, the Viola Coal Company disclaims and renounces any and all interest in and claim to the coal properties or options referred to in the list annexed, and transfers and assigns unto Charles V. Riley all right, title, and interest in and to said property and options. This assignment is signed, "Viola Coal Company, Floyd K. Smith, Secretary." It has not the seal of the company, and there is nothing in the record showing that Smith was secretary. All of these agreements, with the agreement of January 11, 1900, and that of June 26, 1901, are indorsed, "For value received, I hereby transfer and assign the within agreement [or contract] to J. V. Thompson. [Signed] C. V. Riley," no date appearing on the assignments.

The only other paper in the record that seems to be necessary to a full understanding of the facts in the cause is the letter which appears to have been sent from the law office of T. S. Riley, Wheeling, W. Va., April 30, 1901, addressed to John Standiford, and signed by J. M. Ritz, which says: "Dear Sir: Your abstract has been finished and is now ready for the typewriter. I have gone back with the title to the patent or Commonwealth. Very truly yours."

The main question to be determined is the nature of the agreement of January 11, 1900. This agreement, although in its recitals professing to be bipartite, is signed only by Standiford. Riley, the party to whom it was given, calls it an "option," and the paper in evidence is indorsed, "Coal option," and all through his testimony in the cause it is referred to as an option. In the agreement between Riley and Holmes, acting for the Viola Coal Company, it is called an "option," and the Viola Coal Company, in its notice to Standiford of date September 25, 1900, says: "We hereby accept under an agreement made for our benefit the option granted by you to C. V. Riley on the 11th day of January, 1900," etc. The agreement of June 26, 1901, between Riley, Standiford, and others, refers to this and like papers as options; and in his letter to Standiford of March 8, 1902, which is the first and only written notice of the sale to Thompson, Riley speaks of it as "your option to me dated on the 11th day of January, 1900." All the witnesses, including T. S. Riley, the lawyer, and his partner, Ritz, and W. H. Hearne, the counsel for the appellee, refer to this and like papers as options. The agreement between McCombs and Riley of February 14, 1902, which is a part of plaintiff's chain of title, assigns "the options covering the coal land," and Standiford's name appears on the "list of options," which was a part of that agreement.

Although the rule undoubtedly is that an instrument in writing must be construed according to its terms, and not by what people call it, the contemporaneous interpretation, and the practical construction put upon its language by both parties and by all persons familiar with the subject-matter, should be considered in solving any doubts which may arise in construing the words in which the parties have attempted to clothe their intentions; and there is no doubt

whatever, from the testimony, that Standiford intended to give Riley an option upon his coal lands, and nothing more. An option has been defined to be "an unaccepted offer to sell." It transfers no title or right in rem, but creates a right in personam, and that right is to accept or reject a present offer within a limited or reasonable time in the future. It is a continuing offer until the expiration of the time limited, and we are of opinion that, in the circumstances proved in this case, it was Standiford's intention to confer upon Riley an agency for the sale of the lands mentioned, at a named price, for a named period, and it was expressly agreed that the first payment was to be made on or before October 1, 1900, "or as soon thereafter as the title shall be examined and accepted." This last clause undoubtedly gave Riley some time after October 1, 1900, for the examination of the title, and to that extent is somewhat indefinite, but the time to be given for that purpose should be construed to be a reasonable time; and it appears from the testimony that Standiford did furnish to Riley's attorneys all the papers necessary for the preparation of an abstract of title, and by the letter of April 30, 1901, it further appears that the attorneys had finished the abstract before that date, and had gone back with the title to the patent or Commonwealth, and no fault or question was made as to the title. When, therefore, the Viola Coal Company, in whose interest the option was taken, on September 25, 1901, five days before the expiration of the time limited, gave notice to Standiford that they accepted the terms proposed, they did not perfect any title simply by exercising their right of acceptance, but the same should have been fully completed by payment within the time limited, or a reasonable time thereafter. But it is contended that this paper of January 11th was not an option, but an agreement of sale. How did Riley regard it? There can be no sale without a purchaser, and Riley surely did not regard himself as a purchaser, nor did he so regard the Viola Coal Company, to whom he assigned all of his rights under the agreement, for we find that in June following, apparently upon the assumption that the Viola Company was insolvent and had no intention of completing the transaction, Riley obtains from Standiford the agreement of June 26, 1901, for the avowed purpose of getting "further time to complete the sale of said block." His whole attitude is that of a broker, who, for the purpose of making commissions for himself, obtains an option for a limited period of these coal lands, which he expects to sell to the Viola Coal Company. When the time fixed in the option had expired, and the Viola Company had lost or abandoned any rights which it could claim under the agreement of January 11th, Riley, still desirous of making his commissions, obtains from Standiford another option, and straightway seeks to find another purchaser. The second option differs from the first in this: That by its terms the time in which to complete the sale is limited to October 1, 1901, and, in consideration of such extension, he expressly agrees that, if he or his assignees are not ready to make payment on the last-mentioned date, he will surrender all the papers in his possession. There is no provision in the second option for any time after October 1st for the examination of the titles—partly, it may be assumed, because the



owners of the land, who had been waiting about 18 months to sell their coal, were not willing to continue indefinitely to allow the cloud to hang over their titles, and partly because there was no longer any question as to Standiford's title, for it had already been examined and approved, and was then in the possession of Riley's brother and counsel, who was present when the agreement of June 26, 1901, was made.

The only view upon which plaintiff's cause can be sustained is that the agreement of January 11, 1900, was not an option, but a contract for the sale of the land upon a condition subsequent, vesting a title in the land at once in the purchaser, subject to be defeated on the nonpayment of the money upon the day specified. Could Riley be held as a purchaser under such agreement? Clearly not, for he did not sign it, and there was no time from the beginning of these transactions to the end when Standiford could have compelled him to take the land. The doctrine of the specific performance of contracts for the sale of lands mainly depends upon the principle that, when such agreement is made, the purchaser becomes the equitable owner, and a trust is impressed upon the legal estate for his benefit. The beneficial and substantial ownership of the estate is in the vendee, and the equitable ownership of the purchase fund is in the vendor. Equity will therefore enforce the performance of such a contract properly concluded between the parties, if, for sufficient reasons, one of the parties fails to keep the exact date assigned by the contract for its completion, if it can do justice between them, and there is nothing in the express stipulations, or in the nature of the property, or in the surrounding circumstances, which indicates that time was not regarded by the parties as a material element, and the payment of interest on the deferred payment would be full compensation to the vendor for the delay. The ground of relief is that the equitable title being in the vendee, liable to be defeated by failure to comply with a nonessential part of the agreement, equity, which abhors penalties and forfeitures, will in any proper case grant relief where the party asking it has lost his right to a legal remedy by omission to comply with the provisions in respect to the time of performance. In such cases, and in such cases only, can it be properly said that equity does not regard time as of the essence of a contract; but in equity, as at law, the intention of the parties should govern, and if it plainly appears that it was the intention of the parties that no rights should vest until some act was done, and the time for the doing of the prescribed act is definitely specified, a court of equity has no power to make a new contract for the parties, and to confer upon one of them rights which by the terms of the contract did not exist. It cannot disregard the intention of the parties where it is embodied in an express stipulation, and especially is this true where the essential element of time inheres in the nature of the subject-matter. As was said by Justice Story in *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405—a case where specific performance was decreed:

"There is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulation of the par-

ties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or purchaser."

If the subject of the contract is one likely to be of greater or less value, according to the effluxion of time, and a definite time is fixed therein for its performance, there is a necessary implication that time was of the essence of the contract relating to it. As said by the court in *Waterman v. Banks*, 144 U. S. 403, 12 Sup. Ct. 646, 36 L. Ed. 479:

"This principle is peculiarly applicable where the property is of such character that it will likely undergo sudden, frequent, or great fluctuations in value. In respect to mineral property, it has been said that it requires, and of all properties, perhaps, the most requires, the parties interested in it to be vigilant and active in asserting their rights."

Pomeroy on Specific Performance of Contracts, § 387, states the principle thus:

"In respect to unilateral contracts there is some discrepancy among the authorities. One group of decisions holds that, with respect to them, time is, and necessarily must be, essential, in the strict sense of the term, while another group holds that time is merely material, and not essential. This conflict may perhaps be reconciled by a suggestion drawn from the form and provisions of the contracts themselves. Where the contract is really an offer on one side, with a provision that this offer must be assented to and accepted, when a mere acceptance is contemplated, or payment must be made, when payment was the act of acceptance contemplated, at or before a specified day, then, of course, the act of assent or of payment must be done within the prescribed time; and time is, from the very form of the contract, essential. If, therefore, a vendor agrees to convey if payment be made at or before the given date, or if an option is given which is to be accepted by payment within a given time, then the time of the payment is certainly essential. In fact, payment is a condition precedent to the vesting of any right in the vendee."

And after a review of the authorities pro and con, from all of which it appears that the subject-matter of the contract is always considered a material circumstance in construing it, he says, in section 390:

"It is now thoroughly established that the intention of the parties must govern, and, if the intention clearly and unequivocally appears from the contract by means of some express stipulation that time shall be essential, then the time of completion or of performance, or of complying with the terms, will be regarded as essential in equity, as much as at law. No particular form of stipulation is necessary, but any clause will have the effect which clearly and absolutely provides that the contract is to be void if the fulfillment is not within the time prescribed."

In *Richardson v. Hardwick*, 106 U. S. 254, 27 L. Ed. 145, the court, in construing a case where a specific performance was refused, says:

"The written contract gives him the privilege, or as counsel call it, an 'option,' to become equally interested in the lands by paying one-half the purchase money, etc., within two years after its date. The contract of itself did not vest him with any interest or estate in the lands. It merely pointed out the mode in which he might acquire interest, namely, by paying a certain sum of money before a certain time. He did not pay the money within the time limited by the contract. \* \* \* It is clear from the terms of the contract that Richardson was not bound by it. He did not agree to purchase any share in the lands, or to pay Hardwick any money. The contract gave Hardwick no cause of action against Richardson. The latter was not bound to become interested in the lands, or to pay any money thereon, unless he chose to do so. In suits upon unilateral contracts, it is only where the

defendant has had the benefit of the consideration for which he bargained that he can be held bound."

Here we are asked to enforce a contract relating to coal, which in its nature was subject to great changes and fluctuations in value. No fault or laches is imputable to the defendant, for he did all that was required by the terms of the agreement, in furnishing to Riley's attorneys an abstract of title. After waiting about 18 months he gave to Riley, without consideration (for the second extension is not under seal, which might import consideration), an extension of time to October 1, 1901, upon Riley's express agreement to surrender all papers, etc., if the first payment was not made by that date. He then finds that Riley is negotiating with a new purchaser, the plaintiff herein, whose attorney appears at a meeting of farmers who had given like options, and informs them that this contemplated purchaser intends sinking a test well, and, if he finds it satisfactory he will take the lands, otherwise not. This is a condition not referred to or hinted at in the agreement of January 11, 1900. Standiford thus remains in a condition of doubt and uncertainty for a long period of time. He has no contract which he can enforce against anybody. The Viola Company, the only party that was ever in any way bound to him, had abandoned all claims; having, as stated in the bill of complaint, "wholly failed to perform its contract." It was defunct, and Riley, who had represented it in taking the option of June, 1901, had so far supplanted the former agreement that no acceptance under the former by the Viola Company could operate to affect the like option as between Standiford and Riley. Riley confessedly was not bound. He had never agreed to purchase for himself. He was a mere broker, having no title in himself to these lands, but was endeavoring to find a purchaser and thereby secure his commissions. In these circumstances, the defendant and others in like plight took legal advice, and, being assured that he was free from any obligation, had bargained to sell to another. Happily for him, the delay on the part of Riley to find a purchaser who would comply with the terms of the agreement has turned to his advantage, for the price of coal lands was enhanced. Had it been otherwise, and the value had diminished, as it was liable to do, does any one believe that plaintiff would have sought to enforce specific performance? A contract which binds one party for an indefinite period of time, leaving the other party entirely free, is lacking in mutuality. If there was a completed contract, founded upon sufficient consideration, the doctrine of mutuality might be ignored, but here there is no contract which Standiford could have enforced against Riley. The only party who ever became bound was the Viola Company, which, by its acceptance of the option September 25, 1900, could have compelled Standiford to carry out his agreement if it had proffered payment within a reasonable time; but the time fixed in the agreement for payment being October 1, 1900, or as soon thereafter as the titles shall be examined and accepted, any delay on its part in making payment after Standiford had furnished his abstract would be unreasonable, and the testimony shows that Standiford furnished his abstract and the title was examined early in the year 1900. By that time it was apparent that, by reason of insolvency or otherwise, the Viola Company had abandoned all interest in the coal lands.

Neither Riley nor his assignee, the plaintiff here, ever undertook to assume the obligation which was upon the Viola Company by reason of its acceptance; and both Riley and the Viola Company, for whose benefit the agreement was obtained, gave to it the name and character of an option, which required acceptance to make it a completed contract. Neither of them considered it a purchase agreement which would be complete without acceptance. If there is any equitable estate growing out of the agreement, it would be in the Viola Company; and, if such estate is not altogether forfeited and abandoned by reason of its failure for more than a year, without explanation or excuse, to pay for the lands as it agreed to do, it is doubtful whether the paper purporting to be signed by the secretary of the Viola Company in October, 1901, could be considered an instrument which would divest its title, for this paper has not attached to it the seal of the company, and there is no evidence that the company authorized it; but, inasmuch as there is nothing in the decree below which indicates that the judgment appealed from is predicated upon any title derived from the Viola Company, that question need not be further considered.

We are of opinion that the agreement of January 11, 1900, was considered by all the parties to it as an option, and nothing more; that to interpret it as an agreement of sale to Riley, which vested an equitable title in him, would be to make a contract which the parties themselves did not make; that there was not that meeting of minds which must lie at the base of every enforceable contract. The judgment of the court below, therefore, is reversed, and the cause remanded, with instructions to dismiss the bill.

Reversed.

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In re **PLYMOUTH CORDAGE CO. et al.**

(Circuit Court of Appeals, Eighth Circuit. March 7, 1905.)

No. 40.

**1. BANKRUPTCY—PLEADING—JURISDICTIONAL AVERMENTS AMENDABLE.**

The federal courts have power to permit amendments of pleadings by the insertion or correction of jurisdictional as well as other averments.

**2. SAME—PLEADING—AVERMENT OF LESS THAN TWELVE CREDITORS NOT JURISDICTIONAL.**

Where a single creditor files a petition for an adjudication in bankruptcy, the averment that all the creditors of the alleged bankrupt are less than 12 in number does not condition the jurisdiction of the court.

**3. SAME—PLEADING—AMENDMENT.**

A petition in bankruptcy may be amended by the insertion of averments that the alleged bankrupt is not a wage-earner or farmer, and that all his creditors are less than 12 in number.

**4. SAME—PRACTICE—ABSENCE OF DUPLICATE PETITION WAIVED BY ANSWER.**

The objection that a petitioner in bankruptcy failed to file a duplicate of his petition is waived by an answer by the bankrupt within four months of the alleged acts of bankruptcy without presenting the objection.

**5. SAME—PRACTICE—JOINDER OF CREDITORS.**

Creditors may join in a petition in bankruptcy at any time before the decision of the issue of bankruptcy, and be counted to make up the requisite number of creditors and amount of claims.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 104.]

**6. SAME—PRACTICE—TIME OF ADJUDICATION TIME TO TEST SUFFICIENCY OF PETITIONING CREDITORS.**

The time of the adjudication in bankruptcy, and not the time of the institution of proceedings in bankruptcy, is the time to test the sufficiency of the number of the petitioning creditors and of the amount of their claims to warrant the adjudication.

**7. SAME—PRACTICE—NOTICE TO CREDITORS OF PROPOSED DISMISSAL ESSENTIAL.**

Notice to the creditors of the bankrupt of a proposed dismissal of the proceedings is indispensable, and an order of dismissal without notice is erroneous.

(Syllabus by the Court.)

**On Petition for Review.**

This is a petition to superintend and revise in matter of law the proceeding of the District Court of the Second Judicial District of the territory of Oklahoma in the county of Kingfisher upon a petition of the Plymouth Cordage Company, a corporation, for an adjudication that its debtor, J. A. Smith, was a bankrupt. The petition for review was met in this court by a demurrer, so that all of its averments are admitted. They disclose these facts: The Plymouth Cordage Company had a provable claim against J. A. Smith for \$4,430.25, and on October 31, 1901, it filed a petition in bankruptcy in the court below, in which it set forth this fact, the fact that Smith was insolvent, and that he had committed acts of bankruptcy within four months preceding the filing of the petition, and in which it prayed for an adjudication that he was a bankrupt. On November 12, 1901, Smith filed an answer, in which he denied that he had committed any of the acts of bankruptcy set forth in the petition, or that he was insolvent. His answer contained no other averment or denial. On January 30, 1902, other creditors of Smith filed a petition in the same court, in which they set forth the same acts of bankruptcy, and prayed that they might be permitted to join with the cordage company, and that a subpoena might be issued to Smith, and that he might be adjudged a bankrupt. On May 12, 1902, the court dismissed this petition on the ground that it was not properly verified, with leave to amend, and three of the petitioners made the requisite amendments on May 16, 1902. On the same day they made a motion to be permitted to join in the petition of the cordage company. On June 6, 1902, Smith filed an amended and supplemental answer, wherein he denied the acts of bankruptcy charged against him, and alleged that the original petition for bankruptcy was insufficient because it was a petition of but one creditor, and it failed to aver that the creditors of the alleged bankrupt were less than twelve in number; and that the second petition for bankruptcy was insufficient because the entire amount of the claims of those who verified it was less than \$500. In June, 1902, the suit came to trial before a jury upon these issues, but reached no verdict, because the jury was discharged before the trial was completed. On August 2, 1902, the three creditors who had amended their verifications to the petition of January 30, 1902, made a motion to withdraw from the proceedings because Smith had paid their claims. On March 9, 1903, the alleged bankrupt made a motion to dismiss the original petition, and presented with it a list of seventeen creditors, but did not specify their addresses. On April 6, 1903, three creditors presented to the court petitions in bankruptcy and prayed leave to join the Plymouth Cordage Company, and the latter presented an amended petition, prayed that it be permitted to file it, that the three other petitioning creditors be permitted to join with it, that the court cause all the creditors of the bankrupt named in the list filed on March 9, 1903, to be notified of the pendency of the petitions in bankruptcy, and that it delay the hearing upon such petitions and upon the motion to dismiss for a reasonable time to the end that parties in interest should have an opportunity to be heard. The court denied all the applications of the creditors, and dismissed all the petitions.

Edwin A. Krauthoff (Patrick S. Nagle, W. A. McCartney, J. V. C. Karnes, and Alexander New, on the brief), for petitioners.

W. W. Noffsinger (J. C. Roberts, on the brief), for respondent.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The course of this proceeding in bankruptcy in the court below has been tedious, tortuous, and confusing, and 27 alleged errors are presented for our consideration. It is, however, necessary to consider but one question, and that is, was the petition of the cordage company properly dismissed? The grounds relied upon in this court to sustain this dismissal are (1) that the petition was not filed in duplicate; (2) that it was not duly verified; (3) that it contained no averment that the defendant was not a wage-earner, or a person chiefly engaged in farming; (4) that it contained no averment that the alleged bankrupt had only twelve creditors; and (5) that some of the creditors who sought to join in the petition of the cordage company on April 6, 1903, were parties to the petition of January 30, 1902, who failed to amend their verifications.

The first reason for the dismissal of the petition is untenable, because it is not founded in fact. The cordage company, in its petition for review, avers, and the demurrer of the respondent admits, that the original petition of the cordage company was filed in duplicate. Moreover, the bankruptcy act shows that the only purpose of filing in duplicate is to furnish one copy for the clerk and one for service on the bankrupt. Act July 1, 1898, c. 541. § 59c, 30 Stat. 561, 562 [U. S. Comp. St. 1901, p. 3445]. There are decisions in *In re Stevenson* (D. C.) 94 Fed. 110, 115, and in *In re Dupree* (D. C.) 97 Fed. 28, that, when the duplicate is not filed within four months of the alleged act of bankruptcy, its absence is not waived by the general appearance of the respondent, and that the petition should be dismissed for want of jurisdiction. But the alleged bankrupt appeared and answered in the case in hand within four months of the alleged acts of bankruptcy, and without objection on the ground that the petition was not filed in duplicate. The copy for service on the bankrupt is for his benefit. The only object of requiring its filing is to give him a copy of the petition, in order to enable him to answer it. The right to it is a personal privilege, which he may demand and secure or may renounce and waive. As the only benefit of the privilege is to enable him more speedily and conveniently to answer the petition, an answer without a demand of the privilege is a waiver of it. It estops the bankrupt from thereafter insisting upon it, because it leads the petitioner to proceed and to incur expense in reliance upon the renunciation of the privilege which has become *functus officio* by the answer. For a like reason the second ground for the dismissal of the petition—the defect in its verification—was waived by the repeated answers of the alleged bankrupt. *Leidigh Carriage Co. v. Stengel*, 95 Fed. 637, 37 C. C. A. 210; *Roche v. Fox*, Fed. Cas. No. 11,974; *In re Vastbinder* (D. C.) 126 Fed. 417, 418.

The fact that the petition contained no averment that the alleged bankrupt was not a wage-earner or farmer was remediable by

amendment. Rules in Bankruptcy, 11, 89 Fed. vii, 32 C. C. A. xiv; In re Pilger (D. C.) 118 Fed. 206; In re Bellah (D. C.) 116 Fed. 69; Beach v. Macon Grocery Co., 120 Fed. 736, 57 C. C. A. 150; In re Brett (D. C.) 130 Fed. 981, 983; In re Mero (D. C.) 128 Fed. 630, 633.

But it is earnestly and persistently contended that the want of the averment that all of the creditors of Smith were less than twelve in number in the original petition of the cordage company was fatal to the jurisdiction of the court, and could not be cured by amendment. There are, however, several answers to this proposition, which appear to us to be conclusive. In the first place, the uniform practice of the federal courts, founded on the public policy of the nation evidenced by acts of Congress and the rules of the Supreme Court, is to permit amendments in all judicial proceedings where they are necessary to enable parties to reach the merits of the controversy they attempt to present, and where the allowance of such amendments will work no injustice to any one. The act of September 24, 1789, c. 20, § 32, 1 Stat. 91 [U. S. Comp. St. 1901, p. 696, § 954], which has remained in force for more than a century, and has inspired this practice, provides that no proceedings in civil causes in any court of the United States "shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." The rule in bankruptcy declares that "the court may allow amendments to the petition and schedules on application of the petitioner." Neither the act of Congress nor the rule in bankruptcy excepts jurisdictional averments from the power of the court to permit amendments, and the established rule is that jurisdictional as well as other averments may be inserted or reformed by amendment. Whalen v. Gordon, 37 C. C. A. 70, 73, 95 Fed. 305, 308; Bowden v. Burnham, 8 C. C. A. 248, 59 Fed. 752; Carnegie, Phipps & Co. v. Hulbert, 16 C. C. A. 498, 70 Fed. 209.

Again, neither the fact of the existence of twelve creditors at the time of the filing of the petition by a single creditor nor the averment of that fact is indispensable to the jurisdiction of the court or to an adjudication of bankruptcy upon the petition under the bankruptcy law of 1898. It is only essential that there shall have been twelve creditors at the time of the filing of the petition, or that sufficient creditors shall have joined before the adjudication to make three in number whose claims amount in the aggregate to \$500. The bankruptcy act provides that if all of the creditors are less than twelve in number, one creditor whose claim amounts to \$500 may file a petition to adjudge his debtor a bankrupt. But it also provides that, if he avers that the creditors are less than

twelve in number, and if the defendant answers that they are more than twelve, the latter shall file with his answer a list under oath of all the creditors, with their addresses; that thereupon the court shall cause all such creditors to be notified of the pendency of the petition, and shall delay the hearing upon the petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; and that if upon such hearing it shall appear that a sufficient number have joined in the petition, or if prior to or during the hearing a sufficient number shall join therein the case may be proceeded with, but otherwise it shall be dismissed. Section 59d, c. 541, 30 Stat. 561, 562 [3 U. S. Comp. St. 1901, p. 3445]. The same section provides that creditors other than original petitioners may at any time enter their appearance and join in the petition. Section 59f. The fact that there is no averment that the creditors are less than twelve cannot be more fatal to the right of the petitioner to an adjudication in bankruptcy than the fact that he has made such an averment, which, upon the trial, proves to be without foundation in fact. The truth is that the contention of counsel for the respondent fails to distinguish between the averments essential to jurisdiction over the subject-matter and the parties and those requisite to invoke a favorable adjudication upon the petition. Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy or an insufficient complaint at law, accompanied by proper service upon the defendants, gives jurisdiction to the court to determine the questions it presents, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Allegations indispensable to a favorable adjudication or decree include all those requisite to state a complete cause of action, and they comprehend many that are not requisite to the jurisdiction of the suit or proceeding. The averment that all the creditors of Smith were less than twelve was not of the former, but of the latter, class. It was not essential to invoke the jurisdiction of the court over the parties to the proceeding and the property it involved, because the act of Congress gave that court, upon the filing of the petition of the creditor, jurisdiction to hear and determine the questions it presented, whether they were questions of jurisdiction or upon the merits. Not only this, but the averment that the creditors were less than twelve was not even essential to a favorable adjudication upon the petition, because the bankruptcy law provided that if two other creditors, whose claims were sufficient in amount, joined in the petition of the cordage company, the court might proceed to adjudicate the issue of bankruptcy upon the merits although the creditors exceeded twelve in number. The time when, under the bankruptcy law, the petitioning creditors must be sufficient in number and amount, is not at the inception of the pro-



ceeding, but at the time of the adjudication in bankruptcy. Creditors may join at any time before that adjudication and be counted to make up the number of creditors and the amount of claims required by the act. *In re Brett* (D. C.) 130 Fed. 981; *In re Romanow* (D. C.) 92 Fed. 510, 512; *In re Mercur* (D. C.) 95 Fed. 634; *In re Mackey* (D. C.) 110 Fed. 355, 363; *Williams' Case*, Fed. Cas. No. 17,700; *Roche v. Fox*, Fed. Cas. No. 11,974. The averment that there were less than twelve creditors of the alleged bankrupt was not, therefore, indispensable to the jurisdiction of the court, and it was competent for the court to permit its insertion in the petition by amendment.

This conclusion has not been reached without a perusal and thoughtful consideration of the opinion of Judge Holland in *In re Stein* (D. C.) 130 Fed. 377, wherein he holds that a petition which does not show on its face that the claims of the petitioners do not amount in the aggregate to \$500 or over fails to give the court jurisdiction, and that it has no power to allow an amendment whereby other creditors are joined who have claims sufficient to make up the requisite amount. The ruling in that case is not necessarily inconsistent with our conclusion in the case at bar, and neither the decision nor the reasoning which is presented to sustain it commend themselves to our judgment.

Finally, the necessity and utility of an insertion of such an averment in the petition of the cordage company had ceased when the motion to dismiss the petition was made and granted. On January 30, 1902, six creditors petitioned, appeared, and filed a petition to join with the cordage company. Their appearance and prayer to join made them co-petitioners with the cordage company. The fact has not escaped our attention that no order of the court was made that these petitioners should be permitted to join with the cordage company. But no order was necessary. The law gave them permission to join, and when they had entered their appearance and signified their desire to join by a written petition, they became co-petitioners with the cordage company. Section 59f. From the time the petition of January 30, 1902, was filed until after the motion to dismiss the petition of the cordage company was made, there were in court at least four petitioners for the adjudication in bankruptcy. Hence, when the motion to dismiss the petition was filed, it was entirely immaterial whether the number of creditors was more or less than twelve. That motion was made on March 9, 1903. On March 23, 1903, the three petitioners other than the cordage company who had filed motions to withdraw from the petition in August, 1902, were allowed to do so. This order of allowance left the cordage company the only remaining petitioner. On April 6, 1903, four creditors presented their petitions to the judge of the court, and requested that they be permitted to join with the cordage company and the cordage company filed a petition wherein it prayed that the hearing upon these petitions and that the motion to dismiss be delayed for a reasonable time, and that all the creditors of the alleged bankrupt should be notified of the pendency of the petitions that they might have an opportunity to be heard. These pe-

titions were presented to the judge together with an application to amend the petition of October 31, 1901. The court denied the petitions and applications of the creditors, and dismissed the original petition of the cordage company. It is true that the order of dismissal of the original petition bears a filing at 9 a. m. on April 6, 1903, while the order which denied the petition of the Plymouth Cordage Company to amend its petition for a delay in the hearing and a notice to creditors, and which denied the petition of the other three creditors to join in the petition of the cordage company, was filed at 9:05 in the morning of April 6, 1903, and that it recites that it was made because the petitions in bankruptcy had all been dismissed. But the petition for review avers that the amended petitions, the applications to file them, and the application for a delay in the hearing of the motion to dismiss and for notice to the creditors were presented to the judge and denied before the motion to dismiss the original petition was granted. It is not, in our opinion, material whether these new petitions and applications were presented before or after the order of dismissal. They were presented on the same day, and within a few moments of, if not at the same time, that the order of dismissal was made. Whether presented before or after the signature of that order, the power was still vested in the court, and the duty still imposed upon it by the act of Congress, to conform these proceedings to the course there prescribed. That act expressly provides that creditors other than original petitioners may at any time enter their appearance and join in the petition; that when, after issue joined, the fact appears that there are more than twelve creditors, all the creditors shall be notified of the pendency of the petition, and the hearing shall be delayed for a reasonable time to the end that parties in interest shall have an opportunity to be heard (sections 59b, 59f, c. 541, 30 Stat. 561, 562 [3 U. S. Comp. St. 1901, p. 3445]); and that "creditors shall have at least ten days' notice by mail of the proposed dismissal of the proceedings" (section 58a, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]). If the case at bar did not fall within the literal terms of section 59d, because no issue had been made by an averment in the petition that the creditors were less than twelve, and an answer by the respondent Smith that they were more than that number, it was clearly within the purpose and intent of Congress and the fair meaning and spirit of that section. The act contemplates that, where this question of the number of creditors is material, the bankrupt shall file a sworn list of all his creditors, with their addresses. No such list had ever been filed, nor had it ever been material to file it, because until March 23, 1903—only 11 days before the petition was dismissed—there had been more than three petitioning creditors, whose provable claims amounted in the aggregate to more than \$4,000. When the court permitted the withdrawal of three of these creditors, it was its duty under the law to give reasonable notice to all the creditors of the pendency of the petition for an adjudication in bankruptcy, and to give them all an opportunity to join in the petition. Moreover, whether the dismissal was in violation of section 59d or not, it violated the express provision of

section 58a that creditors shall have 10 days' notice by mail of the proposed dismissal of all proceedings. The disregard of this section alone necessitates the vacation of the order of dismissal. The order of dismissal was in violation of sections 58a and 59d of the bankruptcy law and in disregard of the usual practice in such cases, was erroneous, and deprived the creditors of substantial rights secured to them by the act of Congress.

The contention that the failure to give this notice does not constitute prejudicial error, and the citation of *In re Jemison Mercantile Co.*, 112 Fed. 966, 968, 972, 50 C. C. A. 641, have been considered. In the latter case, upon the motion of all the petitioners, a petition in bankruptcy was dismissed without notice to the creditors. Eleven months and 23 days after this dismissal other creditors appeared, and asked permission to join in the dismissed petition and to prosecute the proceeding, and their application was denied. The court held that the dismissal of the petition without giving notice to the creditors was not void, and that the application was too late to be seriously considered. There is a wide difference between an order or judgment that is void and one which is erroneous and reversible upon appeal or petition for review. A dismissal of a petition without notice to creditors is not void because the bankruptcy court has jurisdiction of the subject-matter and of the parties, and its erroneous orders and judgments are as valid, in the absence of direct proceedings to review them, as those in which no error inheres. In the case of *In re Jemison Mercantile Co.* it was too late to review the order of dismissal 11 months after it had been made, and the court properly refused to disturb it. In the case at bar timely application to review the decree of the court below has been made. While that decree is not void, it is erroneous, because it was rendered without the notice to the creditors which the act of Congress requires, and the absence of that notice is fraught with probable consequences to the creditors too grave to be disregarded.

Nor is the absence of notice to creditors the only material error in this dismissal. There were creditors present who should have been permitted to join in the proceeding, and whose joinder would have furnished ample warrant for a denial of the motion to dismiss. At the time this petition was dismissed three creditors, at least two of whom held provable claims against the alleged bankrupt, had appeared in the court, presented proper petitions, and requested leave to join in the original petition. Two of them were sufficient to make the requisite number and amount to warrant a hearing and an adjudication in bankruptcy, and no sound reason is suggested why they should not have then been permitted to take the place of the three creditors whom the court had dismissed from the proceeding 11 days before. The suggestion that some of them had been parties to the petition of January 30, 1902, had failed to amend their verifications, and had retired from that petition under the order of the court, presents no tenable objection to their again becoming petitioners. The only amendment requisite to complete the petition of the cordage company was the insertion of an averment that the respondent, Smith, was not a wage-earner or a farm-

er. This amendment should have been allowed. The other petitioning creditors should have been permitted to join in the original petition, notice of its pendency and of its proposed dismissal should have been given to all the creditors, the disposition of the motion to dismiss should have been delayed for a reasonable time under section 59d of the bankruptcy law to the end that opportunity might be given to the creditors to join in the petition, and at the expiration of that time the question whether the suit should proceed to an adjudication upon the merits or the petition should be dismissed should have been determined by an ascertainment of the fact whether at that time three or more creditors, who had provable claims which amounted in the aggregate to \$500 or over, had become petitioners.

The judgment of dismissal cannot be sustained. It must be vacated, and the case must be remanded to the court below, with directions to cause all the creditors of the alleged bankrupt to be notified of the pendency of the original petition and of the proposed dismissal of the proceedings under section 58a, to continue the hearing upon the motion for dismissal until ample time has been given to creditors after the receipt of notice to be heard upon the motion, to permit all creditors who desire to join in the petition to do so, and if before or during the hearing a sufficient number shall join, to proceed to an adjudication of the suit upon the merits, otherwise to grant the motion for dismissal; and it is so ordered.

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KNAPP v. S. JARVIS ADAMS CO.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1905.)

No. 1,362.

**1. EQUITY—RIGHT TO MAINTAIN SUIT—COMING INTO COURT WITH CLEAN HANDS.**

The maxim of equity that a complainant must come into court with clean hands has reference to fraud or misconduct on the part of complainant in regard to the transaction which is the subject of controversy, and the fact that there was fraud or illegality in the organization of a corporation cannot be set up to defeat its right to maintain a suit for the enforcement of a contract made by it, and of which the defendant received and retains the benefit.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 186.]

**2. CORPORATIONS—POWERS OF DIRECTORS—DECLARING DIVIDENDS.**

The directors of a corporation are impliedly vested with a discretionary power with regard to the time and manner of distributing its profits, and, in the absence of fraud or an abuse of discretion, their action in leaving profits earned in the business instead of distributing them to the stockholders in dividends is legal, and constitutes no violation of the rights of a stockholder.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1288, 1289.]

**3. CONTRACT IN RESTRAINT OF TRADE—CONSIDERATION—LEGALITY.**

Defendant entered the employment of complainant corporation under a contract by which, in addition to his salary, certain stock of the corporation was to be held for his benefit, and the profits or dividends ap-

plicable thereto were to be credited to him toward the purchase price. The contract provided that should he leave the employment for the purpose of entering into a competing business his right to the stock should be forfeited, and he should be entitled only to such sum as had been actually credited to his stock account, but that should he be discharged or leave for any other purpose he should receive the book value of the stock, less the amount due thereon. The company earned a profit the first year, but the same was used in its business, and no dividend was declared and no credit passed to defendant on his stock. Shortly thereafter he left the employment. *Held*, that the payment to him by the company of the book value of the stock, less the purchase price, the amount paid being about 25 per cent. of the face value, constituted a good consideration for a contract by him not to enter into or assist in any competing business for a term of 10 years, and that such contract was legal and enforceable, being ancillary to and in accordance with the original contract of employment.

**4. SAME—TERRITORIAL RESTRICTION.**

A contract not to enter into business in competition with a complainant for a term of years, based on a good consideration, may lawfully extend to all territory wherein complainant's trade is likely to go, having regard to the nature of the business.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 554–560.]

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

Bargar & Bargar and Pomerene & Pomerene, for appellant.  
Henderson & Livesay, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This case was brought here on a former occasion on an appeal by the S. Jarvis Adams Company from a decree dismissing its bill of complaint upon demurrer. The decree of the court below was reversed, with directions to permit the filing of an answer and for further proceedings. 121 Fed. 34, 58 C. C. A. 1.

Upon the entry of the decree in the Circuit Court, pursuant to our mandate, the defendant in that court, who is the appellant here, filed his answer. The answer admits the making of the contracts shown by Exhibits A and B, denies some other allegations of the bill, and sets up certain special matters of defense, which will presently be stated. These exhibits, A and B, were attached to the bill when the latter was filed. The substance of the case as stated by the bill (and of the exhibits which were part thereof) is given, with our opinion, in the volume of reports and at the page of the foregoing citation, to which, in order to save needless repetition, we here refer.

The complainant filed a replication to the answer, proofs were taken, and the case brought to hearing. Judge Thompson, who presided in the Circuit Court, being of opinion that the case as presented by the proofs was controlled by our decision on the former appeal, directed a decree for the complainant.

Counsel for the appellant state the issues for decision by this court, as they understand them, to be as follows:

"First, whether the complainants come into a court of equity with clean hands; second, whether there are in fact any secret processes or trade secrets

to be protected; third, whether the contracts upon which the original complaints are founded are such contracts in restraint of trade as are valid, and (a) are founded upon a legal consideration; (b) afford but a reasonable protection to complainants; (c) require but a reasonable restriction of Knapp and Bossert; (d) are merely ancillary to the main purpose of a lawful contract."

The second of these questions may be dismissed. The decree is silent upon that subject, the complainant having apparently waived any relief in respect to its trade secrets or secret processes. The ground of controversy on that branch of the case is therefore removed.

The special matter of the first "issue" above stated is based upon certain evidence brought out upon the examination of witnesses and not upon any averments of the answer. The imputation that the complainant does not come with clean hands rests upon this basis: that it is shown that when McKnight, Fownes, and the Speers, the parties of the first part in the contract Exhibit A, proceeded to organize the S. Jarvis Adams Company, they first bought out the plant of S. Jarvis Adams & Co. and its good will for \$390,000, and after the company was incorporated they sold this property to it for \$600,000, and took the company's entire capital stock, which was of the same amount, in payment, the company agreeing further to repay them \$125,000, the down payment to S. Jarvis Adams on the purchase from him, and assume the payment of the remaining \$265,000 to S. Jarvis Adams & Co., which had not yet been paid. It is thereupon said by counsel for appellant that the stock was all "pure water," which is not very wide of the mark, but not quite true. It represented the promoter's profits. The business of the company, however, was prosperous, and the profits of the first year amounted to \$150,000.

But whatever the faults in launching the corporation may have been, they cannot be made the subject of inquiry and of remedy in the present suit. The state might interpose to correct them or annul the charter if the incorporation was fraudulent, or, perhaps, the stockholders, if any were defrauded, or creditors, might, in some circumstances, have a remedy in a direct proceeding for that purpose; so that, if we could bring ourselves to believe that the defendant did not know all these facts while he was associated with the company and a prospective stockholder, the matter would be foreign to the present controversy. The maxim of equity to which the defendant refers contemplates some fraud or misconduct on the part of complainant in regard to the transaction which is the subject of controversy, and not to matters not involved in it. It may further be observed that the defendant has never, on that account or any other, sought to rescind the agreement by which his controversy with the company was settled and which is the basis of the present suit. He got the \$6,480.95, and keeps it.

It is manifest that the controversy between the appellant and the company was settled upon the faith of his agreement that he would not engage in competition with the company's manufacture and sale of the specialties enumerated in the contract. By reference to the original contract (Exhibit A), which was the basis of the controversy, it is seen that if he left the company to go into a competing business he was to receive only what had been credited to him upon his stock, which was nothing; whereas, if he left without that intention, he would re-

ceive the book value of his stock, less the sum due upon it, which would include the undivided profits. No dividend had ever been declared, and no credit on the purchase of his stock was due him. The power to declare dividends rests with the directors of a corporation, and a large discretion is given them whether to retain its surplus profits as part of the working capital or divide it out to the stockholders. To be sure, an abuse of that discretion which works a fraud upon the stockholders may be relieved against by a court of equity.

In 1 Mor. on Corp. 447, it is said:

"Profits earned by a corporation may be divided among its shareholders; but it is not a violation of the charter if they are allowed to accumulate and remain invested in the company's business. The managing agents of a corporation are impliedly invested with a discretionary power with regard to the time and manner of distributing its profits. They may apply profits in payment of floating or funded debts or in development of the company's business, and so long as they do not abuse their discretionary powers or violate the company's charter the courts cannot interfere."

And in Thompson's Article on Corporations, 10 Cyc. 548, the law is thus stated:

"In general, except where, under the governing statute or instrument, the directors are overruled by the shareholders, the propriety or expediency of declaring and paying dividends rests in their sound discretion, and the courts will not interfere to compel them to declare and pay a dividend unless they are guilty of bad faith, or of a willful abuse of this discretion, or, what is substantially the same thing, unless in refusing so to do they have acted unreasonably, capriciously, or fraudulently."

The stockholder has no title to the surplus earnings of the company until his share is segregated by the board of directors. The law upon this subject is well and clearly stated in *Wheeler v. Northwestern Sleigh Co.* (C. C.) 39 Fed. 347.

But here there is no proof of fraud in withholding dividends. The business of the company was growing and rapidly extending. It is quite possible that it was wise policy to retain the profits for use in the business. There was nothing in the original contract which entitled the stock set apart for Knapp to any special privilege not belonging to other stock, or that he was to be credited with undivided profits or dividends not declared, except that in one alternative upon his going out he would get an interest in the undivided profits in receiving the book value of the stock. And this confessedly he did get in the settlement. He says he gave this stipulation in the settlement upon advice and his own belief that it was not binding. But he knew that the other party relied upon it, and he is entitled to no relief against it by reason of any legal or equitable consideration due to himself. He must make defense, if at all, upon the ground that his stipulation was injurious to the public, and that the court will not help the other party.

In respect to the point made upon the third issue as grouped by counsel for the appellant, that the stipulation was not founded upon a legal consideration, we find nothing in the proof which disturbs our former conclusion that the consideration for his agreement was both legal and sufficient. It is further contended that the stipulation in question is not necessary to the reasonable protection of the complainant, and requires an unreasonable restriction of the defendant. The proof does not di-

minish the allegations of the bill which were admitted by the demurrer in respect to the scope of the complainant's business, and we are not required to revise our former opinion upon this subject. But we add some further observations. In *Horner v. Graves*, 7 Bingh. 735, Tindal, C. J., said in relation to this subject: "Unless the case was such that the restraint was plainly and obviously unnecessary, the court would not feel justified in interfering." *U. S. v. Trans. Mo. Freight Ass'n*, 58 Fed. 58, 78, 7 C. C. A. 15, 82, 24 L. R. A. 73, per Sanborn, J.; *Phippen v. Stickney*, 3 Metc. (Mass.) 384.

All such covenants do in some degree restrain trade. Whether the restraint is permissible by law depends upon the facts. The party who alleges that the restraint is such as to be in law obnoxious is bound to prove the facts which make it so. There can be no presumption, from the fact that there is some restraint in the instant case, that it is an unlawful one.

With respect to the territory to which the restriction should apply, the rule has always been that it might extend to the limits wherein the plaintiff's trade would be likely to go. The changes which have marked the course of judicial decisions in modern times seem to consist in conforming the application of the rule to the constant development of the facilities of commerce and the enlargement of the avenues of trade. In *Harrison v. Glucose Sugar Refining Co.*, 53 C. C. A. 484, 116 Fed. 804, 58 L. R. A. 915, a valuable case upon this subject, and having many analogies to the present, Judge Jenkins refers to several cases of high authority in which there was no territorial restriction whatever. Among these is the case of *Maxim Nordenfelt Guns, etc., Co. v. Nordenfelt* (1894) App. Cas. 535, a highly important decision of the House of Lords which seems to have established the rule in Great Britain that the territorial restriction of such covenants must be such as the business of the covenantee requires, and is measured by such requirement, and that this is the test of reasonableness in that regard. And the Supreme Court of Michigan in 1873 held, in *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153, that when, as in that case, the covenant was unrestricted in terms in respect of place, it should be construed as not confined to the place where the covenantee had his store and traded, but as extending so far as to embrace the territory to which his trading might extend. So in *Beal v. Chase*, 31 Mich. 490, the same court held that where, on a sale of a publishing business, the vendor had agreed not to engage in a competing business anywhere in the state, the limits of the restriction were not open to valid objection. And see *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67. We think it is not proved that the restriction which the defendant put upon himself was unreasonable or more extensive than the interests of the complainant might require. And so in regard to the subject-matter, it is fairly inferable that it was his skill in the manufacture of these few specialties to which the restriction relates that the appellant was employed. The restriction was not general.

Counsel for appellant lay stress upon the fact that his service under the contract of employment terminated with the month of October, and that the contract of settlement did not take place until November



12th. But the business relations of the parties continued and remained unsettled until the latter date. We do not perceive how the mere fact that the service had been discontinued at the former date affects the obligations of the agreement of November 12th.

The final issue stated involves the question whether the stipulation in question was ancillary to the main contract, or, more precisely stated, was ancillary to some other stipulation in the contract, the value of which to the promisee would be affected by the ancillary stipulation.

The contract of September 28, 1899, contained a stipulation that \$25,000 of stock should be set apart to the appellant and become his property upon the conditions therein stated. The contract also gave to him, in one alternative, the right to share in the earnings of the company included in the book value of the stock, and only upon the payment thereof to him could he be compelled to reassign the stock or to relinquish it. He had an equitable title to the stock. When he resigned he insisted upon the alternative, which gave him rights of a stockholder, and in the settlement was paid the value of the stock. And he received the value of the stock, less, of course, the sum he agreed to pay for it, because he agreed to refrain from going into a competing business which would depreciate its value. It was the equivalent of a repurchase from a stockholder. As we said in our former opinion, the fact that he did not have the legal title, but only an equitable title, to the stock is not material. In the other alternative of going out to engage in a competing business, he would have been compelled to relinquish as from the beginning all the rights of a stockholder.

Another consideration is that in the contract of employment the company (for the contract became that of the company upon its adoption thereof after its incorporation) took security against the appellant's going into a competing business by the provision that in such event he should forfeit his claim to the profits of the company which had not been "actually credited" to him. In order to avoid this forfeiture he made the stipulation in question in the contract of settlement. The business and good will of S. Jarvis Adams & Co. were taken over with the plant by the corporation. No one will doubt that the restriction put upon the appellant as one of the terms of his employment was perfectly lawful; for the appellant had been the superintendent of S. Jarvis Adams & Co., and doubtless knew its customers. He was an associate with Bossert, who became assistant manager for the corporation, went out with him, and was his associate in the competing business. It is perfectly clear that they would know the avenues of the company's business and who were its customers. If they engaged in the same business, they would have the advantage of their knowledge of the company's affairs in supplanting it.

It was held in *Exch. Cham. (Hitchcock v. Coker, 6 Ad. & El. 454)*, *Tindal, C. J.*, delivering the opinion of the court, that the good will of a business was an asset for the protection of which the owner might lawfully obtain a covenant against future competition from one whom he took into his employment. Such cases fall within the sixth class of the classification of valid contracts by Judge Taft in *United States v.*

Addyston Pipe & Steel Co., 85 Fed., at page 281, 29 C. C. A. 141, 46 L. R. A. 122. This feature of such cases was commented upon by Lindley, M. R., and Rigby, L. J., in *Underwood v. Barker* in the Court of Appeals (1899) 1 Ch. 300, on appeal from the judgment of Kekewich, J., reported in 68 Law J. Ch. 201. In that case the employé had gone into the service of a competitor. But it is obvious that the same reasons would apply as if he had himself gone into the competing business on his own account. The Master of the Rolls at page 307 said:

"It is to be taken as proved that it is important to the plaintiffs that their rivals should not know either to whom the plaintiffs sold their hay or where they got it from. The defendant was engaged as their clerk and foreman, and would, whilst acting as such, obtain information on these matters, and such information would, if imparted to a rival in trade, greatly benefit him and proportionately injure the plaintiffs."

And similar observations were made by Rigby, L. J., at page 309, in support of the judgment appealed from. In that case the defendant gave testimony that he had not solicited the former customers of the complainant, but his opportunity and motive for doing so were thought to justify the injunction.

As we have said, in every such case there must be more or less restriction of competition. Whether in a particular case the restriction is so manifestly opposed to public policy as to outweigh that interest which the public has in the freedom of trade and commerce and the inviolability of contracts deliberately made upon sufficient consideration by competent persons is a vital question in determining the reasonableness of the restriction.

In the present instance the public has no such interest in the competition of the defendant in the business in question as ought to excuse him for the violation of his contract by the employment of the special knowledge acquired by him while in the service of the complainant and which he has contracted not to use to the detriment of his employer, whether such knowledge be of what are known as technical trade secrets or of such matters as are essential to the protection of the good will of the employer's business.

If it be admitted that his employment would not have prevented the appellant from engaging in the competing business provided he had accepted the alternative which would have left him free, he did not do so, but insisted on that alternative which was inconsistent with the right to engage in competition with his late employer. This right was secured to him by the original contract, and was as absolute as if the alternative had not been given by the contract. The company could not control his election. If the original contract was lawful, the final agreement must be.

For the reasons stated, we think the decree of the Circuit Court was right, and it is accordingly affirmed, with costs.

## BOSSERT v. S. JARVIS ADAMS CO.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1905.)

No. 1,868.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

B. L. Bargar and Pomerene & Pomerene, for appellant.

Patterson, Sterrett & Acheson and Henderson & Livesay, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This case is in all essential particulars like that of Knapp v. S. Jarvis Adams Co. (No. 1,362, just decided) 135 Fed. 1008, was heard on the same record, and, by agreement of counsel, is subject to the same disposition.

For the reasons given in our opinion in that case, the judgment in this case is affirmed, with costs.

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SOUTHERN PAC. CO. v. SCHUYLER.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1905.)

No. 1,088.

**1. CARRIERS—INJURIES TO MAIL CLERK—EVIDENCE.**

Where, in an action against a carrier for injuries to a mail clerk by derailment, a witness had testified concerning a cloud-burst, the water from which had undermined the track, and on cross-examination stated that the editor of a certain newspaper had interviewed him concerning it, and had afterwards published an account of the interview, such newspaper account was inadmissible for the purpose of affecting a witness' credibility or otherwise.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1287, 1288.]

**2. SAME—CARE REQUIRED—INSTRUCTIONS.**

In an action for injuries to a mail clerk by derailment of a train, caused by a washout, an instruction that, though the railroad was bound to take all reasonable precautions against injuries to passengers, it was not required to employ every possible preventative which the highest scientific skill might suggest, nor to adopt any mere speculative and untried experiment, was properly refused, as such rule applies only to cases involving the use of machinery, devices, and improvements in railroad equipment.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1085-1087.]

**3. SAME—REQUESTS.**

Where the court charged that the law imposed on plaintiff the burden and necessity of showing by a preponderance of evidence that it was the negligence of the defendant railroad company, and not something else, which caused the alleged injuries, the refusal of a requested instruction concerning the preponderance of evidence in such a case was not error.

**4. SAME—ACT OF GOD.**

Where, in an action against a carrier for injuries to a mail clerk, the court charged that the evidence tended to show that a flood and washout

in the railroad embankment, resulting therefrom, at the point of derailment of the train, was an unforeseen occurrence, and that if the flood and washout were unexpected, and no experience of the officers and agents of the railroad had warned them of the likelihood of such an occurrence, the jury might determine that the flood and washout were caused by an act of God, and that if defendant could not have discovered the condition of the embankment by the exercise of such diligence as skillful men engaged in that kind of business might fairly be expected to use under like circumstances, it would not be chargeable with negligence and would not be liable, the court sufficiently charged the rule with reference to the carrier's liability for the accident, resulting from an act of God.

**5. SAME.**

An instruction, in an action against a carrier for injuries to a mail clerk, that it was the carrier's duty to keep its tracks in a safe condition for the passage of trains under all known conditions, was not error, where the court also charged that such duty was fulfilled when the carrier uses the legal degree of care in the premises, no matter whether the safety be the result or not.

**In Error to the Circuit Court of the United States, for the Northern District of California.**

The defendant in error brought an action against the plaintiff in error to recover damages for personal injuries sustained in a train wreck on February 17, 1901. The defendant in error was a mail clerk on a railroad train which was ditched near Mill City by the washing out of a fill or embankment. The embankment was about 150 feet long, 24 feet high, and 16 feet wide at the roadbed, and sloped gradually downward and away. It was constructed at a point where a ravine or dry wash comes down to the railroad. A culvert three feet by four feet was constructed through the embankment to carry off the water which came down the ravine. Shortly before the accident, a volume of water gathered at the embankment in excess of the capacity of the culvert. The fill was undermined by the water, and gave way beneath the weight of the train. The complaint charged the plaintiff in error with negligence in failing to exercise proper care in operating its train, and in failing to construct and keep its roadbed in proper condition and repair. The evidence was that the ravine, spoken of in the testimony as "Willow Creek," across which the embankment extended, was ordinarily dry, but that at times it carried large quantities of water which came to it from a watershed of considerable area. The culvert had been sufficient, however, for many years, to carry away the water and prevent injury to the embankment. The train was wrecked about 6 o'clock in the morning. A culvert about three miles west of the wreck, having a capacity three times that of the culvert at the place of the wreck, was found to be washed out at about 8 p. m. on the day before, and thereby the train on which the defendant in error was carried had been laid up for some six hours immediately before the wreck. No inquiry was made by the train crew, the wrecking crew, or any one as to the condition of the culvert at the place of the wreck. The water was running in the ravine there at half past 1, some 15 hours before the wreck, and was rising rapidly in the creek during all of that time. On the afternoon of the 16th, ditches around Mill City, which is two miles from the place of the wreck, were running full of water. The temperature had risen, a warm wind was blowing, rain was falling, and the snow was melting. There was a Japanese track walker, whose duty it was to patrol the track, where the wreck occurred, from 1:30 p. m. to 6 p. m. of the 16th. He was not produced as a witness. There was evidence that the plaintiff in error had made efforts to find him, but had been unable to discover him at the time of the trial of the cause, which was some two years after the wreck occurred. It was shown that he was at Mill City for about five months after the date of the wreck, and that within less than three months after the wreck an action had been commenced against the plaintiff in error to recover damages for the death of a passenger who had been killed in the wreck. About five hours prior to the accident a heavily loaded repair train

passed over the fill without difficulty, but the crew could not see down the embankment more than five feet, and did not see the water which was dammed up. There was evidence of a cloud-burst, which lasted about 15 minutes, on the morning of the 16th, at a point about 25 miles from the place of the wreck. It was the contention of the plaintiff in error that the accident was caused by an unforeseen and unprecedented accumulation of water resulting from an act of God, and that it had used due diligence in constructing the embankment and in patrolling its track. The foregoing statement is deemed sufficient to render intelligible the questions which are presented on the assignments of error.

P. F. Dunne, for plaintiff in error.

James G. Maguire and Houx & Barrett, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned as error, first, that the court sustained an objection to the admission in evidence of a written copy of a newspaper article which had been published in the Lovelock Tribune on March 2, 1901. A witness had testified on behalf of the plaintiff in error concerning the cloud-burst which occurred on February 16th near Lovelock, some 25 miles from the place of the accident. On his cross-examination he stated, whether voluntarily or in answer to a question does not appear from the bill of exceptions, that the editor of the newspaper came and interviewed him about it, and afterwards published an account of the interview. On his redirect examination the plaintiff in error offered a written copy of the published interview. There was no error in its exclusion. It was not competent for any purpose, nor was it admissible under any rule of evidence. It is claimed that it was material evidence affecting the credibility of the witness' testimony. It is too clear to require discussion, however, that it was not competent to fortify the testimony of the witness by showing that a newspaper had published an interview with him which substantially corroborated the oral testimony which he gave in court.

The remaining assignments of error are equally devoid of merit. They relate to the charge to the jury. The court gave the jury full instructions upon all features of the case. Error is assigned to one portion of the charge, and to the refusal of the court to give certain instructions which were requested. A portion of one of the instructions so requested is quoted in the brief of the plaintiff in error as follows:

"The law does not require from a railroad company the utmost degree of care which the human mind is capable of imagining. It simply requires that the highest degree of practicable care should be used which is consistent with the mode of transportation employed. While railroad companies are to use all reasonable precautions against injuries to passengers, these precautions are to be measured by those in known use in the same business which have been shown by experience to be efficacious. The railroad company is required to use the best precautions in known practical use to secure the safety of its passengers, but it is not required to employ every possible preventive which the highest scientific skill might suggest, nor is it required to adopt any mere speculative and untried experiment."

This requested instruction, which is indeed well sustained by authority, was properly denied, for the reason that it had no relation to the case. Such an instruction applies to cases involving the use of machinery, devices, and improvements in railroad equipment. In lieu of the requested instruction, the court charged the jury that it was the duty of the carrier to keep its track in a safe condition for the passage of trains under all known conditions, and to employ such agents and laborers as would secure that result under the usual and known circumstances attending the situation, and directed them to find a verdict for the defendant if they found that it used the care and vigilance of a very prudent and cautious person in the situation, and in view of all the circumstances attending the derailment of the train.

Another instruction was requested involving the presentation of the rule concerning the preponderance of evidence in such a case. But the court in that connection instructed the jury that the law imposed upon the defendant in error "the burden and necessity of showing by preponderance of evidence that it was the negligence of the defendant railroad company, and not something else, which caused the alleged injuries."

Another instruction requested by the plaintiff in error was the following:

"If the jury should find from the evidence that the derailment was caused by an unprecedented flood at a particular spot on the track, and that such flood was not the result of any human act or agency, but was the result of natural forces operating in an unforeseen and inevitable way, such as is sometimes named 'an act of God,' without the intervention of any breach of duty on the part of the defendant, I instruct you that, in providing against any such natural happening or act of God, the railroad company is not held to the utmost and extreme care of a very cautious person, but sufficiently discharges its duty in the premises if in this behalf it exercises ordinary care and diligence."

As to the proposition involved in the first part of this requested instruction, the court charged the jury thus:

"The evidence tends to show that this flood, and the washout in the railroad embankment resulting therefrom at this point, was an unforeseen occurrence. No flood and washout at this particular place had occurred during the many years the railroad had been built. If you believe this evidence—that the flood and washout were unexpected, and that no experience of the officers and agents of the railroad company had warned them of the likelihood of such an occurrence—if you believe this testimony, as I have said, you may determine that the flood and washout were caused by what the law terms 'an act of God.'"

But as to the latter portion of the requested instruction, the plaintiff in error cites and relies upon *Gillespie v. St. L., K. C. & N. Ry. Co.*, 6 Mo. App. 554, in which the court announced the rule that, to give "to the carrier the practical benefit which the law allows him, he must be held, in preventing or averting the effect of the act of God, only to such foresight and care as an ordinarily prudent person or company in the same business would use under all the circumstances in the case." It is true that a carrier is not liable for injury from a vis major or an act of God, if it be uncombined with neglect in the employment of human agency. The party claiming the benefit and application of this exemption must be without fault on his part. *Read v. Spaulding*, 30

N. Y. 630, 86 Am. Dec. 426; Odd Fellows' M. Aid Ass'n v. James, 63 Cal. 598, 607, 49 Am. Rep. 107; Dibble & Seligman v. Morgan, 1 Woods, 406, Fed. Cas. No. 3,881. The court, we think, fully complied with the rule applicable to such a case in giving the following instruction:

"But if, on the other hand, the defendant could not discover the condition of this embankment by the exercise of such diligence and prudence as skillful men engaged in that kind of business might fairly be expected to use under like circumstances, it would not be chargeable with negligence, and would not be liable in this case."

It is assigned as error that the court charged the jury as follows:

"It is undoubtedly the duty of the carrier to keep its tracks in safe condition for the passage of trains under all known conditions, and to employ such agents and laborers as would secure that result under the usual and known circumstances attending the situation."

But the court also said to the jury:

"The duty of the carrier is fulfilled when it uses the legal degree of care in the premises, no matter whether the safety be the result or not."

The court thus properly charged the jury on the law of the case when applied to the question of the right of a passenger to recover damages for personal injuries sustained under the circumstances of the present case. We find no error in any of the instructions given, or in refusing those that were requested.

The judgment of the Circuit Court is affirmed.

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#### SIMS v. THREE STATES LUMBER CO.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1905.)

No. 1,980.

#### COMPROMISE AND SETTLEMENT—VALIDITY—ACCEPTANCE OF AGREED PAYMENT.

Where there is a bona fide dispute as to the amount due upon a demand, the acceptance in satisfaction of the entire demand of a sum less than was claimed is supported by a sufficient consideration, and precludes a recovery of the balance.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Compromise and Settlement, §§ 35-38.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

N. F. Lamb and J. F. Gautney, for appellant.

John B. Jones, for appellee.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge. This was a suit in equity, brought by the appellant to avoid a release theretofore executed by him to the appellee, and to recover a balance claimed to be due to him for lumber which he had manufactured and delivered to the appellee. The pleadings and evidence disclose these facts: After the manufacture and

delivery of the lumber a dispute arose between the parties as to whether the lumber was in good condition when delivered, or was damaged to an extent which materially detracted from its value. The dispute was composed and adjusted, each party acting with full knowledge of all the facts, by an agreement that 50 cents per 100 feet for a certain portion of the lumber should be deducted from the contract price. The account was then stated in conformity to the adjustment, the balance shown to be due was paid to the appellant, and he executed a receipt therefor to the appellee declaring that the payment was accepted in full satisfaction of all demands. The contention of the appellant is that the adjustment and release were obtained by duress, and that the dispute was not bona fide, but was merely colorable, and brought about by the appellee for the wrongful purpose of compelling the appellant to accept less than was due to him. While the evidence is conflicting, it preponderates against the contention, and brings the case within the rule that, where there is a bona fide dispute as to the amount due upon a demand, the acceptance, in satisfaction of the entire demand, of a less sum than is claimed is supported by a sufficient consideration and precludes a recovery of the balance. *Chicago, Milwaukee & St. Paul Ry. Co. v. Clark*, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099; *City of San Juan v. St. John's Gas Co.*, 195 U. S. 510, 522, 25 Sup. Ct. 108, 49 L. Ed. —.

The decree is affirmed.

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## MEMORANDUM DECISIONS.

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**THE ATLAS. THE LEONARD J. BUSHBY.** (Circuit Court of Appeals, Second Circuit. March 17, 1905.) No. 49. Appeal from the District Court of the United States for the Eastern District of New York. Avery F. Cushman, for appellant. Albert A. Wray, for the Bushby. Le Roy S. Gove, for appellee Follette. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decree (115 Fed. 856) affirmed, without interest or costs.

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**CELLA COMMISSION CO v. MOORE.** (Circuit Court of Appeals, Eighth Circuit. December 9, 1904.) No. 2,064. In Error to the Circuit Court of the United States for the Eastern District of Missouri. Chester H. Krum, for plaintiff in error. Walter H. Saunders and E. L. Brown, for defendant in error. No opinion. Affirmed, with costs.

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**FITZ v. LEADAM.** (Circuit Court of Appeals, Second Circuit. March 20, 1905.) No. 164. Appeal from the Circuit Court of the United States for the Eastern District of New York. E. C. Verrill, for appellant. Henry D. Williams, for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decree (132 Fed. 659) affirmed, with costs, on opinion of Judge Thomas in Circuit Court.



**FRANK et al. v. BERNARD.** (Circuit Court of Appeals, Second Circuit, March 7, 1905.) No. 157. Appeal from the Circuit Court of the United States for the Southern District of New York. Charles S. Champion, for appellant. Andrew Foulds, Jr., for appellees. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decree (181 Fed. 269) affirmed, with costs.

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**THE HARTFORD. THE MANHATTAN.** (Circuit Court of Appeals, Second Circuit, March 7, 1905.) No. 141. Appeal from the District Court of the United States for the Southern District of New York. R. S. Benedict and Samuel Park, for appellants. Herbert Green, for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decree (125 Fed. 559) affirmed, with costs, on opinion of District Judge.

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**H. B. CHAFFEE MFG. CO. v. SELCHOW et al.** (Circuit Court of Appeals, Second Circuit, February 28, 1905.) No. 148. Appeal from the Circuit Court of the United States for the Southern District of New York. For opinion below, see 181 Fed. 548. A. Bell Malcomson, for appellant. F. L. Chappell, for appellees. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Affirmed in open court.

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**In re MANDEL.** (Circuit Court of Appeals, Second Circuit, March 20, 1905.) No. 14. Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy. E. Eschwege, for petitioner. W. Lesser, for respondent. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Order of District Court (127 Fed. 863) affirmed.

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**THE MEDIA.** (Circuit Court of Appeals, Second Circuit, March 20, 1905.) No. 173. Appeal from the District Court of the United States for the Southern District of New York. For opinion below, see 182 Fed. 148. Le Roy S. Gove, for appellant. Henry G. Ward, for appellee. Before LACOMBE and TOWNSEND, Circuit Judges.

PER CURIAM. Decree affirmed, with costs.

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**NEW JERSEY WIRE CLOTH CO. v. BUFFALO EXPANDED METAL CO.** (Circuit Court of Appeals, Second Circuit, March 20, 1905.) No. 147. Appeal from the Circuit Court of the United States for the Western District of New York. For opinion below, see 181 Fed. 266. C. J. Sawyer and M. B. Phillipp, for appellant. E. H. Hunter, for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decree affirmed, with costs, on opinion of District Judge Hazel in Circuit Court.

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**THE NEW YORK CENTRAL NO. 22. THE JOHN FLEMING et al.** (Circuit Court of Appeals, Second Circuit, March 20, 1905.) No. 19. Appeal from the District Court of the United States for the Southern District of New

York. Howard S. Harrington, for appellants. F. M. Brown, for appellee New York Central No. 22. James E. Carpenter, for appellees Drum et al. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decree affirmed, on opinion of District Judge Adams (124 Fed. 750), with interest to libelants and costs to the New York Central No. 22 against the Fleming.

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THE O. L. HALLENBECK. OLSEN v. CAHILL. (Circuit Court of Appeals, Second Circuit. November 21, 1904.) No. 78. Appeals from the District Court of the United States for the Eastern District of New York. Le Roy S. Gove, for appellant. Albert A. Wray, for appellees. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decrees (119 Fed. 468) affirmed, on opinion below.

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PAOE v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. March 28, 1905.) No. 1,388. In Error to the District Court of the United States for the Middle District of Alabama. W. W. Pearson, for plaintiff in error. W. S. Reese, Jr., and Julius Sternfeld, for the United States. Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The judgment of the District Court is affirmed, on the authority of Samuel M. Ciyatt v. The United States, 25 Sup. Ct. 429, 49 L. Ed. —, decided by the Supreme Court March 13, 1905. As to the second count in the indictment, see, also, Gardes v. United States, 87 Fed. 172, 30 C. C. A. 596.

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POST v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. March 28, 1905.) No. 1,352. In Error to the Circuit Court of the United States for the Southern District of Florida. On rehearing. For former opinion, see 135 Fed. 1. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The opinion and decision heretofore filed practically dispose of indictments Nos. 141, 160, and 161. If the plaintiff in error is tried again on the issues raised by indictment No. 176, it will be found on an examination of the opinion that it decides all material questions raised on the former trial. The petition of plaintiff in error for a rehearing is therefore denied.

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SOUTHERN BUILDING & LOAN ASS'N v. CAREY et al. (Circuit Court of Appeals, Sixth Circuit. March 19, 1904.) No. 1,268. Appeal from the Circuit Court of the United States for the Western District of Tennessee. Thomas M. Scruggs, for appellant. Thomas W. Brown, for appellees. No opinion. Affirmed, with costs. For opinion on motion for allowance of appeal, see 117 Fed. 325.

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S. P. SHOTTER CO. v. LARSEN et al. (Circuit Court of Appeals, Fifth Circuit. March 28, 1905.) No. 1,391. Appeal from the District Court of the United States for the Southern District of Georgia. On rehearing. For former opinion, see 184 Fed. 705. Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. The petition for rehearing in this case is granted. The case is ordered restored to the docket and set down for hearing on the first day of our next term at Atlanta, Ga.

**WILLIAM A. FORCE & CO., Inc., v. INDEPENDENT MFG. CO. et al.** (Circuit Court of Appeals, Second Circuit. March 18, 1905.) No. 18. Appeal from the Circuit Court of the United States for the Eastern District of New York. Henry Schreiter, for appellant. H. A. West, for appellees. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree (124 Fed. 72) affirmed, on opinion of Circuit Judge.

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**LINCOLN MFG. CO. v. NEW HAVEN CLOCK CO.** (Circuit Court, S. D. New York. October 17, 1904.) On Motion to Make Complaint More Definite and Certain. R. Floyd Clarke, for the motion. George Alfred Lamb, opposed.

LACOMBE, Circuit Judge. In view of the phraseology of the contract sued upon, the complaint is not entirely clear, and the motion is granted, so far as the first two propositions in the moving papers are concerned. When that is done, there need be no difficulty about answering the complaint, and whether or not a bill of particulars should be required can then be determined. There will have to be a substitution of attorney for the plaintiff. George Alfred Lamb, whose name appears on the papers, is a member of the state bar, and therefore properly began the cause in the state court; but he has never been admitted to practice at the bar of the United States Circuit Court in this District.

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**UNITED STATES v. CHAMBERS.** (Circuit Court, S. D. New York. December 1, 1904.) Ernest E. Baldwin, Asst. U. S. Atty. Hays & Hirschfeld, (Max J. Kohler, of counsel), for defendant.

THOMAS, District Judge. The motion to dismiss the indictment because of the illegal use of the schedules in bankruptcy before the grand jury is granted.

END OF CASES IN VOL. 135.

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### Particular causes or grounds of action.

See "Collision," § 6; "Death," § 1; "Fraud," § 2; "Insurance," § 1; "Label and Slander," § 1; "Money Lent"; "Use and Occupation"; "Work and Labor."

Bond of clerk of court, see "Clerks of Courts."

Breach of charter party, see "Shipping," § 1.

City warrants, see "Municipal Corporations," § 1.

Infringement of patent, see "Patents," § 10.

Infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 2.

Injuries to goods in custody of carrier, see "Carriers," § 1.

Personal injuries, see "Carriers," § 3; "Master and Servant," § 3.

Price of goods, see "Sales," § 5.

Recovery of payment, see "Payment," § 1.

Rescission of contract for insurance, see "Insurance," § 2.

Services, see "Work and Labor."

Unfair competition in trade, see "Trade-Marks and Trade-Names," § 2.

### Particular forms of special relief.

See "Injunction"; "Interpleader"; "Specific Performance."

Cancellation of written instrument, see "Cancellation of Instruments."

Enforcement or foreclosure of lien, see "Maritime Liens," § 2.

Establishment and enforcement of trust, see "Trusts," § 1.

Foreclosure of mortgage, see "Mortgages," § 1.

### Particular proceedings in actions.

See "Damages"; "Depositions"; "Evidence"; "Judgment"; "Jury"; "Limitation of Actions"; "Motions"; "Pleading"; "Removal of Causes"; "Trial."

Default, see "Judgment," § 1.

Verdict, see "Trial," § 3.

### Particular remedies in or incident to actions.

See "Injunction"; "Receivers."

### Proceedings in exercise of special jurisdictions.

Criminal prosecutions, see "Criminal Law."

Suits in admiralty, see "Admiralty"; "Collision," § 6; "Maritime Liens," § 2.

Suits in equity, see "Equity."

### Review of proceedings.

See "Appeal and Error"; "Exceptions, Bill of."

### § 1. Commencement, prosecution, and termination.

The rule that, where two suits between the same parties and for the same cause of action

are pending in different states, the remedy of the defendant is to apply to the court in which the second suit is brought to stay proceedings until the first suit is determined, cannot be applied where the parties to the two suits are not the same.—*Kirkpatrick v. Eastern Milling & Export Co. (C. C.)* 144.

## ACTS OF BANKRUPTCY.

See "Bankruptcy," § 2.

## ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity, see "Cancellation of Instruments," § 1; "Equity," § 1.

## ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," §§ 2, 3.

## ADMINISTRATION.

Of estate of bankrupt, see "Bankruptcy," § 7. Of estate of decedent, see "Executors and Administrators."

## ADMIRALTY.

See "Collision"; "Maritime Liens"; "Salvage"; "Shipping"; "Towage."

### § 1. Jurisdiction.

A contract on the one part to furnish cargoes for carriage by sea, and on the other to furnish vessels to carry such cargoes, is maritime, and an action for its breach is within the admiralty jurisdiction.—*Graham v. Oregon R. & Nav. Co. (D. C.)* 608.

### § 2. Parties, process, claims, and stipulations or other security.

Under Act Pa. 1851, §§ 18, 19 (P. L. 674), and Act 1855 (P. L. 309), where a stevedore filed a libel for injuries and died before trial, the proceeding did not abate, but was properly continued in the name of libellant's personal representative.—*The City of Belfast (D. C.)* 208.

Where a bond was executed to relieve a ship from liability under a libel for injuries, it was not discharged by libellant's death, pending suit, which was revived in the name of libellant's personal representative.—*The City of Belfast (D. C.)* 208.

### § 3. Decree and enforcement thereof.

While interest is recoverable in admiralty as a matter of right on claims arising out of contract as on a claim for freight, the allowance of interest by way of damages as in cases of collision or other cases of pure damage, as well as the allowance of costs, is in the discretion of the court.—*Bethell v. Mellor & Rittenhouse Co. (D. C.)* 445.

### § 4. Appeal.

Where the district judge in an admiralty cause saw and heard the witnesses, a judg-

ment based on findings of fact made on conflicting evidence will not be reversed by an appellate court, unless there is a decided preponderance of evidence against it.—*The Edward Smith (C. C. A.)* 32.

### § 5. Costs.

Libellant, who misstated facts before the commissioner and thereby necessitated extra testimony and commissioner's and stenographer's costs, would be required to bear the additional expenses caused by his misstatements.—*The Elton (D. C.)* 446.

## ADMISSIONS.

As evidence, see "Evidence," § 2.

## ADVERSE POSSESSION.

See "Limitation of Actions."

## AFFIDAVITS.

See "Depositions."

In proceedings to take depositions in causes in federal courts, see "Courts," § 5. Of defense, see "Pleading," § 2.

## AFFREIGHTMENT.

Contracts, see "Shipping," § 4.

## AGENCY.

See "Principal and Agent."

## AGREEMENT.

See "Contracts."

## ALIENS.

See "Indians."

Removal of suits by or against aliens to United States court, see "Removal of Causes," § 2. Waiver of right to appeal in deportation proceedings, see "Appeal and Error," § 1.

### § 1. Exclusion or expulsion.

A Chinese person, not of the laboring class, domiciled in the United States previous to the treaty of 1880 and the exclusion acts, who has left the country temporarily with the intention of returning, cannot be excluded, under rules 1 and 2 of the regulations of the Department of Commerce and Labor, because he is not included in one of the excepted classes who alone are permitted by such rules to enter.—*Ex parte Ng Quong Ming (D. C.)* 378.

## AMENDMENT.

*Of particular legal proceedings.*

See "Pleading," § 4.

Petition in bankruptcy, see "Bankruptcy," § 2. Pleadings in federal courts, see "Courts," § 5.

**AMOUNT IN CONTROVERSY.**

Jurisdictional amount, see "Courts," § 5.

**ANCILLARY ADMINISTRATION.**

See "Executors and Administrators," § 1.

**ANIMALS.**

Carriage of live stock, see "Carriers," § 2.

**ANSWER.**

In pleading, see "Equity," § 2.

**ANTICIPATION.**

Of invention, see "Patents," § 2.

**APPEAL AND ERROR.**

See "Exceptions, Bill of."

Appellate jurisdiction of Circuit Court of Appeals, see "Courts," § 7.

Review in action for infringement of patent, see "Patents," § 10.

Review in criminal prosecutions, see "Criminal Law," § 8.

Review of proceedings in admiralty, see "Admiralty," § 4.

**§ 1. Right of review.**

Right of Chinaman who had been ordered deported to prosecute a perfected appeal to the District Court *held* not waived by mere executory agreement purporting to accomplish such waiver.—*Ah Tai v. United States* (C. C. A.) 513.

Question of waiver by a Chinaman of his appeal to the District Court from an order deporting him *held* reviewable by the Circuit Court of Appeals.—*Ah Tai v. United States* (C. C. A.) 513.

**§ 2. Presentation and reservation in lower court of grounds of review.**

To entitle a party to review a ruling overruling objections to the admissions of evidence, the grounds of such objections must have been stated.—*Thomas China Co. v. C. W. Raymond Co.* (C. C. A.) 25.

A single exception to a refusal to give a number of requests to submit several propositions of law and fact is insufficient, if any one of them is erroneous.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

Error cannot be assigned in the appellate court to the admission in evidence of letters, a portion of which was relevant, on the ground that other parts were not, where no motion was made to strike out the irrelevant parts.—*Texas & P. Ry. Co. v. Coutourie* (C. C. A.) 465.

An objection that the transcript of a judgment introduced in evidence was not properly certified cannot be first raised on appeal.—*Ætna Indemnity Co. v. Ladd* (C. C. A.) 836.

On appeal in an action removed from a state court, it is the duty of the Circuit Court of Ap-

peals to determine the question of federal jurisdiction, though no objection was raised thereto.—*Fred Macey Co. v. Macey* (C. C. A.) 725.

**§ 3. Record and proceedings not in record.**

A statement of claim in an intended action, attached as an exhibit to the statement of plaintiff's demand in a subsequent action against the clerk of the Circuit Court, *held* a part of the record on error.—*United States v. Bell* (C. C. A.) 836.

**§ 4. Assignment of errors.**

An objection to the computation of interest on claims against an insolvent bank, in process of liquidation, cannot be reviewed on appeal, where it was not made the subject of an assignment of error.—*George v. Wallace* (C. C. A.) 286; *Brownlee v. Same, Id.*; *Morsman v. Same, Id.*; *Poppleton v. Same, Id.*; *Morton v. Same, Id.*; *McCague Inv. Co. v. Same, Id.*

The overruling of motions to quash an alternative writ of mandamus and compel amendment of the petition *held* not to be reviewed, unless challenged in the assignments of error.—*Jones v. United States* (C. C. A.) 518.

**§ 5. Review.**

Where a preliminary injunction has been granted on a sworn bill, and it appears that no injury will result therefrom to defendant which cannot be provided against by bond, the appellate court, on an appeal from the order, will not consider questions going to the merits of the bill which were not presented by proper pleadings to the trial court.—*Lehman v. Graham* (C. C. A.) 89.

Where it is determined by the appellate court, on an assignment of error presenting the question, that the evidence, which is all in the record, not only warranted, but required, the verdict that was rendered, further assignments of error relating to the giving and refusal of instructions become immaterial and will not be considered.—*Creary v. Wefel* (C. C. A.) 304.

Where a jury is waived by stipulation in an action at law in a federal court, its findings of fact are conclusive in the appellate court, and only the questions of law applicable thereto can be considered.—*American Bridge Co. v. Camden Interstate Ry. Co.* (C. C. A.) 823.

Ordinarily questions involving the standing of a party in court are influenced largely by the knowledge of the court as to the history of the proceeding, and are disposed of summarily upon discretion.—*Ah Tai v. United States* (C. C. A.) 513.

Refusal to exclude testimony in effect similar to testimony previously given *held* harmless.—*Ætna Indemnity Co. v. Ladd* (C. C. A.) 836.

It is the settled law in the federal courts that an order setting aside a verdict and granting a new trial cannot be reviewed on writ of error.—*Clement v. Wilson* (C. C. A.) 749.

A former decision and decree of the Court of Appeals of the Indian Territory, which was not then reviewable because not final, is not the law of the case in the Circuit Court of Appeals on an appeal from a subsequent final decree,

which first presents for review all the proceedings of the case from its inception.—*Buster v. Wright* (C. C. A.) 947.

Where a former decision of an inferior court erroneously reverses the dismissal of a bill on demurrer, and after answer on the same facts the final decree of the same court affirms such a dismissal, that decree should not be reversed.—*Buster v. Wright* (C. C. A.) 947.

The findings of a referee in bankruptcy as to the date of a transfer of a claim against the bankrupt's estate will not be disturbed on petition to review, unless manifestly against the weight of the evidence.—*In re Shults* (D. C.) 623.

### § 6. Determination and disposition of cause.

A judgment is not reversible because of an erroneous construction of a contract by the court in its instructions, by which a party was denied the right to recover damages for a breach, where under the evidence only nominal damages would have been recoverable.—*Thomas China Co. v. C. W. Raymond Co.* (C. C. A.) 25.

Where the record on appeal in a suit for infringement fails to show any connection between the defendant and the act of infringement proved, the court will not remand the case to permit the amendment of the pleadings and the introduction of new evidence to prove such connection, nor to substitute as defendant the party shown to have infringed.—*National Casket Co. v. Stolts* (C. C. A.) 534.

## APPRAISAL.

Of merchandise subject to duty, see "Customs Duties," § 3.

## APPROPRIATION.

Of water rights in general, see "Waters and Water Courses," § 1.

## ARGUMENT OF COUNSEL.

In criminal prosecutions, see "Criminal Law," § 2.

## ASSESSMENT.

Of loss on insured, see "Insurance," § 2.

Of tax, see "Taxation," § 2.

On unpaid subscriptions to corporate stock, see "Corporations," § 8.

## ASSETS.

Of insolvent national bank, see "Banks and Banking," § 1.

## ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 4.

## ASSIGNMENTS.

In bankruptcy, see "Insolvency," § 5.

Of corporate shares, see "Corporations," § 1.

Of patents, see "Patents," § 8.

### § 1. Operation and effect.

Transaction by which surety company undertook the completion of a guaranteed contract held an absolute assignment of such contract, and not merely an assignment for security.—*Ætna Indemnity Co. v. Ladd* (C. C. A.) 636.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."

## ASSOCIATIONS.

See "Building and Loan Associations."

## ASSUMPSIT, ACTION OF.

See "Money Lent"; "Use and Occupation"; "Work and Labor."

## ASSUMPTION.

Of risk by employé, see "Master and Servant," §§ 1-3.

## ATTACHMENT.

Exemptions, see "Homestead."

Jurisdiction of bankruptcy court to stay proceedings in state court, see "Bankruptcy," § 1.

Proceedings after removal to federal court, see "Removal of Causes," § 6.

## ATTORNEY AND CLIENT.

Arguments and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 2.

Attorneys in fact, see "Principal and Agent."

Disqualification of attorney of bankrupt to vote at creditors' meeting, see "Bankruptcy," § 4.

Enforcement against homestead of attorney's fees provided for in note secured by mechanic's lien, see "Homestead," § 1.

## AUTHORITY.

Of agent, see "Principal and Agent," §§ 2, 3.

## AVERAGE.

General average, see "Shipping," § 7.

## AVOIDANCE.

Pleading matter in avoidance, see "Pleading," § 2.



## BAILMENT.

See "Carriers," § 1

## BANKRUPTCY.

Documentary evidence on hearing of contested claim, see "Evidence," § 3.  
 Estoppel by claim in bankruptcy proceedings, see "Estoppel," § 1.  
 State laws as rules of decision, see "Courts," § 6.

### § 1. Petition, adjudication, warrant, and custody of property—Jurisdiction and course of procedure in general.

Bankr. Act July 1, 1898, c. 541, § 11, cl. 2, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], *held* not to confer jurisdiction on a court of bankruptcy to stay an attachment proceeding in a state court which had acquired jurisdiction of the parties, subject-matter, and property attached prior to the filing of the bankruptcy petition.—Tennessee Producer Marble Co. v. Grant (C. C. A.) 322.

On an involuntary petition to adjudge a corporation a bankrupt, the court of bankruptcy had no jurisdiction of a receiver appointed for the corporation by a state court; no relief being demanded against him.—In re Bay City Irr. Co. (D. C.) 850.

### § 2. — Involuntary proceedings.

A court of bankruptcy having jurisdiction of the parties, subject-matter, and proceedings, the fact that the first involuntary petition filed was defective for want of equity did not preclude the filing of an amended petition more than four months after the commission of the last act of bankruptcy.—In re Shoesmith (C. C. A.) 684.

Where land subject to a mortgage was fraudulently conveyed by an alleged bankrupt to his brother by a quitclaim deed, the mortgage indebtedness *held* chargeable as a liability of the bankrupt in determining his insolvency.—In re Shoesmith (C. C. A.) 684.

Where an alleged involuntary bankrupt had received \$4,500 as the proceeds of a fraudulent conveyance, and had retained it for several months prior to the filing of the bankruptcy petition against him, after which he invested it in distant states, such sum should be treated as "concealed assets" in determining his insolvency.—In re Shoesmith (C. C. A.) 684.

Notice to creditors of the proposed dismissal of the proceedings is indispensable.—In re Plymouth Cordage Co. (C. C. A.) 1000.

An objection that a petitioner in bankruptcy failed to file a duplicate of his petition, *held* waived by an answer of the bankrupt within four months.—In re Plymouth Cordage Co. (C. C. A.) 1000.

A petition in bankruptcy may be amended by the insertion of averments that the alleged bankrupt is not a wage earner or farmer and that all his creditors are less than 12 in number.—In re Plymouth Cordage Co. (C. C. A.) 1000.

Where a single creditor files a petition for an adjudication in bankruptcy, the averment that all the creditors are less than 12 does not affect the jurisdiction of the court.—In re Plymouth Cordage Co. (C. C. A.) 1000.

The time of the adjudication in bankruptcy is the time to test the sufficiency in number of petitioning creditors and of the amount of their claims.—In re Plymouth Cordage Co. (C. C. A.) 1000.

Creditors may join in a petition in bankruptcy at any time before the decision of the issue of bankruptcy, and be counted.—In re Plymouth Cordage Co. (C. C. A.) 1000.

An averment in an involuntary petition of an act of bankruptcy by the transfer and removal of property with intent to hinder, delay, and defraud creditors *held* insufficient.—In re White (D. C.) 199.

An averment in an involuntary petition that defendant, who was a merchant, committed an act of bankruptcy by conveying a part of his property, consisting of real estate described, to a person named, with intent to hinder, delay, and defraud his creditors, is sufficient.—In re White (D. C.) 199.

A petition in involuntary bankruptcy must show that the defendant is not within one of the classes excepted from the operation of the act, either by a negative averment to that effect or by a direct averment of his principal business; but a petition defective in that respect may be amended.—In re White (D. C.) 199.

A petition in involuntary bankruptcy should state the nature of the petitioners' claims; but an omission in that respect may be cured by amendment.—In re White (D. C.) 199.

A mere allegation of an attachment against an alleged bankrupt in an involuntary petition *held* not to allege an act of bankruptcy, within Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410].—In re Vetterman (D. C.) 448.

A new trial granted, on a petition in involuntary bankruptcy, on the ground of error in the court's instructions.—In re Marks Bros. (D. C.) 448.

An involuntary bankruptcy petition, alleging concealment of assets, *held* not demurrable on the ground that it alleged mere conclusions, and not facts constituting an act of bankruptcy.—In re Hark (D. C.) 608.

Allegations of acts of bankruptcy in an involuntary petition in the language of the act, without setting forth any other facts or circumstances, are insufficient.—In re Hark (D. C.) 608.

An involuntary bankruptcy petition, conforming to general order 37 (18 Sup. Ct. x), *held* not objectionable for failure to state when the several amounts of indebtedness became due, the amount of securities held, or the manner in which the value of the securities was fixed.—In re Hark (D. C.) 608.

An irrigation corporation, authorized to exercise the right of eminent domain, *held* not within the national bankruptcy act.—In re Bay City Irr. Co. (D. C.) 850.

A corporation organized to furnish water for irrigation *held* not a corporation engaged in "trading," and therefore not subject to be adjudged an involuntary bankrupt, under Bankr. Act 1898 (Act July 1, 1898, c. 541) c. 8, § 4b, 80 Stat. 547 [U. S. Comp. St. 1901, p. 8423].—In re Bay City Irr. Co. (D. C.) 850.

Costs will be allowed to an alleged bankrupt, on dismissal of an involuntary petition against him, only after the filing of his bill of costs with the clerk and notice to the petitioning creditors.—In re Haeseler-Kohlhoff Carbon Co. (D. C.) 867.

### § 3. — Warrant and custody of property.

Under Bankr. Act July 1, 1898, c. 541, § 2, cl. 3, 30 Stat. 545 [U. S. Comp. St. 1901, p. 8421], and section 23, as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 418], a court of bankruptcy has jurisdiction, in a suit to recover property held by a third person, to determine whether the claimant is, in fact, an adverse claimant, or a mere bailee for the bankrupt.—In re Andre (C. C. A.) 738.

Under Bankr. Act July 1, 1898, c. 541, § 2, cl. 3, 30 Stat. 545 [U. S. Comp. St. 1901, p. 8421]; section 23, as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 418]; and section 69, 30 Stat. 565 [U. S. Comp. St. 1901, p. 8450]—a court of bankruptcy *held* without jurisdiction to compel a sheriff, claiming property of an alleged involuntary bankrupt adversely under an attachment from a state court, to surrender the same.—In re Andre (C. C. A.) 738.

Where the appointment of a receiver for a bankrupt's property before adjudication was invalid for petitioner's failure to file a bond, as required by Bankr. Act July 1, 1898, c. 541, §§ 3e, 69, 30 Stat. 547, 565 [U. S. Comp. St. 1901, pp. 8423, 8450], the fact that a bond was filed on a subsequent application by another creditor was no ground for refusal to vacate the first order.—In re Haff (C. C. A.) 742.

Under Bankr. Act July 1, 1898, c. 541, § 3, subd. "a," 30 Stat. 547 [U. S. Comp. St. 1901, p. 8423] and section 69, 30 Stat. 565 [U. S. Comp. St. 1901, p. 8450], an order appointing a receiver for the property of an alleged bankrupt before adjudication, failing to specify the time when the petitioner's bond should be filed, or to require such filing before the receiver was directed to take possession, *held* erroneous.—In re Haff (C. C. A.) 742.

### § 4. Assignment, administration, and distribution of bankrupt's estate—Appointment, qualification, and tenure of trustee.

An attorney employed by a bankrupt only to file his petition *held* not disqualified from thereafter accepting claims of creditors and voting thereon at the election of a trustee.—In re Cooper (D. C.) 196.

Where creditors of a bankrupt elected but two trustees at the first meeting, the referee had no power to select a third under Bankr. Act July 1, 1898, c. 541, § 44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 8438], unless the creditors failed to elect the third trustee after calling another meeting.—In re William F. Fisher & Co. (D. C.) 223.

### § 5. — Assignment, and title, rights, and remedies of trustee in general.

Under Rev. St. Ohio, § 4155-2, a reservation of title in a contract for a conditional sale of chattels, which was not recorded at the time of the bankruptcy of the purchaser, is void as against his creditors, whether their claims arose before or after the sale.—Dolle v. Cassell (C. C. A.) 62; York Mfg. Co. v. Same, *Id.*

Under Bankr. Act July 1, 1898, c. 541, § 70, subds. 3, 5, 30 Stat. 565 [U. S. Comp. St. 1901, p. 8451], title to a seat in the New York Stock Exchange *held* to have passed to the owner's trustee in bankruptcy.—In re Hurlbutt, Hatch & Co. (C. C. A.) 504.

A seat in a stock exchange *held* a part of the assets of a bankrupt stock exchange firm, and not the individual property of one of its members.—In re Hurlbutt, Hatch & Co. (C. C. A.) 504.

Though a seller of goods waived his lien by extending credit to the buyer, such lien was revived, on the buyer becoming insolvent, as to such part of the goods as remained in the seller's possession.—In re Manuel J. Portuondo Co. (D. C.) 592.

Where claimant accepted a bankrupt's notes as conditional payment for tobacco, and retained possession of the tobacco in question until after the bankrupt's adjudication and the notes had matured, the title thereto passed to the trustee, subject to claimant's lien for the unpaid price.—In re Manuel J. Portuondo Co. (D. C.) 592.

A transaction *held* a sale of goods with a privilege of return, and not to entitle the seller to recover the goods unsold as against the buyer's trustee in bankruptcy.—In re Miller & Brown (D. C.) 868.

A shipment of certain ribbons to a bankrupt firm, in addition to the amount ordered, which the bankrupt set apart to be returned, *held* a bailment, and not a "sale and return," so that the seller was entitled to recover such ribbons from the bankrupt's trustee.—In re Miller & Brown (D. C.) 871.

Money applied to salary by the manager of a bankrupt's business, as he was authorized to do, before filing of the bankruptcy petition, *held* not recoverable by the trustee as money belonging to the bankrupt.—In re Lebrecht (D. C.) 878.

### § 6. Preferences and transfers by bankrupt, and attachments and other liens.

Under Bankr. Act July 1, 1898, c. 541, § 67, subds. "a," "c," 30 Stat. 564 [U. S. Comp. St. 1901, p. 8449], chattel mortgage void by the state law as against creditors of the mortgagor

*held void as against his trustee in bankruptcy.*—In re First Nat. Bank (C. C. A.) 62.

Grounds for reasonable belief in the present inability of a debtor to pay his debts in the course of business are not necessarily grounds for believing that he is insolvent, within the definition of insolvency contained in Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], so as to require the creditor to surrender payments received as preferences.—In re Pettingill & Co. (D. C.) 218.

A creditor *held*, under the facts shown, not to have had reasonable cause to believe his debtor insolvent at the time payments were received, so as to require such payments to be surrendered as preferences before proving its claim in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443].—In re Pettingill & Co. (D. C.) 218.

A mortgage given by an insolvent within four months prior to his bankruptcy, in part to secure an antecedent debt and in part to secure a loan made at the time, is valid to the extent of the latter consideration.—In re Dismal Swamp Contracting Co. (D. C.) 415.

A parol agreement by a borrower, when the loan was made, to give security upon the property which was to be purchased with the borrowed money, does not render valid a mortgage given pursuant thereto within four months prior to the borrower's bankruptcy, and when he was insolvent, which constitutes a voidable preference under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].—In re Dismal Swamp Contracting Co. (D. C.) 415.

Payments made by a bankrupt, while insolvent, by a return of goods, *held* to have been received by the creditors when they had reasonable cause to believe the debtor insolvent, and to have constituted preferences, which must be returned before proof of claims.—In re Andrews (D. C.) 599; *Ex parte Hardy*, *Id.*

A petition filed in a bankruptcy proceeding by an adverse claimant of property, which is also claimed by the trustee as a part of the bankrupt's estate, to determine the ownership thereof, presents a controversy in relation to the estate, of which the court of bankruptcy is given jurisdiction by Bankr. Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420].—In re Hadden Rodee Co. (D. C.) 886.

Evidence *held* insufficient to sustain a petition for the recovery of goods shipped by the petitioner to the bankrupt, on the ground that they were obtained by means of a false financial statement made by the bankrupt to a commercial agency.—In re Rose (D. C.) 888.

Mortgages given by a shipbuilding company on its plant and stock of material *held* void as to materials used by the mortgagor in the construction of a boat for a customer in the ordinary course of its business as contemplated by the mortgages, and to give the mortgagees no lien on the boat or its proceeds as against the company's trustee in bankruptcy.—In re Marine Construction & Dry Dock Co. (D. C.) 921.

## § 7. Administration of estate.

An objection that an order compelling a bankrupt to transfer his membership in the New York Stock Exchange for the benefit of the trustee in bankruptcy of a firm owning the same amounted to a resignation of his personal membership in the Exchange *held* unsustainable.—In re Hurlbutt, Hatch & Co. (C. C. A.) 504.

Under Bankr. Act July 1, 1898, c. 541, § 2, subds. 7, 15, and section 7, subd. 4, 30 Stat. 545, 548 [U. S. Comp. St. 1901, pp. 3421, 3425], a court of bankruptcy *held* to have jurisdiction to compel a member of a bankrupt firm to execute a transfer of a seat in the New York Stock Exchange, which he had contributed to the assets of the firm.—In re Hurlbutt, Hatch & Co. (C. C. A.) 504.

A petition to sell property of a bankrupt *held* properly filed with the referee, instead of the clerk of the court, notwithstanding Bankr. Act July 1, 1898, c. 541, § 70b, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451].—In re William F. Fisher & Co. (D. C.) 223.

Where but two trustees of a bankrupt's estate were appointed at the creditors' first meeting, who applied for a sale of the bankrupt's assets, pending which a third trustee was elected, who joined in the petition under Bankr. Act July 1, 1898, c. 541, § 44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438], it was immaterial thereafter under section 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], that the application was filed by the two only.—In re William F. Fisher & Co. (D. C.) 223.

Where money necessary to pay taxes and priority debts under Bankr. Act July 1, 1898, c. 541, § 12b, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3427], had not been deposited, the pendency of a petition for composition *held* no defense to a proceeding for a sale of the bankrupt's assets.—In re William F. Fisher & Co. (D. C.) 223.

Under Bankr. Act July 1, 1898, c. 541, § 39a, cl. 5, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3436] and general order 27 (89 Fed. xi), a referee in bankruptcy *held* without jurisdiction to certify a question not raised in a contested proceeding between the parties to the judge for decision.—In re Reukauff, Sons & Co. (D. C.) 251.

In a proceeding against an involuntary bankrupt to recover assets, evidence *held* to support a finding that the bankrupt had under her control the sum of \$2,425, which she had concealed and refused to surrender to her trustee.—In re Cole (D. C.) 439.

In an action against a bankrupt, stenographer's notes of his testimony taken at creditors' meetings is admissible, but the testimony of other witnesses at such meetings is incompetent.—In re Wiesen Bros. (D. C.) 442.

A court of bankruptcy is not limited in its sales of assets of bankrupts by Act March 3, 1893, c. 225, 27 Stat. 751 [U. S. Comp. St. 1901, p. 710], providing that all sales of real estate made under any decree of a United States court shall be at public auction, but

they have power to order either real or personal property sold at private sale.—In re Edes (D. C.) 595.

A referee in bankruptcy has authority to entertain and consider the claim of an intervening petitioner to property or its proceeds in the hands of a trustee, alleged to be the property of the petitioner and not of the estate in bankruptcy.—In re Drayton (D. C.) 883.

#### § 8. — Actions by or against trustee.

Where, after reversal of a judgment in favor of a trustee in bankruptcy, a decree of restitution was ordered against him, it was proper for the court of bankruptcy, in the exercise of its summary jurisdiction, to order the trustee to pay the person entitled thereto the amount determined by such decree.—In re Howard (C. C. A.) 721.

#### § 9. Claims against and distribution of estate.

An allowance to the attorney of a voluntary bankrupt *held* improperly made a prior charge on the proceeds of mortgaged property as against the mortgagee.—Liddon & Bro. v. Smith (C. C. A.) 43.

Under Bankr. Act July 1, 1898, c. 541, § 1, subd. 11, and section 68, 30 Stat. 544, 565 [U. S. Comp. St. 1901, pp. 3419, 3450], a national bank, indebted to a bankrupt on a deposit and holding a liability against him as indorser which matured after the bankruptcy petition was filed, *held* entitled to set off the deposit against such liability and prove the balance against his estate.—In re Philip Semmer Glass Co. (C. C. A.) 77.

Liability of a bankrupt indorser of commercial paper which did not become absolute until after the filing of the petition *held* a provable debt.—In re Philip Semmer Glass Co. (C. C. A.) 77.

Under Bankr. Act July 1, 1898, c. 541, § 57, subds. "a," "b," "d," "f," 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], the verified claim against a bankrupt, valid on its face, is prima facie evidence of the bankrupt's indebtedness.—In re Dresser (C. C. A.) 495.

Failure to file a writing, the basis of a claim against a bankrupt's estate, as required by Bankr. Act July 1, 1898, c. 541, § 57b, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], *held* not to create a presumption against the existence thereof.—In re Dresser (C. C. A.) 495.

A creditor, holding an unrecorded chattel mortgage securing his debt, at whose instance the debtor obtained a loan from a bank on a written statement showing his property free from incumbrance, and who received part payment of his debt from the proceeds, will be postponed in bankruptcy, as to the remainder of his claim, to the debt of the bank.—In re Ewald & Brainard (D. C.) 168.

The act of a creditor in withholding from record a chattel mortgage securing his debt, by agreement with the mortgagor, until the latter's bankruptcy, while it may render the mortgage invalid as a lien as against subsequent creditors without notice, does not of itself affect his right to prove his debt in bankruptcy, nor subor-

dinate it to the claims of subsequent creditors.—In re Ewald & Brainard (D. C.) 168.

A referee's finding that a claim against a bankrupt's estate was transferred by the claimant to her husband, with knowledge of the bankrupt's insolvency, for the purpose of enabling the husband to set it off as against an indebtedness to the bankrupt, *held* sustained by the evidence.—In re Shults (D. C.) 623.

Where one indebted to a bankrupt firm took an assignment of a claim against the firm, which he claimed as an offset against his indebtedness, the burden was on him to show that the transfer was made before the firm suspended, and without knowledge of its insolvency.—In re Shults (D. C.) 623.

#### § 10. Rights, remedies, and discharge of bankrupt.

Facts *held* insufficient to show the abandonment of a bankrupt's homestead by his removal to another state.—In re Schulz (D. C.) 228.

A bankrupt *held* not entitled to a discharge under Bankr. Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], because of his failure to keep any books from which his financial condition could be ascertained.—In re Alvord (D. C.) 236.

A bankrupt *held* not entitled to an extension of time for the filing of an application for a discharge within the court's discretion, under Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427].—In re Lewin (D. C.) 252.

Specifications of objections to the discharge of a bankrupt on various grounds considered, and *held* not sustained by the evidence.—In re Doherty (D. C.) 432.

The portion of the monthly salary of a public officer of a state which was earned, but not payable, at the time of his filing a petition in bankruptcy, did not pass to his trustee, and his failure to schedule the same was not, therefore, a concealment of property which defeats his right to a discharge.—In re Doherty (D. C.) 432.

Where a notice of exemption is so general as not to indicate what specific articles the bankrupt claims as exempt, and he makes no request for specific articles until after the sale, the right of exemption is waived.—In re Von Kerm (D. C.) 447.

Where a bankrupt fraudulently conveyed certain of his property within four months prior to the filing of his petition, he was not entitled to a discharge under Bankr. Act July 1, 1898, c. 541, § 14, subd. b (4), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411].—In re Miller (D. C.) 591.

A bankrupt whose financial difficulties were the result of fraudulent transactions *held* not entitled to his discharge.—In re Miller (D. C.) 591.

A specification that a bankrupt had failed to deliver to the trustee a stock of goods in his possession *held* insufficient, in the absence of an averment that he concealed the same.—In re Taplin (D. C.) 861.

An objection to a bankrupt's discharge, not set forth in the specifications filed, cannot be considered.—In re Taplin (D. C.) 861.

Under Bankr. Act July 1, 1898, c. 541, §§ 14 (1), 29b, 30 Stat. 550, 554 [U. S. Comp. St. 1901, pp. 3428, 3433], a specification against a bankrupt's discharge, failing to allege that he knowingly and fraudulently concealed property which he failed to inventory, *held* insufficient.—In re Taplin (D. C.) 861.

Where a lease to a bankrupt contained a waiver of exemptions, the landlord was entitled to payment of rent as a preferred claim from the proceeds of a sale of exempt property subject to distress, though no levy was made.—In re Sloan (D. C.) 878.

An assignment of a bankrupt's exemption, under Act Pa. 1849 (P. L. 533), *held* an abandonment thereof.—In re Sloan (D. C.) 878.

A bankrupt having notified the receiver of the property from which he desired his exemptions allotted on the day the property was sold, prior to the filing of his schedules, he was entitled to claim his exemption from the proceeds of such property.—In re Sloan (D. C.) 878.

Where a bankrupt and his assignee claimed an interest in the fund derived from the sale of his assets, they were entitled to contest the allowance of a claim against such fund.—In re Sloan (D. C.) 878.

The burden of showing fraudulent concealment of assets by bankrupt *held* to be on the creditors opposing his discharge.—In re Keefer (D. C.) 885.

Failure to keep books of account *held* not ground for refusing bankrupt a discharge.—In re Keefer (D. C.) 885.

Under general orders in bankruptcy No. 32 (89 Fed. xiii), a creditor opposing a discharge *held* required, unless for good cause, to enter appearance not later than the return day.—In re Grant (D. C.) 889.

The liability of a bankrupt to the trustee of another bankrupt, under Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], for the value of property transferred to him by the latter while insolvent, in fraud of his creditors, is one based upon his own fraud, from which he is not released by a discharge, under section 17a (2) as amended in 1903 (32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 411]).—Mackel v. Rochester (D. C.) 904.

A bankrupt is not entitled to a stay of a pending suit against him which is based upon his alleged fraud, although the plaintiff in his complaint has waived the tort and sued upon an implied contract; the claim sued on being one from which, if sustained, a discharge would not be a release.—Mackel v. Rochester (D. C.) 904.

§ 11. Appeal and revision of proceedings. Proceedings on a petition filed in a bankruptcy court by a mortgagee, asserting the right to

the proceeds of mortgaged property of the bankrupt sold by his trustee, are reviewable by the Circuit Court of Appeals in the exercise of its general appellate jurisdiction, under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431].—Liddon & Bro. v. Smith (C. C. A.) 48.

An order disallowing a mortgage lien upon merchandise and fixtures of a bankrupt is the subject of an appeal to the Circuit Court of Appeals, under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431].—In re First Nat. Bank (C. C. A.) 62.

An order allowing a claim against the individual estate of a partner in a bankrupt firm, after it had been allowed against the firm estate, is not different from any order allowing a debt or claim, and is reviewable, if the amount is sufficient, only by appeal, under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].—In re Mueller (C. C. A.) 711.

Judgments or orders of a District Court in bankruptcy proceedings proper, relating to the administration of the estate, if appealable under the terms of Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], cannot be reviewed on petition to revise in matter of law under section 24b; the two provisions being exclusive of each other.—In re Mueller (C. C. A.) 711.

Judgments or orders of a District or Circuit Court, entered in controversies arising in bankruptcy proceedings, as distinguished from those entered in bankruptcy proceedings proper, are reviewable by the Circuit Courts of Appeals only by appeal or writ of error under their general appellate jurisdiction, as provided in Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].—In re Mueller (C. C. A.) 711.

A claimant of a lien against a bankrupt's property, held invalid as a preference by the referee and District Court, *held* not a purchaser for value, or adverse claimant, entitled to appeal within six months, under Bankr. Act July 1, 1898, c. 541, § 24, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431], but was within the ten-day limitation prescribed by section 25a.—Kenova Loan & Trust Co. v. Graham (C. C. A.) 717.

Whether a lien claimed by a bankrupt's creditor under a trust deed constituted a valid preference, under the bankrupt law, *held* a question of fact, not reviewable on a petition for review of an adverse determination by the referee and District Court.—Kenova Loan & Trust Co. v. Graham (C. C. A.) 717.

On a petition for review of an order of a District Court in bankruptcy, as distinguished from an appeal therefrom, questions of law only can be considered.—Kenova Loan & Trust Co. v. Graham (C. C. A.) 717.

Where the parties to an appeal to the Circuit Court of Appeals in effect were unable to agree on the record, it was appellant's duty to designate the same, leaving appellee to his remedy by certiorari to obtain the insertion of omissions.—In re A. L. Robertshaw Mfg. Co. (D. C.) 220.

Under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], and Act March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], the record of appeals to the Circuit Court of Appeals in bankruptcy cases must contain the entire record, as required by Rev. St. §§ 698, 750 [U. S. Comp. St. 1901, pp. 568, 591], in the absence of a stipulation to the contrary.—In re A. L. Robertshaw Mfg. Co. (D. C.) 220.

The court of bankruptcy from which an appeal is taken has no jurisdiction to designate what records shall be certified on which the appellate court shall determine the appeal.—In re A. L. Robertshaw Mfg. Co. (D. C.) 220.

Bankruptcy proceedings *held* to be still pending in the District Court after the dismissal of petition to revoke discharge, so as to authorize it to restrain arrest of bankrupt, while the cause stands on review in the Circuit Court of Appeals on petition, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431].—In re Chandler (D. C.) 893.

## BANKS AND BANKING

Jurisdiction of actions against national banks, see "Courts," §§ 2-4.

### § 1. National banks.

Notes executed by an insolvent national bank in process of liquidation, under a contract with another bank which had assumed the debts of the liquidating bank, *held* "contracts, debts, and engagements" of the liquidating bank in equity, for which its stockholders were liable, under Rev. St. § 5151 [U. S. Comp. St. 1901, p. 3465].—George v. Wallace (C. C. A.) 286; Brownlee v. Same, Id.; Morsman v. Same, Id.; Poppleton v. Same, Id.; Morton v. Same, Id.; McCague Inv. Co. v. Same, Id.

A suit by a simple creditor of a liquidating insolvent national bank for the enforcement of a lien and the administration of a trust with reference to the liquidating bank's assets *held* maintainable, though complainant had not reduced his claim to judgment.—George v. Wallace (C. C. A.) 286; Brownlee v. Same, Id.; Morsman v. Same, Id.; Poppleton v. Same, Id.; Morton v. Same, Id.; McCague Inv. Co. v. Same, Id.

Where a contract for the assumption of the debts of an insolvent national bank by another national bank was fully ratified by the vote of more of the stock of the liquidating bank than was required by Rev. St. §§ 5220, 5221 [U. S. Comp. St. 1901, p. 3503], its stockholders were not entitled thereafter to claim that the contract was ultra vires.—George v. Wallace (C. C. A.) 286; Brownlee v. Same, Id.; Morsman v. Same, Id.; Poppleton v. Same, Id.; Morton v. Same, Id.; McCague Inv. Co. v. Same, Id.

A trustee and liquidating agent of an insolvent national bank holds its assets under an express trust for the benefit of its creditors.—George v. Wallace (C. C. A.) 286; Brownlee v. Same, Id.; Morsman v. Same, Id.; Poppleton v. Same, Id.; Morton v. Same, Id.; McCague Inv. Co. v. Same, Id.

The tangible assets and the liability of stockholders of an insolvent national bank in process of voluntary liquidation, in the hands of the liquidating agent, are a trust fund for the primary benefit of creditors.—George v. Wallace (C. C. A.) 286; Brownlee v. Same, Id.; Morsman v. Same, Id.; Poppleton v. Same, Id.; Morton v. Same, Id.; McCague Inv. Co. v. Same, Id.

## BAR.

Of action by former adjudication, see "Judgment," § 2.

## BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

## BENEFITS.

Acceptance of, as ground of estoppel, see "Estoppel," § 1.

## BEQUESTS.

See "Wills."

## BIAS.

Of juror, see "Jury," § 1

## BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

## BILLS AND NOTES.

Cancellation of note, see "Cancellation of Instruments," § 1.

Jurisdiction of action on note of national bank, see "Courts," §§ 2, 4.

## BONA FIDE PURCHASERS.

Of municipal bonds, see "Municipal Corporations," § 1.

## BONDS.

Character of parties ground of jurisdiction of federal courts in action on, see "Courts," § 4. In proceedings in admiralty, see "Admiralty," § 2.

Municipal bonds, see "Municipal Corporations," § 1.

Of clerks of courts, see "Clerks of Courts."

Of corporation, see "Corporations," §§ 2, 3.

Of government contractor, see "United States," § 2.

Perjury in taking oath as to qualifications as surety on distiller's bond, see "Perjury," § 1.

Sureties on bonds, see "Principal and Surety."

## BREACH.

Of contract, see "Sales," § 3.

Of warranty, see "Sales," § 4.

**BRIDGES.**

Measure of damages for breach of contract relating to, see "Damages," § 2.

**BROKERS.**

See "Factors."

§ 1. **Duties and liabilities to principal.**  
A broker, being authorized to close margin transactions on the margin being "exhausted," held entitled to close when the margins were depleted or impaired.—*Foster v. Murphy & Co.* (C. C. A.) 47.

In an action against a broker for wrongfully closing a margin account, evidence held to justify a finding that defendant afforded plaintiff a reasonable time within which to deposit margins.—*Foster v. Murphy & Co.* (C. C. A.) 47.

Evidence held to justify a finding of modification of a broker's contract, so as to authorize him to sell plaintiff's cotton without notice on plaintiff's failure to keep his margins good.—*Foster v. Murphy & Co.* (C. C. A.) 47.

In an action against a broker for selling plaintiff's cotton for his failure to put up margins, evidence as to what quotations were posted on plaintiff's blackboard on the day of the sale held inadmissible.—*Foster v. Murphy & Co.* (C. C. A.) 47.

**BUILDING AND LOAN ASSOCIATIONS.**

Subscription for building and loan stock and contract for loan of money construed as distinct, and held enforceable according to their terms in the matter of application of payments made by the subscriber and borrower.—*Cooper v. Brazelton* (C. C. A.) 476.

Transaction by which a note for \$1,200 was given in consideration of loan for \$800 held usurious.—*Cooper v. Brazelton* (C. C. A.) 476.

**BUILDING CONTRACTS.**

See "Counties," § 1.

**CANCELLATION OF INSTRUMENTS.**

Cancellation of deed for invalidity, see "Deeds,"

§ 1.  
Rescission of contracts for insurance, see "Insurance," § 2.

§ 1. **Right of action and defenses.**

A federal court of equity has jurisdiction of a suit for the cancellation of a promissory note alleged to have been obtained from complainant by fraud; the remedy at law not being plain, adequate, and complete.—*Manning v. Berdan* (C. C.) 159.

A conveyance of plaintiff's interest in her brother's estate held in the nature of an executed gift, not subject to vacation in equity, in the absence of fraud.—*Fowler v. Fowler* (C. C.) 405.

**CARGO.**

See "Shipping."

**CARRIERS.**

Carriage of goods by vessels, see "Shipping," § 4.

Carriage of passengers by vessels, see "Shipping," § 5.

§ 1. **Carriage of goods.**

Evidence of habitual intoxication and neglect of duty by the superintendent of a wharf held competent, in an action against the owner to recover for a loss by fire of cotton piled on the wharf, alleged to have been due to a course of negligent conduct on the part of defendant in piling the cotton and in failure to take proper measures for its protection.—*Texas & P. Ry. Co. v. Coutourie* (C. C. A.) 465.

Upon the issue as to the negligence of a railroad company in failing to employ a sufficient number of watchmen to guard a large quantity of cotton piled upon its wharf against fire, evidence of the existence at the time of labor disturbances, relating to men employed on ships loading at such wharf, was competent.—*Texas & P. Ry. Co. v. Coutourie* (C. C. A.) 465.

A carrier is not liable for a loss of property in shipment through an act of God which could not reasonably have been foreseen, although but for its previous negligence, by which the shipment was delayed, the property would have escaped the danger and the loss would not have occurred.—*Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.* (C. C.) 135; *Minnesota & D. Cattle Co. v. Same, Id.*

§ 2. **Carriage of live stock.**

A railroad company held not chargeable with negligence in diverting a through shipment of stock to another route than the one over which it was billed, where the circumstances were such as to render the action necessary and prudent.—*Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.* (C. C.) 135; *Minnesota & D. Cattle Co. v. Same, Id.*

Loss to a large shipment of cattle which had been placed by a railroad company in the stockyards at Kansas City during an unprecedented flood which covered the yards held to have been proximately due to such cause, and not to any negligence on the part of the company which rendered it liable therefor.—*Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.* (C. C.) 135; *Minnesota & D. Cattle Co. v. Same, Id.*

§ 3. **Carriage of passengers.**

A railroad company may lawfully exempt itself by contract with an express company using its cars from liability for negligence of its employees causing the injury of express messengers occupying such cars, and where a messenger has assented to such exemption in his contract of employment with the express company there can be no recovery from the railroad company for his injury or death.—*Kelly v. Malott* (C. C. A.) 74.

A judgment in favor of a passenger for \$200 damages for wrongful ejection from a car on defendant's railroad affirmed, on the authority of *Pullman's Palace Car Co. v. King*, 99 Fed.

380, 89 C. C. A. 578.—Baltimore & O. R. Co. v. Kitchin (C. C. A.) 520.

In an action against a carrier for injuries to a mail clerk by a defect in the track, a requested instruction that the carrier was not bound to employ every possible preventative which the highest scientific skill might suggest, nor to adopt any mere speculative and untried experiment, *held* properly refused.—Southern Pac. Co. v. Schuyler (C. C. A.) 1015.

The court having charged that the burden was on plaintiff to prove by a preponderance of evidence that his injuries resulted from defendant's negligence, a requested instruction on the preponderance of evidence *held* properly refused.—Southern Pac. Co. v. Schuyler (C. C. A.) 1015.

Instructions given in an action against a carrier for injuries to a mail clerk *held* to sufficiently charge the rule with reference to the carrier's liability for the accident, resulting from the act of God.—Southern Pac. Co. v. Schuyler (C. C. A.) 1015.

In an action against a carrier for injuries to a mail clerk, an instruction that it was the duty of the carrier to keep its tracks in safe condition for the passage of trains under all known conditions *held* not error.—Southern Pac. Co. v. Schuyler (C. C. A.) 1015.

## CAUSE OF ACTION.

See "Action."

## CHALLENGE.

To juror, see "Jury," § 1.

## CHANCERY.

See "Equity."

## CHARGE.

To jury, in civil actions, see "Trial," § 2.

To jury, in criminal prosecutions, see "Criminal Law," § 2.

## CHARTER PARTIES.

See "Shipping," § 1.

## CHATTEL MORTGAGES.

Adoption by federal courts of state laws as rules of decision relating to, see "Courts," § 6. Effect of proceedings in bankruptcy, see "Bankruptcy," § 6.

### § 1. Rights and remedies of creditors.

Under the law of Ohio a mortgage on merchandise, permitting the mortgagor to remain in possession, is valid from the time the mortgagee takes actual possession, but is void as to purchasers and creditors of the mortgagor before possession taken by the mortgagee.—In re First Nat. Bank (C. C. A.) 62.

## CHEAT.

See "Fraud."

## CHINESE.

Exclusion or expulsion, see "Aliens," § 1.

## CHOSE IN ACTION.

Assignment, see "Assignments."

## CIRCUIT COURTS OF APPEALS.

See "Courts," § 7.

## CIRCUMSTANTIAL EVIDENCE.

Requisites and sufficiency of instructions relating to, see "Criminal Law," § 2.

## CITIES.

See "Municipal Corporations."

## CITIZENS.

See "Aliens"; "Indians."

Citizenship ground of jurisdiction of United States courts, see "Courts," § 4; "Removal of Causes," § 2.

## CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 9.

Of patent, see "Patents," § 7.

## CLERKS OF COURTS.

The bond of a clerk of the United States Circuit Court, though given to the United States, is available to a private suitor.—United States v. Bell (C. C. A.) 336.

Plaintiff in an action on the bond of the clerk of a federal Circuit Court *held* not entitled to recover for the clerk's refusal to file papers in a suit and issue summons, where the statement of plaintiff's claim showed on its face no cause of action.—United States v. Bell (C. C. A.) 336.

The right and duty of a clerk of a Circuit Court to charge the fees fixed by Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], for each copy of an injunctive order directed by the court to be certified and served on each defendant in a suit, is not affected by the fact that the copies, being large in number, were printed.—Cudahy Packing Co. v. McGuire (C. C.) 891.

## COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1; "Guaranty."



## COLLISION.

Caused by negligence of pilot, see "Pilots."  
Limitation of action for damages from, see  
"Limitation of Actions," § 1.

§ 1. *Sail vessels meeting or crossing.*

A collision at sea in the night between two meeting schooners *held*, on conflicting testimony of their respective officers and crews, to have been solely due to the fault of the privileged vessel in changing her course just previous to the collision.—*The Eagle Wing* (D. C.) 828.

§ 2. *Steam vessels meeting or crossing.*

A steamboat *held* solely in fault for a collision in Hell Gate with a ferryboat which had just left her slip at Astoria, for being too close inshore and for not keeping her course, as required by the starboard hand rule.—*The Steinway* (C. C. A.) 344; *City of New York v. New York & E. R. Ferry Co.*, Id.

§ 3. *Steam vessels and sail vessels.*

It is the duty of the navigator of a steamer, under Inland Rules, arts. 20-23, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883], to avoid risk of danger of collision with a crossing sailing vessel; and the presence of a passing steamer increases the necessity for precautionary care.—*Donald v. Gny* (D. C.) 429.

The pilot of a steamer, having her navigation in charge, *held* under the evidence solely in fault for a collision with a crossing schooner in Chesapeake Bay, for failing to change his course or speed until collision was unavoidable, although the schooner kept her course and speed as required by the rules.—*Donald v. Gny* (D. C.) 429.

A steamer *held* solely in fault for a collision with a meeting schooner on Long Island Sound in a fog, because of her excessive speed.—*The Chelsea* (D. C.) 618.

§ 4. *Vessels in tow.*

A collision between a tow and an anchored scow *held* due solely to the fault of the tow, whose steering gear was out of order, by reason of which she did not follow her tug, which fact was known to her owners, but not to the tug.—*The Alfred W. Booth* (C. C. A.) 519; *Booth v. Moran*, Id.

An ocean tug with a long tow, requiring her to exercise the utmost prudence, *held* solely in fault for a collision between her tow and a crossing schooner.—*The Gladys* (D. C.) 601; *Tooker v. Philadelphia & R. Ry. Co.*, Id.

A tug navigating the ocean at night with three tows on a single line, the whole 4,000 feet in length, is to be regarded as one vessel, and is required to exercise extreme care to avoid collision with crossing vessels.—*The Gladys* (D. C.) 601; *Tooker v. Philadelphia & R. Ry. Co.*, Id.

A steamship meeting a tug incumbered with a tow is under the duty of keeping out of the way and avoiding any risk of collision.—*The Georgetown* (D. C.) 854; *The Salisbury*, Id.; *The Barge No. 5*, Id.

The fact that a tug with a tow, on meeting a steamer, gave the first passing signal, does not

make the steamer the privileged vessel.—*The Georgetown* (D. C.) 854; *The Salisbury*, Id.; *The Barge No. 5*, Id.

A steamer *held* solely in fault for a collision with a meeting barge in tow, on the ground that she stopped and reversed after passing the tug, not only without justifiable cause, but without signaling as required by article 18, rule 8, and article 28, of the Inland Navigation Rules (Act June 7, 1897, c. 4, 30 Stat. 100, 102 [U. S. Comp. St. 1901, pp. 2882, 2884]).—*The Georgetown* (D. C.) 854; *The Salisbury*, Id.; *The Barge No. 5*, Id.

§ 5. *Narrow channels, harbors, rivers, and canals.*

Steam vessels, one of which overtook and was attempting to pass the other in the dredged channel leading from Lake St. Clair to the canal, in violation of the rules, both *held* in fault for a collision between the overtaken vessel and a passing tow.—*The Edward Smith* (C. C. A.) 32.

A steamer *held* solely in fault for collision with an anchored ship in the Columbia river in the night, on the ground that she was navigating without a lookout and was going at an excessive speed.—*The Cypromene* (D. C.) 558.

§ 6. *Suits for damages.*

Where at the instance of claimant the cost of repairing a vessel injured in collision has been adopted as the measure of damages to the libellant, the latter is entitled to recover by way of demurrage compensation for the loss of her use during repair; or, where she was sold without repairing, but before the repairs could have been completed, he may recover demurrage to the time of sale.—*The Cumberland* (D. C.) 234; *The Admiral Farragut*, Id.

The failure to take the testimony of those navigating a tug in a suit for collision between her tow and another vessel tends against her, in the absence of equivalent testimony.—*The Gladys* (D. C.) 601; *Tooker v. Philadelphia & R. Ry. Co.*, Id.

In determining which of two vessels in collision was in fault, on the conflicting testimony of their respective officers and crews, the intelligence, experience, and apparent reliability of the witnesses are matters to be taken into account in weighing their testimony.—*The Eagle Wing* (D. C.) 826.

While there is a presumption that the privileged one of two meeting vessels which came into collision obeyed the law and kept her course, yet when such presumption is overthrown, and her fault is clearly established, and is in itself sufficient to account for the collision, she can only avoid full liability by proving the fault of the other vessel beyond a reasonable doubt.—*The Eagle Wing* (D. C.) 826.

Where the navigation of one of two vessels in collision was at the time in charge of an unlicensed mate, in violation of the positive provisions of Rev. St. § 4438, as amended by Act Dec. 21, 1898, c. 29, 30 Stat. 764 [U. S. Comp. St. 1901, p. 3034], there is a presumption that such fact caused or contributed to the collision, and the vessel has the burden of showing that

it could not have done so.—*The Eagle Wing* (D. C.) 826.

Where the evidence in favor of one of two vessels in collision largely preponderates, including the testimony of disinterested witnesses, the failure of the other to call members of her own crew who were in a position to know the facts is a circumstance entitled to be considered against her.—*The Georgetown* (D. C.) 854; *The Salisbury, Id.*; *The Barge No. 5, Id.*

The burdened vessel, having been found chargeable with faults sufficient in themselves to account for a collision, has the burden of proving that they could not have caused or contributed to it, and every reasonable doubt is to be resolved in favor of the other vessel.—*The Georgetown* (D. C.) 854; *The Salisbury, Id.*; *The Barge No. 5, Id.*

## COMBINATIONS.

See "Conspiracy."

## COMITY.

Between courts, see "Courts," § 8.

## COMMERCE.

Carriage of goods and passengers, see "Carriers."

Regulations as to equipment of trains used in interstate commerce, see "Railroads," § 1.

## COMMISSION MERCHANTS.

See "Factors."

## COMMISSIONS.

Of agent, see "Principal and Agent," § 2.

## COMMON CARRIERS.

See "Carriers."

## COMPENSATION.

For salvage services, see "Salvage," § 1.

Of agent, see "Principal and Agent," § 2.

Of clerks of courts, see "Clerks of Courts."

Of pilot, see "Pilots."

## COMPETENCY.

Of juror, see "Jury," § 1.

Of witnesses in general, see "Witnesses," § 1.

## COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 2.

## COMPLAINT.

In pleading, see "Pleading," § 4.

## COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

## COMPROMISE AND SETTLEMENT.

See "Payment."

Where there is a bona fide dispute as to the amount due upon a demand, the acceptance in satisfaction of the entire demand of a sum less than was claimed is supported by a sufficient consideration, and precludes a recovery of the balance.—*Sims v. Three States Lumber Co.* (C. C. A.) 1018.

## CONCLUSION.

In pleading, see "Pleading," § 1.

## CONCURRENT JURISDICTION.

Of courts, see "Courts," § 8.

## CONDEMNATION.

Taking property for public use, see "Eminent Domain."

## CONFESSION.

Pleading by way of confession and avoidance, see "Pleading," § 2.

## CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see "Courts," § 8.

## CONSIDERATION.

Of contract, see "Contracts," § 1.

## CONSIGNMENT.

See "Factors."

## CONSOLIDATION.

Of corporations, see "Corporations," § 4.

## CONSPIRACY.

Competency of witnesses, see "Witnesses," § 1.  
Requisites and sufficiency of indictment in general, see "Indictment and Information," § 1.

### § 1. Criminal responsibility.

An indictment for conspiracy against the United States held not fatally defective for failure to allege certain facts stated in the indictment to be unknown to the grand jury.—*Wong Din v. United States* (C. C. A.) 702.

An indictment for conspiracy to defraud the United States held good, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3876], where it alleged facts showing that defendants conspired to deceive inspectors of the United States in the performance of their official func-

tions by fraudulently inducing them to approve life preservers which did not in fact fulfill the requirements of the law.—United States v. Stone (D. C.) 392.

To constitute the offense of conspiring "to defraud the United States," under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], it is not essential that the conspiracy should have been to commit an act in violation of a criminal statute.—United States v. Stone (D. C.) 392.

An indictment for conspiracy to defraud the United States by secretly inserting pieces of iron in cork blocks, intending that they should be used in making life preservers, *held* to sufficiently show that life preservers so made would not fulfill the requirements of the law.—United States v. Stone (D. C.) 392.

An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for conspiracy to defraud the United States, which sets out the unlawful agreement, need not aver an intent upon the part of the accused to defraud the United States.—United States v. Stone (D. C.) 392.

## CONSTITUTIONAL LAW.

Special or local laws, see "Statutes," § 1.  
Provisions relating to homestead, see "Homestead," §§ 2, 8.

### § 1. Obligation of contracts.

A statute exempting the property of a railroad company from state or local taxation for a term of years creates a contract, which is impaired by the state by the action of local authorities in levying taxes on the exempt property under their general powers given by the state law.—Wicomico County Com'rs v. Bancroft (C. C. A.) 977.

Ordinances consolidating street railroad companies whose franchises terminated at different times, requiring the lines to be operated together, and authorizing the building of extensions and the use of electric power on all the lines, *held* to create a contract which authorized and required the consolidated company to operate its lines until the termination of the later franchise, and which was protected by the Constitution against impairment.—Cleveland Electric Ry. Co. v. City of Cleveland (C. C.) 368.

Act Ark. March 27, 1893 (Acts 1893, p. 169), construed, and *held* not retroactive, and does not apply to warrants issued before its passage.—Condon v. City of Eureka Springs, Ark. (C. C.) 566.

### § 2. Retrospective and ex post facto laws.

An exemption from taxation, granted by special act to a railroad company, *held* limited to the line of road built under its charter, and not to extend to purchased lines.—Wicomico County Com'rs v. Bancroft (C. C. A.) 977.

## CONTEMPT.

Violation of injunction against infringement of patent, see "Patents," § 10.

## CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Assignment, see "Assignments."

Cancellation, see "Cancellation of Instruments."

Damages for breach, see "Damages," § 2.

Impairing obligation, see "Constitutional Law," § 1.

Jurisdiction of admiralty as to matters of contract, see "Admiralty," § 1.

Parol or extrinsic evidence, see "Evidence," § 4.

Specific performance, see "Specific Performance."

### *Contracts of particular classes of parties.*

See "Carriers," § 3; "Corporations," § 2;

"Counties," § 1; "Master and Servant";

"United States," § 2.

National bank, see "Banks and Banking," § 1.

### *Contracts relating to particular subjects.*

Exemption of carrier from liability for injury to passenger, see "Carriers," § 8.

Ground for maritime lien, see "Maritime Liens," § 1.

Making bequest or devise, see "Wills," § 1.

### *Particular classes of express contracts.*

See "Guaranty"; "Insurance"; "Partnership"; "Rewards"; "Sales."

Affreightment, see "Shipping," § 4.

Agency, see "Principal and Agent."

Charter parties, see "Shipping," § 1.

Employment, see "Master and Servant."

Sales of realty, see "Vendor and Purchaser."

Suretyship, see "Principal and Surety."

### *Particular classes of implied contracts.*

See "Money Lent"; "Use and Occupation"; "Work and Labor."

### *Particular modes of discharging contracts.*

See "Compromise and Settlement"; "Payment."

### § 1. Requisites and validity.

A contract by which an employe of a corporation, on leaving its service, in consideration of being paid the profits accruing on certain stock held for him, which by the terms of his employment he was not entitled to if he left to engage in a competing business, bound himself not to enter into such competition for the term of 10 years, *held* based on a good consideration, and valid.—Knapp v. S. Jarvis Adams Co. (C. C. A.) 1008; Bossert v. Same (C. C. A.) 1015.

A contract not to enter into business in competition with a complainant for a term of years, based on a good consideration, may lawfully extend to all territory wherein complainant's trade is likely to go, having regard to the nature of the business.—Knapp v. S. Jarvis Adams Co. (C. C. A.) 1008; Bossert v. Same (C. C. A.) 1015.

## CONTRIBUTORY NEGLIGENCE.

Of person injured by operation of railroad, see "Railroads," § 1.

Of person killed by electricity, see "Electricity."

Of servant, see "Master and Servant," §§ 1-3.

## CONVEYANCES.

### *Particular classes of conveyances.*

See "Assignments"; "Chattel Mortgages"; "Deeds"; "Mortgages."

## COPYRIGHTS.

### **§ 1. Nature and acquisition.**

Interim copyright act (Act Cong. Jan. 7, 1904, 38 Stat. 4, c. 2), extending copyright for term provided by Rev. St. tit. 60, c. 3 [U. S. Comp. St. 1901, p. 3405], *held* not to apply to a book of a foreign publisher which had been previously published by American publishers in the United States.—*Encyclopædia Britannica Co. v. Werner Co.* (C. C.) 841.

## CORPORATIONS.

Diverse citizenship ground of federal jurisdiction, see "Courts," § 4.

What corporations may be adjudged bankrupts, see "Bankruptcy," § 2.

### *Particular classes of corporations.*

See "Building and Loan Associations"; "Municipal Corporations."

Water companies, see "Waters and Water Courses," § 2.

### **§ 1. Capital, stock, and dividends.**

A corporation cannot prevent a shareholder from selling stock, and no right of action accrues to it for misrepresentations made by him in so doing.—*Stratton's Independence v. Dines* (C. C. A.) 449.

The directors of a corporation are impliedly vested with a discretionary power with regard to the time and manner of distributing its profits, and in the absence of fraud, or an abuse of discretion their action in leaving profits in the business, instead of distributing them to the stockholders in dividends, is legal, and constitutes no violation of the rights of a stockholder.—*Knapp v. S. Jarvis Adams Co.* (C. C. A.) 1008; *Bossert v. Same* (C. C. A.) 1015.

False and fraudulent representations, made in a prospectus issued by the promoters of a corporation respecting the value of property which was to be transferred by them to the corporation when organized, afford ground for equitable relief against the corporation in behalf of one who subscribed for its stock in reliance on such representations.—*Manning v. Berdan* (C. C.) 159.

### **§ 2. Corporate powers and liabilities.**

A contract made by the directors of a corporation for the publication of notices to its stockholders, advising them of a proposed scheme for exchanging its stock for that of another corporation, *held* to be within their general powers and binding on the corporation.—*Rascovor v. American Linseed Co.* (C. C. A.) 341.

The corporate seal affixed to an assignment purporting to be the act of a corporation by its president is *prima facie* evidence that the as-

signment was executed by corporate authority.—*Kirkpatrick v. Eastern Milling & Export Co.* (C. C.) 144.

An assignment by a corporation of an underwriting agreement for its bonds to a pledgee of the bonds construed, and *held* to carry with it as an incident the right to certain shares of stock, which were to be delivered to the subscribers for the bonds as a bonus.—*Kirkpatrick v. Eastern Milling & Export Co.* (C. C.) 146.

An underwriting agreement with a corporation, by which the subscribers agreed to purchase an issue of its bonds, is assignable by the corporation to a pledgee of the bonds.—*Kirkpatrick v. Eastern Milling & Export Co.* (C. C.) 146.

The president and secretary of a corporation *held* to have been acting within the apparent scope of their authority in executing an assignment of an underwriting agreement to a pledgee of the underwritten bonds, so as to entitle the assignee to enforce the contract.—*Kirkpatrick v. Eastern Milling & Export Co.* (C. C.) 146.

### **§ 3. Insolvency and receivers.**

Fees and expenses incurred on a hearing before a master of interlocutory issues arising in insolvency proceedings against a corporation cannot be allowed in advance of the general distribution of assets, to be made a charge against a particular class of creditors, many of whom are not before the court nor properly represented on that question.—*Girard Trust Co. v. McKinley-Lanning Loan & Trust Co.* (C. C.) 180.

Debenture bondholders of a loan company *held* entitled to intervene in insolvency proceedings against the company to contest an application by a trustee holding pledged securities for leave to sell the same.—*Girard Trust Co. v. McKinley-Lanning Loan & Trust Co.* (C. C.) 180.

An agreement under which securities were pledged with a trustee by a loan company to secure its debentures construed, and *held* not to authorize the trustee to collect or sell the same on the general insolvency of the company and when a receiver had been appointed to administer its assets.—*Girard Trust Co. v. McKinley-Lanning Loan & Trust Co.* (C. C.) 180.

Application of the receiver of an insolvent corporation to levy assessment on unpaid stock subscriptions necessary to pay debts *held* premature.—*Kirkpatrick v. American Alkali Co.* (C. C.) 230.

On an application by the receiver of an insolvent corporation to levy an assessment on unpaid subscriptions, the court must determine what proportion of the unpaid subscriptions will probably be needed to meet the liabilities.—*Kirkpatrick v. American Alkali Co.* (C. C.) 230.

### **§ 4. Consolidation.**

A consolidation of corporations under and in conformity to Rev. St. Mo. 1899, § 1334,

which authorizes the consolidation of "any two corporations \* \* \* whose objects and business are in general of the same nature," is not invalidated by the fact that one of the constituent corporations was itself created by a prior consolidation.—*Jones v. Missouri-Edison Electric Co. (C. C.)* 153.

A consolidation of corporations under Rev. St. Mo. 1899, § 1334, operates to extinguish the constituent companies, and a stockholder in one of such companies cannot maintain a suit based on the theory that it is still in existence, and where the relief prayed for must be enforced through such company.—*Jones v. Missouri-Edison Electric Co. (C. C.)* 153.

#### § 5. Foreign corporations.

President of a bank, which remitted collections to a foreign building and loan association, held not the agent of the association for service of process.—*Cooper v. Brazelton (C. C. A.)* 476.

The failure of a foreign corporation doing business in Pennsylvania to register as required by Act April 22, 1874 (P. L. 108), cannot be taken advantage of by the corporation or by its trustee in bankruptcy to avoid its contracts made in the state.—*In re Naylor Mfg. Co. (D. C.)* 206.

### CORPUS DELICTI.

Evidence of, see "Criminal Law," § 1.

### COSTS.

In admiralty, see "Admiralty," § 5.

In bankruptcy," see "Bankruptcy," § 2.

### COUNTIES.

#### § 1. Property, contracts, and liabilities.

A committee of a county board, required to report plans for a courthouse on April 1, 1903, held without power to extend the time for submission of plans by architects to April 21, 1903.—*Kinney v. Manitowoc County (C. C. A.)* 491.

Where a resolution of a county board for the construction of a courthouse contemplated a building the cost of which should not exceed \$100,000, a committee of the board had no authority to contract for plans for a building to cost \$100,000, "exclusive of heating and plumbing."—*Kinney v. Manitowoc County (C. C. A.)* 491.

A committee of a county board held not authorized to decide to erect a courthouse, nor to order working plans and specifications, but only preliminary plans for the information of the board.—*Kinney v. Manitowoc County (C. C. A.)* 491.

Plans and specifications furnished for the construction of a courthouse held not to constitute a sufficient compliance with a contract therefor to entitle plaintiffs to recover thereon.—*Kinney v. Manitowoc County (C. C. A.)* 491.

### COURTS.

Clerks, see "Clerks of Courts."

Judges, see "Judges."

Province of court and jury, see "Trial," § 2.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

*Jurisdiction of particular actions, proceedings, or subjects.*

See "Cancellation of Instruments," § 1.

Condemnation proceedings, see "Eminent Domain," § 1.

*Special jurisdictions and proceedings thereon.*

See "Equity," § 4.

#### § 1. Establishment, organization, and procedure in general.

Judges in the same court should not overrule the decisions of each other, except for the most cogent reasons.—*Boatmen's Bank of St. Louis v. Fritzlen (C. C. A.)* 650.

#### § 2. United States courts—Jurisdiction and powers in general.

Act Cong. June 30, 1876, c. 156, § 2, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509], conferring federal jurisdiction in suits in the nature of a creditors' bill against a national banking association, held not repealed by Act Cong. July 12, 1882, c. 290, § 4, 22 Stat. 163 [U. S. Comp. St. 1901, p. 3458], nor by Act Cong. Aug. 13, 1888, c. 806, § 4, 25 Stat. 436 [U. S. Comp. St. 1901, p. 514].—*George v. Wallace (C. C. A.)* 286; *Brownlee v. Same, Id.*; *Morsman v. Same, Id.*; *Poppleton v. Same, Id.*; *Morton v. Same, Id.*; *McCague Inv. Co. v. Same, Id.*

A suit by an assignee of a nonnegotiable note of a national bank held properly brought in the federal Circuit Court, under Act Cong. June 30, 1876, c. 156, § 2, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509] in so far as it was sought thereby to enforce the liability of stockholders of such bank.—*George v. Wallace (C. C. A.)* 286; *Brownlee v. Same, Id.*; *Morsman v. Same, Id.*; *Poppleton v. Same, Id.*; *Morton v. Same, Id.*; *McCague Inv. Co. v. Same, Id.*

The national courts inferior to the Supreme Court can exercise such jurisdiction and powers only as are expressly conferred on them by Congress.—*United States v. Barrett (C. C.)* 189.

#### § 3. — Jurisdiction dependent on nature of subject-matter.

A suit which may be brought in a federal Circuit Court by or against a citizen of a state, because arising under the laws of the United States, may for that reason be brought in such court by or against a national bank located in the same state, notwithstanding Act Cong. July 12, 1882, c. 290, § 4, 22 Stat. 163 [U. S. Comp. St. 1901, p. 3458].—*George v. Wallace (C. C. A.)* 286; *Brownlee v. Same, Id.*; *Morsman v. Same, Id.*; *Poppleton v. Same, Id.*; *Morton v. Same, Id.*; *McCague Inv. Co. v. Same, Id.*

A suit against an insolvent national bank in voluntary liquidation, to enforce a specific lien,

or to judicially administer a contract or resulting trust arising from the insolvency or liquidation proceedings, *held* maintainable in the federal court, under Act Cong. Aug. 13, 1888, c. 866, §§ 1, 4, 25 Stat. 434, 436 [U. S. Comp. St. 1901, p. 514].—George v. Wallace (C. C. A.) 286; Brownlee v. Same, Id.; Morsman v. Same, Id.; Poppleton v. Same, Id.; Morton v. Same, Id.; McCague Inv. Co. v. Same, Id.

Where the statement of a claim in a federal court disclosed neither diverse citizenship nor a federal question, a mere allegation that defendants were liable under Rev. St. §§ 1979, 1980 [U. S. Comp. St. 1901, p. 1262], *held* insufficient to establish federal jurisdiction.—United States v. Bell (C. C. A.) 338.

**§ 4. — Jurisdiction dependent on citizenship, residence, or character of parties.**

Where a nonnegotiable note, executed by one national bank to another, both citizens of Nebraska, was assigned to a citizen of another state, he was not entitled to maintain suit thereon in the federal courts, on the ground of diversity of citizenship.—George v. Wallace (C. C. A.) 286; Brownlee v. Same, Id.; Morsman v. Same, Id.; Poppleton v. Same, Id.; Morton v. Same, Id.; McCague Inv. Co. v. Same, Id.

Under Const. Mich. art. 15, § 11, a partnership created under 2 Comp. Laws Mich. pp. 1883, 1888, as amended by Pub. Acts 1903, pp. 398-404, *held* not a corporation having citizenship, for the purpose of federal jurisdiction, in a state where it was created, independent of the individuals comprising it.—Fred Macey Co. v. Macey (C. C. A.) 725.

An action on the bond of a government contractor, brought under Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], in the name of the United States for the use of a materialman, is not one in which the United States is plaintiff or petitioner, within the meaning of Judiciary Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], and a federal court is without jurisdiction unless the requisite diversity of citizenship and amount in controversy are shown.—United States v. Barrett (C. C.) 189.

The Circuit Court has no jurisdiction over an action for injuries brought against a domestic and a foreign corporation, where there is any ground to claim a right of action against the domestic corporation.—Keller v. Kansas City, St. L. & C. R. Co. (C. C.) 202; Harmon v. Louisiana & M. R. R. Co., Id.

A declaration in an action by a partnership created under Comp. Laws Mich. 1897, c. 160, §§ 6079, 6089, *held* to sufficiently charge the citizenship of the persons composing the firm to confer jurisdiction.—Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency (C. C.) 613.

**§ 5. — Procedure, and adoption of practice of state courts.**

The making of special findings by a federal Circuit Court, on waiver of a jury, *held* gov-

erned by Rev. St. §§ 649, 700.—Jones v. United States (C. C. A.) 518.

The federal courts will permit amendments of pleadings by correction of jurisdictional, as well as other, averments.—In re Plymouth Cordage Co. (C. C. A.) 1000.

The federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) does not require a federal court in Connecticut to deviate from its established practice in serving process in an action against a town, and to follow Gen. St. Conn. 1902, § 571, which requires the service of copies of the process, including the declaration or complaint, duly attested by the officer.—Elson v. Town of Waterford (C. C.) 247.

Where a party to a suit in a federal court applied to take depositions under Rev. St. § 863 [U. S. Comp. St. 1901, p. 661], he was not bound by Act Cong. March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], to take the same orally before an authority named in the notice, but was entitled to take the same in the mode prescribed by the laws of the state in which the court was held.—Magone v. Colorado Smelting & Mining Co. (C. C.) 846.

An affidavit merely alleging that witnesses lived more than a hundred miles from the place of the trial of the action *held* insufficient for the issuance of a *dedimus* to take depositions, under Rev. St. § 866 [U. S. Comp. St. 1901, p. 663].—Magone v. Colorado Smelting & Mining Co. (C. C.) 846.

Act Cong. March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], authorizing the taking of depositions in the mode prescribed by state laws, *held* not to restrict or enlarge the grounds for taking depositions, prescribed by Rev. St. U. S. §§ 863, 866 [U. S. Comp. St. 1901, pp. 661, 663].—Magone v. Colorado Smelting & Mining Co. (C. C.) 846.

**§ 6. — State laws as rules of decision.**

In determining the validity of a chattel mortgage in bankruptcy proceedings, the federal court will follow decisions of the state in which the transaction occurred.—In re First Nat. Bank (C. C. A.) 62.

The federal courts, in determining the validity of a legislative act under which municipal bonds in suit were issued under the state Constitution, will follow the construction placed upon the Constitution by the highest court of the state at the time the bonds were issued and sold.—Rees v. Olmsted (C. C. A.) 296.

Act Ohio March 21, 1894 (91 Ohio Laws, p. 543), authorizing road improvements in districts of counties having a certain population and the issuance of bonds therefor, is not invalid, under Const. Ohio, art. 2, § 26, as a "law of a general nature" not uniform in its operation, as such provision was construed by the Supreme Court of the state at the time of its passage, and bonds issued in conformity thereto are valid and enforceable.—Rees v. Olmsted (C. C. A.) 296.

A federal court is not bound to follow the construction placed upon a state statute by the

local courts in a suit involving rights under such statute which accrued prior to such construction.—*Wicomico County Com'rs v. Bancroft* (C. C. A.) 977.

#### § 7. — Circuit courts of appeals.

The granting of a preliminary injunction rests in the sound judicial discretion of a Circuit Court, and, while its order granting such injunction is reviewable, it will not be disturbed on appeal, unless it is violative of the rules of equity that have been established for the guidance of its discretion.—*Lehman v. Graham* (C. C. A.) 39.

Exceptions to a refusal to set aside the verdict present no question reviewable in the Circuit Court of Appeals.—*Foster v. Murphy & Co.* (C. C. A.) 47.

A Circuit Court of Appeals is without power to dismiss an appeal on motion of the appellant, and to remand the case to the court below, with directions to permit the amendment of a pleading, on a showing that facts were inadvertently omitted therefrom, which was not known to appellant until after the appeal was taken.—*Strand v. Griffith* (C. C. A.) 739.

#### § 8. Concurrent and conflicting jurisdiction, and comity.

Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], does not prevent a federal court, in a suit otherwise within its jurisdiction, from granting relief against a judgment of a state court obtained by fraud or on other equitable grounds, nor from granting a preliminary injunction to prevent the enforcement of such judgment by execution or otherwise.—*Lehman v. Graham* (C. C. A.) 39.

A court which has the actual custody of property to which another court of concurrent jurisdiction has a superior right may retain the property until the latter court requests possession.—*Boatmen's Bank of St. Louis v. Fritzen* (C. C. A.) 650.

Wherever one court secures the custody of specific property, the object of a suit in another court, the latter action should proceed until the custody of the property is required, and then be stayed until the proceedings in the court which has obtained the prior custody are concluded.—*Boatmen's Bank of St. Louis v. Fritzen* (C. C. A.) 650.

### COVERTURE.

See "Husband and Wife."

### CREDIBILITY.

Of witness, see "Witnesses," § 3.

### CREDITORS.

See "Bankruptcy," §§ 4-9.

Remedies against surety, see "Principal and Surety," § 3.

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 1.

### CREDITORS' SUIT.

Jurisdiction of federal courts, see "Courts," § 2.

### CRIMINAL LAW.

Competency of witnesses, see "Witnesses," § 1. Indictment, information, or complaint, see "Indictment and Information."

#### Particular offenses.

See "Conspiracy," § 1; "Larceny"; "Perjury." Against postal laws, see "Post Office," § 1.

#### § 1. Evidence.

It is now the well-settled rule that in all criminal cases the corpus delicti, as well as that defendant committed the crime, may be proved by circumstantial evidence.—*Dimmick v. United States* (C. C. A.) 257.

#### § 2. Trial.

The action of a district attorney in asking questions calling for incompetent testimony *held* not misconduct such as to constitute ground for reversing a judgment of conviction.—*Dimmick v. United States* (C. C. A.) 257.

Instructions upon circumstantial evidence in a criminal prosecution considered and approved.—*Dimmick v. United States* (C. C. A.) 257.

The refusal of requests for instructions is not error, where the court in the charge given clearly and correctly covers all the principles applicable in the case.—*Dimmick v. United States* (C. C. A.) 257.

The judge of a federal court in a criminal case is not warranted in instructing the jury that they should ignore evidence offered by the defendant as to the possession by her of certain powers of mental healing, because it was contrary to well-established laws of nature; the weight and credibility of the evidence, if admissible, being for the jury.—*Post v. United States* (C. C. A.) 1, 1022.

#### § 3. Appeal and error, and certiorari.

Where counsel for defendant in a criminal case base an argument to the jury on an assumption of facts not shown by the evidence, he cannot assign it as error that counsel for the prosecution, in answering such argument, also goes outside the record.—*Dimmick v. United States* (C. C. A.) 257.

An appellate court in a criminal case cannot weigh the evidence, and the sole question for its determination thereon is whether there is any legal evidence to sustain the verdict.—*Dimmick v. United States* (C. C. A.) 257.

Offers of evidence by the prosecution with respect to prior convictions of defendant for other offenses *held* not prejudicial to defendant's rights, in view of the rulings and charge of the court.—*Dimmick v. United States* (C. C. A.) 257.

The admission of irrelevant testimony in a criminal case, which was afterward stricken out on motion of defendant's counsel, and which the jury were instructed to disregard, was not

prejudicial error.—*Dimmick v. United States* (C. C. A.) 257.

## CUSTOMS DUTIES.

### § 1. Validity, construction, and operation of customs laws in general.

The provision in section 3030, Rev. St. [U. S. Comp. St. 1901, p. 1995], for "merchandise entitled to debenture," refers to merchandise in a customs bonded warehouse, in regard to which its owner or the importer is entitled to a certificate showing the amount of duties paid thereon and that it has been entered for export.—*W. H. Thomas & Son Co. v. Barnett* (C. C.) 172.

Under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], paraffin imported from Germany, where it was manufactured from petroleum produced in Russia, is dutiable at a rate equal to that imposed by Russia on petroleum or its products imported from the United States.—*United States v. R. F. Downing & Co.* (C. C.) 250.

### § 2. Goods subject to duty, rate, and amount.

Broken stereotype plates containing 85 per cent. of lead, 12 per cent. of antimony, and 3 per cent. of tin and copper, *held* not to be "types, old," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 690, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1689], but to be classifiable as "type metal" under section 1, Schedule C, par. 190, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1645].—*Sapery v. United States* (C. C. A.) 332.

Half pearls, so called, are dutiable by similitude under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 436, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676].—*United States v. Hahn* (C. C. A.) 349.

Handmade printing paper *held* more specifically provided for under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 396, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1671], as printing paper, than as handmade paper, under paragraph 401, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672].—*United States v. Miller, Sloan & Wright* (C. C. A.) 349.

*Held* that certain honeystone articles used for polishing purposes are not free of duty as "hones," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 574, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], but are dutiable as unenumerated manufactured articles under section 6 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).—*R. J. Waddell & Co. v. United States* (C. C.) 211.

The provision for "hones and whetstones," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 574, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], includes only articles used in sharpening edged instruments.—*R. J. Waddell & Co. v. United States* (C. C.) 211.

Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "imitations \* \* \* of precious stones \* \* \* not exceeding an inch in di-

mensions," contemplates the measurement of any single dimension.—*Albert Lorsch & Co. v. United States* (C. C.) 214.

Rock-crystal intaglios, painted, are dutiable under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "precious stones advanced \* \* \* by cleaving, splitting, cutting, or other process," and not under paragraph 115 of said act (Schedule B, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]), as manufactures of rock crystal, not specially provided for.—*Benedict & Warner v. United States* (C. C.) 242.

Lentiscum or lentiscus, being the leaves or stems of the pistacia lentiscus, or mastic tree, finely pulverized, is within the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 482, 30 Stat. 195 [U. S. Comp. St. 1901, p. 1680], for "articles in a crude state used in dyeing or tanning."—*Leber & Meyer v. United States* (C. C.) 243.

Articles used in dyeing or tanning are not "drugs," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628], and paragraph 548, Free List, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683].—*Leber & Meyer v. United States* (C. C.) 243.

Fruit in spirits is not dutiable as "fruits preserved in sirup," under Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule G, par. 218, 28 Stat. 524, but as unenumerated manufactured articles under section 3 of said act (28 Stat. 547).—*Reiss & Brady v. United States* (C. C.) 248.

Certain "rhinestones," composed chiefly of paste, used for decorating women's outer apparel, are dutiable as manufactures of paste not specially provided for, under tariff act of July 24, 1897, c. 11, § 1, Schedule B, par. 112, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635], and not as "buttons made of glass," under paragraph 414 of said act (Schedule N, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1674]).—*B. Blumenthal & Co. v. United States* (C. C.) 254.

Watchman's time detectors, containing a clock mechanism or time indicator, are dutiable under the provision for "watch movements, whether imported in cases or not," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 191, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645].—*Hensel, Bruckmann & Lorbacher v. United States* (C. C.) 255.

Wheat injured by frost to such an extent as to reduce it to a low grade, or to "no grade," but which can still be used for seed and for making flour, is dutiable as "wheat" under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 234, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], and not as a nonenumerated unmanufactured article, under section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].—*United States v. W. P. Devereux Co.* (C. C.) 428.

*Held*, that crude feathers for ornamental purposes, which need to be manufactured before becoming suitable for such purposes, are dutiable as "crude" feathers, and not as "ornamental" feathers, under Tariff Act July 24, 1897, c. 11,



§ 1, Schedule N, par. 425, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675].—*Brodie v. United States* (C. C.) 914; *Spero v. Same* (C. C.) 915.

Crude ornamental eagle and condor quills, needing further treatment before becoming suitable for ornamental purposes, are dutiable as crude feathers, and not as ornamental feathers, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675].—*Brodie v. United States* (C. C.) 914; *Spero v. Same* (C. C.) 915.

Slides or buckles of metal, made to imitate precious stones and precious metals, and used in ornamenting slippers, *held* not to be "articles commonly known as jewelry," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], but to be dutiable as manufactures of metal not specially provided for, under paragraph 193 of said act (Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]).—*E. H. Bailey & Co. v. United States* (C. C.) 917.

Fish roe, or caviar, in tin packages, is dutiable as fish in tins, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 258, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], by virtue of the similitude clause in section 7 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).—*Menzel & Co. v. United States* (C. C.) 918; *Meyer & Lange v. Same*, *Id.*; *Weber v. Same*, *Id.*

Cotton strips intended to be used for shoe labels, after being cut appropriately, are not within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], for "labels for garments."—*Herzog v. United States* (C. C.) 919.

### § 3. Entry and appraisal of goods, bonds, and warehouses.

Under section 3030, Rev. St. [U. S. Comp. St. 1901, p. 1995], merchandise in customs bonded warehouses may not be transferred from the original packages for safety or preservation, unless entered for export.—*W. H. Thomas & Son Co. v. Barnett* (C. C.) 172.

Where an importer of unenumerated merchandise wishes to contend that it should be assessed at the rate applicable to an enumerated article, by virtue of the so-called similitude clause in Tariff Act Aug. 27, 1894, § 4, 28 Stat. 547, he refers to the provision relating to the enumerated article, the protest will be sufficient, under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].—*United States v. Dearberg Bros.* (C. C.) 245.

A protest claiming a refund on skins weighing less than 12 pounds each, which is the dividing line between hides and skins, *held* to satisfy the requirements for protests in Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], and to be sufficient as a claim for free entry under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 664, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], relating to skins.—*Helm-rath v. United States* (C. C.) 912.

Certain evidence as to manner of separation of skins from a mixed importation of hides and skins *held* to justify the finding that the pieces separated as skins were in fact skins.—*Helm-rath v. United States* (C. C.) 912.

The duty "per square foot" provided on rugs in Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 379, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668] should be based on the entire area of the rug, including the salvage.—*Fritz & La Rue v. United States* (C. C.) 916; *W. & J. Sloane v. United States*, *Id.*

## DAMAGES.

Expert testimony, see "Evidence," § 5.

For collision, see "Collision," § 6.

For fraud, see "Fraud," § 2.

### § 1. Grounds and subjects of compensatory damages.

Mortification and distress of mind, in contemplation of the crippled condition, *held* too remote to constitute an element of damage in an action for personal injury.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

In action for personal injury, plaintiff may recover for bodily suffering and mental pain.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

### § 2. Measure of damages.

The measure of damages recoverable by a defendant by way of recoupment in an action for the contract price of certain bridges, because of plaintiffs' delay in their completion, stated.—*American Bridge Co. v. Camden Interstate Ry. Co.* (C. C. A.) 323.

A longshoreman, injured by the negligence of a barge winchman, *held* entitled to a decree against the barge for \$1,750.—*The City of San Antonio* (D. C.) 879.

## DEATH.

Caused by electricity, see "Electricity."

### § 1. Actions for causing death.

What deceased spent on his family *held* evidence of his earning capacity, in the absence of better evidence.—*Memphis Consol. Gas & Electric Co. v. Letson* (C. C. A.) 969.

An instruction in an action for the damages to wife and children from death of deceased *held* proper as to the elements to be considered under the Tennessee statutes, as construed by the Supreme Court.—*Memphis Consol. Gas & Electric Co. v. Letson* (C. C. A.) 969.

## DEBTOR AND CREDITOR.

See "Bankruptcy."

## DECEDENTS.

Estates, see "Executors and Administrators."

## DECEIT.

See "Fraud."

**DECREE.**

In admiralty, see "Admiralty," § 3.

**DEDICATION.**

§ 1. *Nature and requisites.*

Facts held insufficient to show a dedication of certain outlying property adjacent to a town, rendering it subject to a highway easement.—*Pitcairn v. Town of Chester* (O. O.) 587.

**DEEDS.**

Cancellation, see "Cancellation of Instruments." Of trust, see "Mortgages."

§ 1. *Pleading and evidence.*

In a suit to set aside a deed of complainant's interest in her brother's estate, evidence held insufficient to establish that complainant was induced to execute the deed by fraudulent representations.—*Fowler v. Fowler* (C. C.) 405.

**DEFAMATION.**

See "Libel and Slander."

**DEFAULT.**

Judgment by, see "Judgment," § 1.

**DELAY.**

In discharging vessel, see "Shipping," § 6.

**DELIVERY.**

Of goods sold, see "Sales," § 3.

**DEMURRAGE.**

See "Shipping," § 6.

For detention of vessel for repairs for injuries from collision, see "Collision," § 6.

Maritime lien for, see "Maritime Liens," § 2.

**DEMURRER.**

In pleading, see "Equity," § 2.

**DEPOSITIONS.**

See "Witnesses."

In equity, see "Equity," § 3.

In federal courts, see "Courts," § 5.

A general objection to a question asked a witness, on the taking of his deposition, as immaterial and irrelevant, without stating any specific ground, was properly overruled.—*Texas & P. Ry. Co. v. Coutourie* (C. C. A.) 465.

**DESCENT AND DISTRIBUTION.**

See "Executors and Administrators"; "Homestead," § 3; "Wills."

**DESCRIPTION.**

Names of individuals, see "Names."

**DEVISES.**

See "Wills."

**DILATORY PLEAS.**

See "Pleading," § 2.

**DILIGENCE.**

Of party asking relief, see "Specific Performance," § 1.

**DIRECTING VERDICT.**

In civil actions, see "Trial."

**DIRECTORS.**

Of corporation, see "Corporations," § 2.

**DISCHARGE.**

From indebtedness, see "Bankruptcy," § 10: "Compromise and Settlement."

From liability as guarantor, see "Guaranty," § 1.

From liability as surety, see "Principal and Surety," § 2.

**DISCLAIMER.**

Affecting claim of patent, see "Patents," § 6.

**DISCRETION OF COURT.**

Amendment of pleading, see "Pleading," § 4.

Review in civil actions, see "Appeal and Error," § 5.

**DISMISSAL AND NONSUIT.**

Dismissal of cause removed from state court, see "Removal of Causes," § 6.

Dismissal of proceedings in bankruptcy, see "Bankruptcy," § 2.

Dismissal of suit in equity, see "Equity," § 4.

**DISSOLUTION.**

Of partnership, see "Partnership," § 1.

**DISTRIBUTION.**

Of estate of bankrupt, see "Bankruptcy," § 9.

**DISTRICT AND PROSECUTING ATTORNEYS.**

Conduct at trial, see "Criminal Law," § 2.

## DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 4; "Removal of Causes," § 2.

## DIVERSION.

Of water, see "Waters and Water Courses."

## DIVIDENDS.

On corporate stock, see "Corporations," § 1.

## DOCUMENTS.

As evidence in civil actions, see "Evidence," § 3.

## DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 4.

## DUTIES.

Customs duties, see "Customs Duties."  
Excise duties, see "Internal Revenue."

## EASEMENTS.

See "Dedication."

## EJECTION.

Of passenger, see "Carriers," § 3.

## ELECTION.

Between counts in pleading, see "Pleading," § 5.  
Of trustee in bankruptcy, see "Bankruptcy," § 4.

## ELECTRICITY.

The kind of a cord with which an electric light in a house was connected *held* immaterial on the question of contributory negligence, the customer being killed in turning on the light.—*Memphis Consol. Gas & Electric Co. v. Letson* (C. O. A.) 969.

An inference of negligence *held* inferable by the jury from the killing of a customer of an electric light company by the crossing of the primary and secondary wires.—*Memphis Consol. Gas & Electric Co. v. Letson* (C. O. A.) 969.

## EMINENT DOMAIN.

§ 1. Proceedings to take property and assess compensation.

An order requiring condemnation proceedings against the receiver of a railroad appointed in the federal court to be brought in such court *held* not an interference with the state's right of eminent domain.—*Buckhannon & N. R. Co. v. Davis* (C. O. A.) 707.

## EMPLOYES.

See "Master and Servant."

## ENTRY.

Of imported goods, see "Customs Duties," § 3.

## EQUITABLE ESTOPPEL

See "Estoppel," § 1.

## EQUITY.

Equitable estoppel, see "Estoppel," § 1.  
Laches in suing to establish trust, see "Trusts," § 1.

Laches in suing to restrain unfair competition, see "Trade-Marks and Trade-Names," § 2.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See "Cancellation of Instruments"; "Injunction"; "Interpleader"; "Receivers"; "Specific Performance"; "Trusts."

Compelling conveyance of public land, see "Public Lands," § 1.

Suits for infringement of patents, see "Patents," § 10.

§ 1. Jurisdiction, principles, and maxims.

Under Const. U. S. Amend. 7, and Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], a federal court has no jurisdiction in equity where complainant has a complete remedy at law.—*Indian Land & Trust Co. v. Shoenfelt* (C. C. A.) 484.

The maxim of equity that a complainant must come into court with clean hands has reference to fraud or misconduct on the part of complainant in regard to the transaction which is the subject of controversy.—*Knapp v. S. Jarvis Adams Co.* (C. C. A.) 1008; *Bossert v. Same* (C. C. A.) 1015.

§ 2. Pleading.

A bill by one or more creditors of a national bank, on behalf of all, to obtain a complete judicial administration of its affairs, etc., *held* not multifarious.—*George v. Wallace* (C. C. A.) 286; *Brownlee v. Same, Id.*; *Morsman v. Same, Id.*; *Poppleton v. Same, Id.*; *Morton v. Same, Id.*; *McCague Inv. Co. v. Same, Id.*

Where it is manifest on the face of a bill that it presents two causes of action, the defense of multifariousness can be taken by a general demurrer.—*Emmons v. National Mut. Bldg. & Loan Ass'n* (C. C. A.) 689.

A bill by a borrowing stockholder against a building and loan association, seeking as a borrower to have his contract canceled and as a stockholder to obtain the appointment of a receiver for the association, *held* multifarious.—*Emmons v. National Mut. Bldg. & Loan Ass'n* (C. C. A.) 689.

The replication to an answer in equity cannot be made to perform the office of exception.—*Robinson v. American Car & Foundry Co.* (C. C. A.) 693.

A bill by an assignee of a patent, in form and substance an original bill in the nature of a supplemental bill, *held* not objectionable as a supplemental bill only.—Haarmann-De Laire-Schaffer Co. v. Leuders (C. C.) 120.

An original bill in the nature of a supplemental bill having been filed by an assignee of a patent *pendente lite*, such assignee *held* entitled to the benefit of all proceedings in the original suit.—Haarmann-De Laire-Schaffer Co. v. Leuders (C. C.) 120.

A charge in an answer in equity denominated a cross-bill may be accepted as a statement of respondent's case, notwithstanding the misnomer in calling the answer a cross-bill.—Hoge v. Eaton (C. C.) 411.

### § 3. Taking and filing proofs.

That it is advantageous to examine experts orally *held* insufficient to justify an order appointing a special examiner outside the district.—Magone v. Colorado Smelting & Mining Co. (C. C.) 848.

An order for the introduction of oral testimony on final hearing under equity rule 67, as amended by rule of May 15, 1893, *held* not to prevent an order for the taking of testimony by depositions.—Magone v. Colorado Smelting & Mining Co. (C. C.) 848.

### § 4. Dismissal before hearing.

Where a court of equity has no jurisdiction, the decree of dismissal must adjudge that it is rendered upon that ground, or provide that it is made without prejudice.—Indian Land & Trust Co. v. Shoenfelt (C. C. A.) 484.

## ERROR, WRIT OF.

See "Appeal and Error."

## ESTABLISHMENT.

Of trusts, see "Trusts," § 1.

## ESTATES.

Decedents' estates, see "Executors and Administrators."

## ESTOPPEL.

By judgment, see "Judgment," §§ 2, 3.  
To assert claim against homestead, see "Homestead," § 2.

To take appeal, see "Appeal and Error," § 1.

### § 1. Equitable estoppel.

Borrowers *held* estopped to deny the amount and validity of an incumbrance on their property, which they induced their lender to purchase.—Cooper v. Brazelton (C. C. A.) 476.

In the absence of expressly proved fraud, there can be no estoppel based on the acts or conduct of the party sought to be estopped, where they are as consistent with honest purpose and with absence of negligence as with

their opposites.—Standard Sanitary Mfg. Co. v. Arrott (C. C. A.) 750.

Where an equitable estoppel is relied upon, the facts upon which it is based must be proved with particularity and precision, and nothing can be supplied by inference or intendment.—Standard Sanitary Mfg. Co. v. Arrott (C. C. A.) 750.

Evidence considered, and *held* insufficient to sustain a claim to the equitable ownership of a patent as against the patentee, either on the ground of contract or estoppel.—Standard Sanitary Mfg. Co. v. Arrott (C. C. A.) 750.

Where, in a suit in equity, testimony of facts which it is claimed raise an estoppel against one party is introduced without objection, and contentious testimony disputing such facts is produced on the other side, the contention for an estoppel may be made at the hearing without having been pleaded.—Standard Sanitary Mfg. Co. v. Arrott (C. C. A.) 750.

There is no estoppel which prevents a patentee from testifying contrary to the oath made by him when applying for the patent in a suit between his assignee and a third party.—De Laval Separator Co. v. Vermont Farm Mach. Co. (C. C. A.) 772.

A bankrupt having procured the dismissal of an involuntary bankruptcy proceeding against him in Arkansas by filing a sworn plea that his residence was in Colorado, his administrator *held* thereby estopped from subsequently denying in a similar proceeding in Colorado that he was a resident of such state.—Long v. Lockman (D. C.) 197.

## EVIDENCE.

See "Depositions"; "Witnesses."

Applicability of instructions to evidence, see "Trial," § 2.

Harmless error in rulings on, see "Appeal and Error," § 5; "Criminal Law," § 3.

Instructions relating to, see "Criminal Law," § 2.

Objections for purpose of review, see "Appeal and Error," § 2.

Questions of fact for jury, see "Trial," § 1.

Review on appeal or writ of error, see "Appeal and Error," § 5; "Criminal Law," § 3.

### As to particular facts or issues.

See "Deeds," § 1; "Estoppel," § 1.

Agency, see "Principal and Agent," § 1.

Contract to devise or bequeath, see "Wills," § 1.

In actions by or against particular classes of parties.

See "Brokers," § 1; "Carriers," § 1; "Master and Servant," § 3; "Principal and Agent," § 3.

### In particular civil actions or proceedings.

See "Bankruptcy," § 7; "Interpleader," § 1; "Money Lent."

Admiralty, see "Collision," § 6.

For causing death, see "Death," § 1.

For infringement of patent, see "Patents," § 10.

For injuries to goods in custody of carrier, see "Carriers," § 1.

For personal injuries, see "Master and Servant," § 3.

For unfair competition, see "Trade-Marks and Trade-Names," § 2.

On opposition to discharge in bankruptcy, see "Bankruptcy," § 10.

*In criminal prosecutions.*

See "Criminal Law," § 1; "Larceny," § 1.

For offenses against postal laws, see "Post Office," § 1.

**§ 1. Relevancy, materiality, and competency in general.**

Statements made by the master of a barge, which was sunk by collision with a bridge, made at a subsequent time and different place, as to the cause of the accident, are not admissible, in a suit to recover for the loss, either as admissions binding the owner or as *res gestæ*.—*The Maurice* (C. C. A.) 518.

**§§ 2, 3. Documentary evidence.**

Unauthenticated letters received by a trustee in bankruptcy, purporting to have been written by third persons, *held* not admissible on the hearing of a contested claim.—*In re Ladue Tate Mfg. Co.* (D. C.) 910.

**§ 4. Parol or extrinsic evidence affecting writings.**

In an action for breach of a charter party, correspondence between the owners and the ship brokers, who negotiated the contract, *held* admissible to explain the same.—*Sewall v. Wood* (C. C. A.) 12.

In an action on a charter party, the exclusion of letters written prior to the execution of the contract *held* proper.—*United States v. Conkling* (C. C. A.) 508.

No implied contract of license to use a patented device, arising from the circumstances under which the patent was taken out and the relations of the parties, can be set up in the face of a proved express contract of license.—*Standard Sanitary Mfg. Co. v. Arrott* (C. C. A.) 750.

**§ 5. Opinion evidence.**

Plaintiff, having been permitted to testify fully as to what was said by him and defendant's agent, *held* not entitled to answer whether a new contract was made between them.—*Foster v. Murphy & Co.* (C. C. A.) 47.

Statements made by the master of a barge, which was sunk by collision with a bridge, made at a subsequent time and different place, as to the cause of the accident, are not admissible, in a suit to recover for the loss, either as admissions binding the owner or as *res gestæ*.—*The Maurice* (C. C. A.) 518.

Where the evidence of damages consists of expert testimony, the jury may credit the same, or may apply their own experience or knowledge of the situation as indicated by the facts.—*Denison v. Shawmut Min. Co.* (C. C.) 864.

## EXAMINATION.

Of witnesses in general, see "Witnesses," § 2.

## EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 2.

To pleading, see "Equity," § 2.

## EXCEPTIONS, BILL OF.

**§ 1. Nature, form, and contents in general.**

Where the evidence in a case is embodied in bills of exceptions duly allowed and certified by the trial judge, the fact that the testimony was not taken down by order of the court, or by consent, but by a stenographer employed by one of the parties, is immaterial, and is not ground for striking it from the record.—*St. Louis Southwestern Ry. Co. v. Purcell* (C. C. A.) 499.

**§ 2. Settlement, signing, and filing.**

Failure to have a bill of exceptions settled at the term the judgment was rendered, though no extension was granted, *held* excused by the illness of the trial judge.—*Roberts v. Bennett* (C. C. A.) 748.

## EXCHANGES.

Right to seat in stock exchange as property passing to trustee in bankruptcy, see "Bankruptcy," §§ 5, 7.

## EXCISE.

Duties, see "Internal Revenue."

## EXECUTION.

Exemptions, see "Homestead."

## EXECUTORS AND ADMINISTRATORS.

See "Wills."

**§ 1. Foreign and ancillary administration.**

An executor cannot sue in his representative capacity in the courts of a sovereignty other than that in which he was appointed.—*Moore v. Petty* (C. C. A.) 668.

An executor may sue in a state other than that of his appointment to enforce a right which has accrued directly to him.—*Moore v. Petty* (C. C. A.) 668.

Action against agents employed by executors *held* to accrue directly to the executors, and could be enforced by them in a foreign state.—*Moore v. Petty* (C. C. A.) 668.

In the absence of statute expressly authorizing suit to be brought against a foreign executor, such an executor, not having taken any steps to collect nonresident assets, cannot be sued in a state other than that wherein he was appointed.—*Courtney v. Pradt* (C. C.) 818.

**EXEMPTIONS.**

See "Homestead."

From taxation, see "Taxation," § 1.  
Of bankrupt, see "Bankruptcy," § 10.

**EXPERT TESTIMONY.**

In civil actions, see "Evidence," § 5.

**EX POST FACTO LAWS.**

Constitutional restrictions, see "Constitutional Law," § 2.

**EXPRESS COMPANIES.**

See "Carriers," § 3.

**FACTORS.**

See "Brokers."

In an action to recover a balance of advances made by plaintiffs against goods consigned to them for sale on commission, the statement of claim should set out the account between the parties, showing the sales made and prices received.—*Park v. Standard Spinning Co. (C. C.)* 860.

**FALSE SWEARING.**

See "Perjury."

**FEDERAL COURTS.**

See "Courts," §§ 2-7.

Pendency of action in state or federal court ground for abatement of action in the other, see "Abatement and Revival," § 1.

**FEDERAL QUESTIONS.**

Grounds for jurisdiction, see "Courts," § 3.

**FEES.**

Of clerk of court, see "Clerks of Courts."

**FELLOW SERVANTS.**

See "Master and Servant," § 2.

**FINDINGS.**

Review on appeal or writ of error, see "Appeal and Error," § 5.

**FIRES.**

Liabilities of carriers for injuries caused by, see "Carriers," § 1.

**FORECLOSURE.**

Of mortgage, see "Mortgages," § 1.

**FOREIGN ADMINISTRATION.**

See "Executors and Administrators," § 1.

**FOREIGN CORPORATIONS.**

See "Corporations," § 5.

**FOREIGN JUDGMENTS.**

See "Judgment," § 4.

**FOREIGN PATENTS.**

See "Patents," § 2.

**FORMER ADJUDICATION.**

See "Judgment," §§ 2, 3.

**FRANCHISES.**

Impairing obligation, see "Constitutional Law," § 1.  
Treaty rights relating to, see "Treaties."

**FRAUD.**

Against sureties, see "Principal and Surety," § 1.

In making or procuring deed, see "Deeds," § 1.  
In subscriptions to corporate stock, see "Corporations," § 1.

**§ 1. Deception constituting fraud, and liability therefor.**

Corporation which exchanged its stock for mining properties held not injured, nor entitled to sue for deceit in the sale to it, by the acts of the seller in selling his stock to others for cash.—*Stratton's Independence v. Dines (C. C. A.)* 449.

Deceit in the sale of mining property held to work no damage, where nothing was given in exchange therefor except stock of a corporation organized to buy the property.—*Stratton's Independence v. Dines (C. C. A.)* 449.

Injury to plaintiff is a necessary prerequisite of recovery in an action for deceit.—*Stratton's Independence v. Dines (C. C. A.)* 449.

**§ 2. Actions.**

The measure of damages for deceit in a contract of sale is the difference between the actual value of what the buyer parts with and of what he receives under the contract.—*Stratton's Independence v. Dines (C. C. A.)* 449.

**FRAUDS, STATUTE OF.****§ 1. Promises to answer for debt, default, or miscarriage of another.**

A promise of a firm to assume a liability of one of its members to return or account for securities pledged for loans of which the firm received the benefit held not within the statute of frauds.—*In re Dresser (C. C. A.)* 495.

## FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 6.  
By bankrupt, effect on right to discharge, see "Bankruptcy," § 10.

## GENERAL AVERAGE.

See "Shipping," § 7.

## GOOD FAITH.

Of party asking equitable relief, see "Specific Performance," § 1.

## GRAND JURY.

See "Indictment and Information."

## GRANTS.

Of public lands, see "Public Lands."

## GUARANTY.

See "Principal and Surety."  
Requirements of statute of frauds, see "Frauds, Statute of," § 1.

### § 1. Discharge of guarantor.

Plaintiff's failure to secure a fidelity bond as required by a contract of employment, performance of which defendant guarantied, *held* to discharge defendant from liability on the guaranty.—*Swift & Co. v. Jones* (C. C.) 437.

## HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 5.  
In criminal prosecutions, see "Criminal Law," § 3.

## HIGHWAYS.

See "Navigable Waters," § 1.  
Dedication, see "Dedication," § 1.  
Special laws relating to appointment of road commissioners, see "Statutes," § 1.

## HOMESTEAD.

Of bankrupt, see "Bankruptcy," § 10.

### § 1. Nature, acquisition, and extent.

Attorney's fees provided for in a note secured by a mechanic's lien for improvements on a homestead cannot be enforced against the homestead.—*Cooper v. Brazelton* (C. C. A.) 476.

### § 2. Transfer or incumbrance.

Under Const. Tex. art. 16, § 50, lien on a homestead created to secure a usurious loan of money *held* void, notwithstanding representations which, if true, would render it valid.—*Cooper v. Brazelton* (C. C. A.) 476.

Under Const. Tex. art. 16, § 50, lender *held* charged with notice of the invalidity of mechanic's lien which he purchased, and the

borrower was not estopped to assert the same.—*Cooper v. Brazelton* (C. C. A.) 476.

### § 3. Rights of surviving husband, wife, children, or heirs.

A homestead being exempt to children on the death of their father, administration was not necessary to render the exemption effectual.—*Randolph v. White* (C. C.) 875.

Rev. St. Tex. 1895, art. 2046, providing for the setting aside of exempt property to deceased's widow, minor children, and unmarried daughters, *held* not in violation of Const. art. 16, § 52.—*Randolph v. White* (C. C.) 875.

Under Rev. St. Tex. 1895, art. 2046, on the death of a father leaving certain unmarried daughters surviving, living with him as a part of his family, the homestead vested in such daughters and the other surviving children, free from the father's debts.—*Randolph v. White* (C. C.) 875.

## HUSBAND AND WIFE.

Rights of survivor, see "Homestead," § 3.

### § 1. Actions.

Acts La. 1902, p. 95, No. 68, amending Rev. Civ. Code 1870, § 2402, by providing that "damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone," is not retroactive, and did not affect a right of action for an injury to a wife which had become fully vested in her husband prior to its passage.—*St. Louis Southwestern Ry. Co. v. Purcell* (C. C. A.) 499.

## IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 1.

## IMPLIED CONTRACTS.

See "Money Lent"; "Use and Occupation"; "Work and Labor."

## IMPORTS.

Duties, see "Customs Duties."

## INCUMBRANCES.

On homestead, see "Homestead," § 2.

## INDEMNITY.

See "Guaranty"; "Principal and Surety."

## INDIANS.

Act May 27, 1902, c. 888, § 2 Stat. 259, which prohibits the deportation of persons in lawful possession of land in any town site, in any town or city in the Indian Territory, did

not repeal or annul the permit laws of the Creek Nation.—*Buster v. Wright* (C. C. A.) 947.

Neither the Creek agreement, ratified by the United States March 1, 1901 (31 Stat. 861, 866, c. 676, §§ 10-16), nor the establishment of town sites within the territory, nor the sale of lots to noncitizens, nor the organization of cities and towns, withdraws such town sites, lots, or their purchasers or occupants, from the governmental jurisdiction of the Creek Nation, or withdraws them from the jurisdiction of the Secretary of the Interior and his subordinates to close the unlawful business of those noncitizens who refuse to pay their permit taxes.—*Buster v. Wright* (C. C. A.) 947.

The Secretary of the Interior and his subordinates may lawfully close the business of noncitizens within the Creek Nation who refuse to pay their permit taxes.—*Buster v. Wright* (C. C. A.) 947.

The legal effect of the permit laws of the Creek Nation prescribing permit taxes is to prohibit noncitizens from conducting business in that nation without paying them.—*Buster v. Wright* (C. C. A.) 947.

A lawful rule, made by the chief of an executive department to which the enforcement of a law is intrusted, which appoints a subordinate for the purpose, is a sufficient process of law to authorize him to prevent its violation, when he can do so without infringing upon any personal or property right of those who threaten to break it.—*Buster v. Wright* (C. C. A.) 947.

Executive officers, charged with enforcing an injunctive law, may prevent, without other writ than the law itself and their commissions, its violation, where they can do so without infringing the rights of those who threaten to break it.—*Buster v. Wright* (C. C. A.) 947.

Prior to the Creek agreement of March 1, 1901, the permit tax of the Creek Nation was valid, and the Secretary of the Interior, the Indian inspector, and the Indian agent had authority to enforce the laws which prescribed it.—*Buster v. Wright* (C. C. A.) 947.

The permit tax of the Creek Nation is the annual price fixed by its laws for the privilege of conducting business within its borders by noncitizens.—*Buster v. Wright* (C. C. A.) 947.

## INDICTMENT AND INFORMATION.

### *For particular offenses.*

See "Conspiracy," § 1; "Larceny," § 1; "Perjury," § 1.

Fraudulent use of mails, see "Post Office," § 1.

### § 1. Requisites and sufficiency of accusation.

An indictment based on Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], charging a conspiracy to defraud the United States by causing the violation of another statute subsequently enacted, need not negative an exception found in the later statute.—*United States v. Stone* (D. C.) 392.

## INFRINGEMENT.

Of patent, see "Patents," §§ 9, 10.

Of trade-mark, see "Trade-Marks and Trade-Names," § 2.

## INJUNCTION.

### *Restraining particular acts or proceedings.*

Assessment of taxes, see "Taxation," § 2.

Diversion of water, see "Waters and Water Courses," § 1.

Infringement of patent, see "Patents," § 10.

Proceedings in state court, see "Courts," § 8.

Unfair competition, see "Trade-Marks and Trade-Names," § 2.

### § 1. Subjects of protection and relief.

A defendant in an action at law *held* not entitled to an injunction restraining the prosecution of such action to enable him to establish an equitable set-off.—*Kewanee Mfg. Co. v. Leigh* (C. C. A.) 58.

Equity has no jurisdiction to enjoin a single trespass on agricultural lands, where the probable injury is not irreparable.—*Indian Land & Trust Co. v. Shoenfelt* (C. C. A.) 484.

Collection and reissuance of trading stamps for advertising purposes *held* an improper interference with complainant's business, entitling complainant to restrain the same.—*Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* (C. C.) 833.

### § 2. Actions for injunctions.

In a suit to enjoin trespass to land, an averment of irreparable injury *held* insufficient, in the absence of allegation of facts from which irreparable mischief may be apprehended.—*Indian Land & Trust Co. v. Shoenfelt* (C. C. A.) 484.

Averments in a bill that plaintiff will suffer irreparable injury from a threatened eviction from land *held* to state no ground for equitable relief.—*Indian Land & Trust Co. v. Shoenfelt* (C. C. A.) 484.

## IN PAIS.

Estoppel, see "Estoppel," § 1.

## INSOLVENCY.

See "Bankruptcy."

Of corporation, see "Corporations," § 8.

Of national bank, see "Banks and Banking," § 1.

## INSTRUCTIONS.

In civil actions, see "Trial," § 2.

In criminal prosecutions, see "Criminal Law," § 2.

## INSURANCE.

### § 1. Actions on policies.

An affidavit of defense in an action to recover life insurance *held* sufficient.—*Mutual Life Ins. Co. v. Keen* (C. C. A.) 677.



**§ 2. Mutual benefit insurance.**

An affidavit of defense in an action for the rescission of a contract of life insurance *held* to state a good defense on the ground of laches.—Supreme Council A. L. H. v. McAlarney (C. C. A.) 72.

**INTEREST.**

Allowance of in decree in admiralty, see "Admiralty," § 3.  
Assignment of error as to computation, see "Appeal and Error," § 4.

**INTERNAL IMPROVEMENTS.**

Grants of lands in aid, see "Public Lands," § 1.

**INTERNAL REVENUE.**

Perjury in taking oath as to qualifications as surety on distiller's bond, see "Perjury," § 1.

A legacy left by a testatrix to a daughter "when she is 18 years old" is contingent, and not vested, and not subject to a legacy tax under War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307].—Heberton v. McClain (C. C.) 226.

Estates of persons who died within one year prior to July 1, 1902, at which time the repeal of War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464, as amended by Act March 2, 1901, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2307], took effect (Act April 12, 1902, c. 500, § 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 279]), are not subject to the legacy taxes imposed by said section.—Philadelphia Trust, etc., Co. v. McCoach (C. C.) 866; Norros v. Same, Id.

Rules and regulations prescribed by the Commissioner of Internal Revenue on April 28, 1902, providing for rebates on manufactured tobacco and snuff, under Act April 12, 1902, c. 500, § 3, 32 Stat. 96 [U. S. Comp. St. Supp. 1903, p. 277], *held* reasonable.—Powell v. United States (C. C.) 881.

Bankrupt's trustee *held* not entitled to recover rebates of internal revenue under Act April 12, 1902, c. 500, § 3, 32 Stat. 96 [U. S. Comp. St. Supp. 1903, p. 277], where there was evidence that the claim of the bankrupt was fraudulent, and there was a failure to comply with the rules and regulations prescribed therefor by the Commissioner of Internal Revenue.—Powell v. United States (C. C.) 881.

A statement of claim in a suit against a collector to recover internal revenue taxes assessed and collected from plaintiff as a broker under War Revenue Act June 13, 1898, c. 448, § 1, 30 Stat. 448, as amended by Act March 2, 1901, c. 806, § 1, 31 Stat. 938 [U. S. Comp. St. 1901, p. 2286], on the ground that plaintiff was not subject to such taxes, should set out the transactions on account of which they were assessed.—Haight & Freese Co. v. McCoach (C. C.) 894.

**INTERNATIONAL LAW.**

See "Allens"; "Treaties."

**INTERPLEADER.****§ 1. Proceedings and relief.**

Evidence considered, and *held* sufficient to sustain the findings of the trial court on issues of fact joined on a bill of interpleader between claimants to a fund paid into court.—Buck v. Mason (C. C. A.) 304.

An order made by the court on a bill of interpleader, requiring one of the claimants to the fund paid into court to give a bond in favor of another claimant to pay the latter his costs and expenses, and interest on the fund in case of his recovery, *held* not warranted and erroneous.—Buck v. Mason (C. C. A.) 304.

**INTERROGATORIES.**

To witnesses, see "Depositions."

**INTOXICATING LIQUORS.**

Perjury in taking oath as to qualifications as surety on distiller's bond, see "Perjury," § 1.

**INVENTION.**

See "Patents."

**IRRIGATION.**

See "Waters and Water Courses," § 1.

**JUDGES.**

See "Courts."

**§ 1. Rights, powers, duties, and liabilities.**

Judges of the courts of common pleas of Pennsylvania *held* exempt from civil liability for acts done by them in the exercise of their judicial functions.—United States v. Bell (C. C. A.) 336.

A judge of the Circuit Court cannot properly take action in a cause pending therein on a motion sent him through the mail and not filed with the clerk, as required by the rules of the court.—In re Kinney (C. C. A.) 340.

**JUDGMENT.**

Decree in admiralty, see "Admiralty," § 3.  
On appeal or writ of error, see "Appeal and Error," § 6.

On pleadings, see "Pleading," § 5.

Review, see "Appeal and Error."

**§ 1. By default.**

Pennsylvania procedure act of May 25, 1887 (P. L. 271), *held* not to entitle plaintiff to a default for failure of defendants to file an affidavit of defense, where plaintiff's statement of claim was subject to demurrer for want of facts.—United States v. Bell (C. C. A.) 336.

## § 2. Merger and bar of causes of action and defenses.

A general decree of dismissal, without more, renders all the issues presented in the case res judicata.—*Indian Land & Trust Co. v. Shoenfelt* (C. C. A.) 484.

Where suits are pending between the same parties which involve the same issues in two courts of concurrent jurisdiction, it is the first final judgment, though it may be rendered in the second suit, which renders the issues res judicata in the other court.—*Boatmen's Bank of St. Louis v. Fritzen* (C. C. A.) 650.

A suit dismissed without prejudice is not a bar to a second suit, nor conclusive of any issue joined in favor of the complainant.—*Robinson v. American Car & Foundry Co.* (C. C. A.) 693.

Defendant having been acquitted in a criminal case for causing transportation of beer marked as soda water, the United States was not entitled thereafter to recover a penalty and condemn the property in a civil action, under Rev. St. § 3449 [U. S. Comp. St. 1901, p. 2277].—*United States v. Seattle Brewing & Malting Co.* (D. C.) 597.

## § 3. Conclusiveness of adjudication.

The United States cannot maintain an action against the administrator of a deceased volunteer soldier to recover pension money which it paid over pursuant to a judgment therefor recovered against it by the administrator, all question of its right thereto having been rendered res judicata by the former judgment.—*United States v. McConnaughey* (C. C. A.) 350.

A decree of restitution after reversal on appeal held res judicata as between the parties, so that the judgment debtor was not entitled to a subsequent modification thereof.—*In re Howard* (C. C. A.) 721.

A question as to the liability of the property of a railroad company to taxation, decided in a suit to which the company was a party, is not res judicata as against holders of mortgage bonds of the company, previously issued where no one representing the mortgage interest was a party.—*Wicomico County Com'rs v. Bancroft* (C. C. A.) 977.

A plea of res judicata overruled, on the ground of want of mutuality of estoppel, because defendant, which was not a nominal party to the former judgment, refused to disclose its connection with the suit until after its final determination.—*Westinghouse Electric & Mfg. Co. v. Jefferson Electric Light, Heat & Power Co.* (C. C.) 365.

## § 4. Foreign judgments.

The record of a judgment rendered in one state may be contradicted as to its recitals of jurisdictional facts in the courts of another state.—*Cooper v. Brazelton* (C. C. A.) 476.

The jurisdiction of a state court to render a judgment offered in evidence in a federal court sitting in the same state is open to attack.—*Cooper v. Brazelton* (C. C. A.) 476.

## JURISDICTION.

### *Jurisdiction of particular actions or proceedings.*

See "Cancellation of Instruments," § 1.  
Condemnation proceedings, see "Eminent Domain," § 1.

### *Special jurisdictions.*

See "Admiralty," § 1; "Bankruptcy," § 1; "Equity," § 4.  
Particular courts, see "Courts."

## JURY.

Instructions in civil actions, see "Trial," § 2.  
Instructions in criminal prosecutions, see "Criminal Law," § 2.

Questions for jury in civil actions, see "Trial," § 1.

Taking case or question from jury at trial, see "Trial," § 1.

Verdict in civil actions, see "Trial," § 3.

### § 1. Competency of jurors, challenges, and objections.

Where, after one of several defendants indicted for conspiracy pleaded guilty in presence of the jury, after a severance, defendant obtained leave to re-examine the jurors as to prejudice therefrom, it was not error for the court to deny a subsequent application for re-examination, on another defendant pleading guilty.—*Wong Din v. United States* (C. C. A.) 702.

## LACHES.

In suing to compel conveyance of public lands, see "Public Lands," § 1.

In suing to establish trust, see "Trusts," § 1.  
In suing to restrain unfair competition, see "Trade-Marks and Trade-Names," § 2.

## LANDLORD AND TENANT.

See "Use and Occupation."

Railroad leases, see "Railroads," § 1.

## LANDS.

See "Public Lands."

## LARCENY.

### § 1. Prosecution and punishment.

An indictment under Act March 3, 1875, c. 144, 18 Stat. 479 [U. S. Comp. St. 1901, p. 3675], which charges defendant with stealing money "belonging to" the United States, sufficiently avers the ownership of the property stolen.—*Dimmick v. United States* (C. C. A.) 257.

Where defendant, charged with larceny of money from a mint while employed therein as clerk, to account for his presence there at unusual hours, testified that he went to check up the pay rolls, it was competent for the government to show the length of time required to

perform such work.—*Dimmick v. United States* (C. C. A.) 257.

On a prosecution for larceny of money, where the evidence was largely circumstantial, it was not error to admit evidence to show that defendant was in debt at the time, as tending in some degree to show a motive for the crime.—*Dimmick v. United States* (C. C. A.) 257.

Circumstantial evidence considered, and *held* sufficient to sustain a conviction for larceny.—*Dimmick v. United States* (C. C. A.) 257.

It is not necessary to a conviction for larceny of money that the money, or any part of it, should be shown to have been in defendant's possession.—*Dimmick v. United States* (C. C. A.) 257.

## LEGACIES.

See "Wills."

## LEGACY TAX.

See "Internal Revenue."

## LETTERS PATENT.

For inventions, see "Patents."

## LIBEL AND SLANDER.

### § 1. Actions.

It is not necessary that declaration in libel should identify the plaintiff with every description in the libel.—*Butler v. Carter & Russell Pub. Co.* (C. C. A.) 69.

A declaration in libel *held* to allege facts sufficiently showing on its face that plaintiff was the person of whom the libel was published.—*Butler v. Carter & Russell Pub. Co.* (C. C. A.) 69.

## LICENSES.

For sale or use of patented articles, see "Patents," § 8.

## LIENS.

### *Particular classes of liens.*

See "Maritime Liens."

For supplies furnished to mining company, see "Mines and Minerals," § 1.

On homestead, see "Homestead," §§ 1, 2.

## LIMITATION.

Of claim of patent, see "Patents," § 7.

## LIMITATION OF ACTIONS.

On city warrants, see "Municipal Corporations," § 1.

### § 1. Statutes of limitation.

Where, in a suit for collision, although both vessels were adjudged in fault, the libeled vessel was held liable for all cargo damage, the

other not being in court, a subsequent suit against such other vessel to recoup one-half the damage so paid rests upon the doctrine of contribution, rather than of subrogation, and it is no defense that actions against the respondent vessel by her cargo owners are barred by limitation.—*The Conemaugh* (D. C.) 240.

## LIS PENDENS.

Pendency of other action ground for abatement, see "Abatement and Revival," § 1.

## LITERARY PROPERTY.

See "Copyrights."

## LIVE STOCK.

Carriage of, see "Carriers," § 2.

## LOAN ASSOCIATIONS.

See "Building and Loan Associations."

## LOANS.

Recovery of money loaned, see "Money Lent."

## LOCAL PREJUDICE.

Ground for removal of cause, see "Removal of Causes," § 3.

## MACHINERY.

Production and use of electricity, see "Electricity."

## MANDAMUS.

Assignment of errors on motion to quash, see "Appeal and Error," § 4.

## MARITIME LIENS.

### § 1. Nature, grounds, and subject-matter in general.

Act Pa. 1858 (P. L. 363), which gives a lien for repairs or supplies furnished on "all ships, steamboats, or vessels navigating the rivers Allegheny, Monongahela, or Ohio in this state," embraces only such vessels as are engaged in the business of trade or commerce on such rivers, and does not apply to a dredgeboat.—*Fredericks v. James Rees & Sons Co.* (C. C. A.) 730; *The Northern, Id.*

A lien to be enforced by proceedings in rem, given by a statute of a state for repairs or supplies furnished to a vessel in her home port, is in the nature of a maritime lien, and may be enforced in admiralty in the District Courts of the United States, and the jurisdiction of such courts is exclusive.—*Fredericks v. James Rees & Sons Co.* (C. C. A.) 730; *The Northern, Id.*

There is no lien on a vessel for repairs made in a foreign port on the order of the owner,

not the master, in the absence of an agreement therefor, even though the person making them relied on the credit of the vessel.—*The Reed Bros. Dredge No. 1* (D. C.) 867.

An account for materials and labor furnished in the repairing of a vessel considered and adjusted.—*The Mary N. Bourke* (D. C.) 895.

Where it was the custom of a shipyard to add an arbitrary per cent. to the net measurement of timber used in repairing vessels for wastage, a contract with such yard for making repairs to a vessel will be presumed to have been made with reference to such custom, in the absence of evidence to show otherwise.—*The Mary N. Bourke* (D. C.) 895.

## § 2. Enforcement.

The owner of a vessel cannot recover demurrage from a repairer on account of delay in completing the repairs, in the absence of contract and of evidence showing an actual loss, or what her earnings during the detention would probably have been.—*The Mary N. Bourke* (D. C.) 895.

## MARRIAGE.

See "Husband and Wife."

## MARRIED WOMEN.

See "Husband and Wife."

## MASTER AND SERVANT.

See "Work and Labor."

## MASTERS OF VESSELS.

See "Shipping," § 2.

### § 1. Master's liability for injuries to servant.

Servants assume the risk of occasional acts of negligence of their fellow servants, but may by notice cast the risk of habitual negligence of their co-employees upon the master.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

Act March 2, 1893, 27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174], as amended by Act March 2, 1903, 32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1903, p. 367], held not to apply in an action for injuries to a fireman by a collision, in the absence of proof that the engine and cars in collision were used in interstate commerce.—*Rosney v. Erie R. Co.* (C. C. A.) 311.

A yard rule of a railroad company held explicit, and sufficient to protect a train on the main track within the yard limits from collision with a switch train in the yard.—*Rosney v. Erie R. Co.* (C. C. A.) 311.

The injury of a servant while attempting without orders to replace a belt on moving shafting held due solely to his own negligence, which precluded his recovery from the master.—*Johnson v. Bridgeport Deoxidized Bronze & Metal Co.* (C. C.) 218.

### § 2. — Fellow servants.

In an action for injuries to a railroad brakeman, the declaration held to state a cause of action for negligence of the engineer, plaintiff's superior servant, under Const. Miss. 1890, § 193, and Code 1892, § 3559.—*Moore v. Illinois Cent. R. Co.* (C. C. A.) 67.

A master must exercise reasonable care to employ competent servants.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

A master must discharge a servant for habit of negligence, or drunkenness, or lack of skill, of which he has notice.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

The diligence required of a master to learn the habits of servants employed with due care permits him to rely on the presumption that servants once competent remain so.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

The reasonable diligence which a master is required to exercise in determining the competency of servants defined.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

All of the employés of a railway company engaged in operating either of two colliding trains were fellow servants of a fireman on one of the trains.—*Rosney v. Erie R. Co.* (C. C. A.) 311.

On a libel in admiralty for injuries to a longshoreman, evidence held to establish that the injury was caused by the negligence of a winchman, who was not libellant's fellow servant.—*The City of San Antonio* (D. C.) 879.

### § 3. Actions.

In an action for injuries to a brakeman, facts alleged, if proved, held to raise a question of fact as to defendant's negligence in furnishing defective appliances, to be submitted to the jury.—*Moore v. Illinois Cent. R. Co.* (C. C. A.) 67.

After proof of the incompetence of a servant, his general reputation is competent to prove notice of the habit of incompetence to the master.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

Specific acts of negligence, of drunkenness, or lack of skill, of which the master had no notice, are inadmissible to prove the incompetence of a servant employed with due care.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

Evidence of specific acts of negligence known to the master, and of acts of negligence so notorious that the master must have known of them, is admissible to prove the character of a servant for incompetence.—*Southern Pac. Co. v. Hetzer* (C. C. A.) 272.

In an action for injuries to a railway fireman, evidence held insufficient to require submission to the jury of defendant's negligence in failing to provide sufficient help on one of the trains, and in providing a crew incapacitated from overwork.—*Rosney v. Erie R. Co.* (C. C. A.) 311.

## MAXIMS.

Of equity, see "Equity," § 1.

## MEASURE OF DAMAGES.

See "Damages," § 2.  
For fraud, see "Fraud," § 2.

## MECHANICS' LIENS.

Effect of appointment of receiver on right to, see "Receivers," § 1.  
Enforcement against homestead, see "Homestead," §§ 1, 2.

## MENTAL SUFFERING.

Element of damages, see "Damages," § 1.

## MINES AND MINERALS.

### § 1. Operation of mines, quarries, and wells.

A lien for supplies furnished a manufacturing corporation under Code Va. 1887, § 2485 (Code 1904, p. 1246) attaches at the time the supplies were furnished, and not from the filing and recording of the claim, under section 2486 (page 1249), so that the claimant is not debarred of priority by the debtor's bankruptcy between the furnishing of the supplies and the filing of the claim for lien.—*Mott v. Wissler Min. Co. (C. C. A.) 697.*

## MISREPRESENTATION.

See "Fraud."

## MODIFICATION.

Of contract, see "Sales," § 2.

## MONEY LENT.

In an action against a surety to recover money loaned to complete a contract, a judgment record showing that the surety claimed ownership of the plant of its principal *held* admissible.—*Ætna Indemnity Co. v. Ladd (C. C. A.) 636.*

Under complaint alleging money advanced for defendant's use, a bond reciting the transaction in which the advancement was made *held* admissible.—*Ætna Indemnity Co. v. Ladd (C. C. A.) 636.*

## MONEY RECEIVED.

Recovery of payment in general, see "Payment," § 1.

## MORTGAGES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 6.

Of personal property, see "Chattel Mortgages."

### § 1. Foreclosure by action.

The holder of a prior mortgage is not a necessary party to the foreclosure of a junior mortgage.—*Boatmen's Bank of St. Louis v. Fritzlen (C. C. A.) 650.*

## MOTIONS.

Direction of verdict in civil actions, see "Trial."

Presentation of objections for review, see "Appeal and Error," § 2.

Relating to pleadings, see "Pleading," § 5.

Under the Pennsylvania practice, an affidavit filed as the foundation for a rule to show cause should contain concise averments of all the necessary facts to make a prima facie case for the relief sought.—*O'Malley v. Times Pub. Co. (C. C.) 909.*

## MULTIFARIOUSNESS.

In equity pleading, see "Equity," § 2.

## MUNICIPAL CORPORATIONS.

See "Counties."

Impairment of contract rights under city warrants, see "Constitutional Law," § 1.

Impairment of contract rights under ordinances, see "Constitutional Law," § 1.

Special laws, see "Statutes," § 1.

Water supply, see "Waters and Water Courses," § 2.

### § 1. Fiscal management, public debt, securities, and taxation.

Where a city issued improvement bonds and pledged special assessments levied therefor, it was not a guarantor of the bonds, but only a statutory trustee for collection, and liable only for the exercise of due diligence therein.—*Jewell v. City of Superior (C. C. A.) 19.*

Rev. St. Wis. 1898, § 1114, *held* not to apply to the relations between a city and holders of local improvement bonds with reference to the collection of municipal assessments applicable to payment of the bonds.—*Jewell v. City of Superior (C. C. A.) 19.*

Local improvement assessments having been returned by a city to the county as delinquent taxes, the city was only liable to account to holders of bonds entitled to such assessments when collected for such amount as was received from the county after collection.—*Jewell v. City of Superior (C. C. A.) 19.*

Extension of municipal improvement assessments applicable to the payment of bonds issued therefor *held* not to render the city absolutely liable for the value of the bonds.—*Jewell v. City of Superior (C. C. A.) 19.*

A city, acting as trustee for collection of local improvement assessments for the benefit of bondholders, *held* liable for interest on unapplied collections only at the rate received from depositories.—*Jewell v. City of Superior (C. C. A.) 19.*

A holder of local improvement bonds for which special assessments had been pledged *held* entitled to share in collections in such proportion as the amount of his bonds bore to the total amount of bonds issued, less sums previously paid him.—*Jewell v. City of Superior (C. C. A.) 19.*

Recitals in bonds issued for road improvements, under Act Ohio March 21, 1894 (81 Ohio Laws, p. 543), *held* to create an estoppel in favor of a bona fide purchaser, which precluded the defense of irregularity in proceedings preceding their issuance.—*Rees v. Olmsted* (C. C. A.) 296.

Neither Sand. & H. Dig. Ark. § 5273, nor any other statutory provision, authorizes a city to affix a seal to its warrants; and, in the absence of a by-law or ordinance providing therefor, such affixing of a seal adds nothing to the dignity or effect of a warrant, which remains in legal effect an unsealed instrument.—*Condon v. City of Eureka Springs, Ark.* (C. C.) 566.

Act Ark. March 27, 1893 (Acts 1893, p. 169), which empowers cities to call in outstanding warrants by order for cancellation and reissue not oftener than once a year, and provides that, if any warrant is not presented pursuant to such an order, it shall be barred, is not retroactive, and does not apply to warrants issued before its passage.—*Condon v. City of Eureka Springs, Ark.* (C. C.) 566.

Act Ark. Feb. 27, 1875 (Acts 1874-75, p. 189), which authorized cities to call in outstanding warrants, but, as construed by the Supreme Court of the state, gave a city no power to compel a holder to present warrants thereunder, conferred no vested rights on a city, and it was within the province of the Legislature to repeal it with respect to warrants previously issued.—*Condon v. City of Eureka Springs, Ark.* (C. C.) 566.

Under the law of Arkansas the five-year statute of limitations covering unsealed instruments applies to actions on city warrants, which are unsealed or to which a seal has been affixed without authority of law; and, such warrants being payable on demand, the statute begins to run from the time of their delivery.—*Condon v. City of Eureka Springs, Ark.* (C. C.) 566.

## MUTUAL BENEFIT INSURANCE.

See "Insurance," § 2.

## NAMES.

See "Trade-Marks and Trade-Names."

Laws N. Y. 1900, p. 452, c. 216, § 363b, *held* not to prevent institution of an action by one who has assumed a trade-name.—*Devlin v. Peek* (Q. C.) 167.

## NATIONAL BANKS.

See "Banks and Banking," § 1.

## NAVIGABLE WATERS.

See "Waters and Water Courses."

§ 1. **Rights of public.**

The injury of a tug from a line which became entangled in its screw *held* not to have

been due to any negligence of respondent which rendered it liable for the injury.—*Moran v. Merritt & Chapman Derrick & Wrecking Co.* (D. C.) 863.

## NAVIGATION.

See "Navigable Waters," § 1.

## NEGLIGENCE.

Causing death, see "Death," § 1.

Instructions in general in action for, see "Trial," § 2.

Measure of damages, see "Damages," § 2.

*By particular classes of parties.*

See "Carriers," §§ 1, 3; "Pilots."

Employers, see "Master and Servant," §§ 1-3.

Railroad companies, see "Railroads," § 1.

*Condition or use of particular species of property, works, or machinery.*

See "Electricity"; "Railroads," § 1.

*Contributory negligence.*

Of person injured by operation of railroad, see "Railroads," § 1.

Of person killed by electricity, see "Electricity."

Of servant, see "Master and Servant," §§ 1-3.

§ 1. **Acts or omissions constituting negligence.**

A characterization of defendant's negligence as "gross" in a declaration does not change the legal effect of the allegation from what it would have been had the term "negligence" alone been used.—*Kelly v. Malott* (C. C. A.) 74.

§ 2. **Proximate cause of injury.**

To give a right of action for an injury on the ground of defendant's negligence, the injury must have been the natural and probable consequence of such negligence, and such as under the circumstances of the case might and ought to have been foreseen.—*Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.* (C. C.) 135; *Minnesota & D. Cattle Co. v. Same, Id.*

## NEW TRIAL.

In bankruptcy proceedings, see "Bankruptcy," § 2.

Review of orders on motion for, see "Appeal and Error," § 5.

## NOTICE.

To corporate stockholders, see "Corporations," § 2.

## OBJECTIONS.

To questions in taking deposition, see "Depositions."

## OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 1.

**OBSTRUCTIONS.**

Of navigable waters, see "Navigable Waters," § 1.

**OCCUPATION.**

Of real property, see "Use and Occupation."

**OFFER.**

Of reward, see "Rewards."

**OFFICERS.**

*Particular classes of officers.*

See "Clerks of Courts"; "Judges"; "Receivers."

Corporate officers, see "Corporations," § 2.  
United States officers, see "United States," § 1.

**OPINION EVIDENCE.**

In civil actions, see "Evidence," § 5.

**OPTIONS.**

For purchase or sale of realty, see "Vendor and Purchaser," § 1.

Specific performance of, see "Specific Performance," § 1.

**ORDERS.**

Of court, see "Motions."

Review of appealable orders, see "Appeal and Error."

**ORDINANCES.**

Impairment of contract rights under ordinances, see "Constitutional Law," § 1.

**PAROL EVIDENCE.**

In civil actions, see "Evidence," § 4.

**PARTIES.**

Character ground of jurisdiction, see "Courts," § 4.

Interpleading, see "Interpleader."

Persons concluded by judgment, see "Judgment," § 3.

*In actions by or against particular classes of parties.*

See "Principal and Agent," § 3.

*In particular actions or proceedings.*

See "Libel and Slander," § 1.

Foreclosure, see "Mortgages," § 1.

For infringement of patent, see "Patents," § 10.

**PARTNERSHIP.**

Appeal in bankruptcy proceedings against partnership, see "Bankruptcy," § 11.

Federal jurisdiction of action against, see "Courts," § 4.

Operation of statute of frauds on promise of firm to assume liability of member, see "Frauds, Statute of," § 1.

**§ 1. Dissolution, settlement, and accounting.**

Where a partnership is terminable at will, it may be dissolved by one of the partners, without regard to the question of good faith or reasonableness of time or circumstance.—*Meysenburg v. Littlefield* (C. C.) 184.

Correspondence employing a firm as selling agents for a manufacturing corporation held not to prevent one of the partners of such firm from dissolving the same on notice at will.—*Meysenburg v. Littlefield* (O. C.) 184.

Where a manufacturing corporation employed a firm to act as its selling agents, the dissolution of the firm operated to terminate the contract of employment.—*Meysenburg v. Littlefield* (O. C.) 184.

**PASSENGERS.**

See "Carriers," § 3.

**PATENTS.**

Parol or extrinsic evidence as to licenses for use of, see "Evidence," § 4.

**§ 1. Subjects of patents.**

A patent for the product of a process is void, where the same product had previously been produced by other processes.—*Société Fabriques de Produits Chimiques de Thann et de Mulhouse v. George Lueders & Co.* (C. C.) 102.

Where a metallurgical process consists, not simply in making use of certain natural properties of a deoxidizing agent such as aluminum, but in making use of them at a certain time, in certain quantities, and in a certain way, it cannot be objected, to a patent for such process, that it seeks to monopolize well-known properties.—*United States Mitis Co. v. Midvale Steel Co.* (C. C.) 103.

To support a process or method patent, there must be a tangible product, or a change in character or quality brought about, and not simply a principle or result underlying or involved in certain mechanical or electrical means or steps.—*Manhattan General Const. Co. v. Helios-Upton Co.* (C. C.) 785.

Where no concrete conception can be worked out of a claim for a mechanical patent, it cannot be sustained.—*Manhattan General Const. Co. v. Helios-Upton Co.* (C. C.) 785.

**§ 2. Patentability.**

A new combination of old parts, which produces a new and useful result, may disclose invention; and, when it displays the exercise

of intuitive skill and genius beyond that possessed and exercised by those skilled in the art, invention should be recognized.—*Western Electric Co. v. North Electric Co.* (C. C. A.) 79.

Where the question of the validity of a patent is in doubt, the doubt should rather be resolved in favor of, than against, the patent.—*Cleveland Foundry Co. v. Kauffman* (C. C. A.) 860.

A patentee of a combination may also obtain a patent on a divisional application for a sub-combination of some of the same elements, if new and useful in itself, or in connection with previously known means or devices necessary to make the whole an operative machine or structure.—*Thomson-Houston Electric Co. v. Black River Traction Co.* (C. C. A.) 759.

Claims of a patent for a regulating device for gas engines otherwise void for anticipation are not rendered valid by adding to the combination some old form of governor to actuate the supply valve, which is an obvious step, in view of the long use of such device on steam engines.—*Press Pub. Co. v. Westinghouse Mach. Co.* (C. C. A.) 767.

The patentability of a process is to be determined by its effect. However simple, it may disclose invention, if it produces an improved result.—*United States Mitis Co. v. Midvale Steel Co.* (C. C.) 103.

Where a patent discloses invention, the courts are not called upon to measure it by an exacting standard.—*Valvona v. D'Adamo* (C. C.) 544.

A United States patent will not be defeated by a prior foreign patent, unless it describes or shows the patented invention in such full, clear, and exact terms as to enable any person skilled in the art to practice it without the necessity of experimenting.—*Valvona v. D'Adamo* (C. C.) 544.

### § 3. Applications, and proceedings thereon.

Where a patentee acquiesces in a rejection of claims by the Patent Office, and amends the same so as to be more specific, such claims must be read and interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover either what was rejected or disclosed by prior devices.—*Greene v. Buckley* (C. C. A.) 520; Same v. *Manhattan Refrigerating Co.*, *Id.*

### § 4. Requisites and validity of letters patent.

The provision of Rev. St. § 4885 [U. S. Comp. St. 1901, p. 3382], requiring a patent to bear date as of a day not later than six months from the time of its allowance and notice thereof to the applicant, is directory merely; and where the accumulation of work in the office delays the issuance of the patent until a later date, the final fee having been paid within the time allowed, such patent will not for that reason be adjudged void at the instance of a private party in a collateral proceeding.—*Western Electric Co. v. North Electric Co.* (C. C. A.) 79.

Claim for mechanical patent otherwise invalid as an abstraction *held* not to be sustained by reference to the specifications.—*Manhattan General Const. Co. v. Helios-Upton Co.* (C. C.) 785.

### § 5. Reissues.

Even though the changes in description in the specification of a reissued patent are not material, and the claims are identical with some of those of the original patent, such facts do not impeach their validity.—*Thomson-Houston Electric Co. v. Black River Traction Co.* (C. C. A.) 759.

### § 6. Disclaimers.

Claims of a reissued patent should, if possible, be given the construction placed thereon by the patentee and the Patent Office to make the reissue effective.—*Thomson-Houston Electric Co. v. Black River Traction Co.* (C. C. A.) 759.

The purpose of a disclaimer, after issue, is to take out of a patent that which has been mistakenly or inadvertently included in it, by which it is made too broad.—*Manhattan General Const. Co. v. Helios-Upton Co.* (C. C.) 785.

### § 7. Construction and operation of letters patent.

The claims of a patent are to be fairly construed in the light of the specification and drawings, so as to cover, if possible, the invention and thus save it, especially if it be a meritorious one.—*Mossberg v. Nutter* (O. C. A.) 95.

Where a theory is erroneously advanced by an inventor in his specifications to explain a patented process, the scope of the invention is not to be narrowed thereby, so as to preclude him from laying claim to other beneficial results.—*United States Mitis Co. v. Midvale Steel Co.* (C. C.) 103.

An invention covered by a patent is not necessarily to be cut down by the fact that while application was pending other applications were brought forward by the same inventor representing different developments of the same idea.—*Manhattan General Const. Co. v. Helios-Upton Co.* (C. C.) 785.

Claims of a patent are to be taken as they read, and are not limited by an amendment of the specification more particularly describing the device shown in the drawings to meet objections of the Patent Office, where the claims themselves are left unchanged.—*Manhattan General Const. Co. v. Helios-Upton Co.* (C. C.) 785.

A patent for a method of maintaining a constant electric current in an alternating current circuit, in which there are translating devices in series, is not limited by the description therein of an apparatus for practicing such method, which must be taken as merely illustrative.—*Manhattan General Const. Co. v. Helios-Upton Co.* (C. C.) 785.

Inventor *held* not restricted to the particulars to which prominence is given in the specifications, where it is evident that he had variations of it in mind and had formulated a claim to



cover them.—*Manhattan General Const. Co. v. Helios-Upton Co. (C. C.)* 785.

**§ 8. Title, conveyances, and contracts.**

A provision of a contract assigning a patent, requiring the assignee to keep accounts showing licenses granted thereunder, which should be subject to inspection by the patentee, *held* not violated by a refusal to permit him to inspect the assignee's books, showing its business of building the patented structure, in which he had no interest, so as to entitle him to a cancellation.—*Duff v. Gilliland (C. C.)* 581.

A contract assigning a patent in consideration of the payment to the patentee of a share of the royalties received for licenses construed, and *held* not violated by the assignee by engaging in the construction of the patented machine for licensees, so as to afford ground for its cancellation, nor to entitle the patentee to an interest in the profits of such business.—*Duff v. Gilliland (C. C.)* 581.

**§ 9. Regulation of dealings in patent rights and patented articles.**

Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388], requiring that articles made under a patent shall be so marked, is not applicable to the case of a process patent, and the omission is not a bar to recovery for infringement, where the defendant has been notified, and continues the infringement in disregard of such notice.—*United States Mitis Co. v. Midvale Steel Co. (C. C.)* 103.

**§ 10. Infringement.**

A defense to a suit for infringement on the ground that the patent bears date more than six months later than the notice given to the applicant of the allowance of the application may properly be taken by plea.—*Western Electric Co. v. North Electric Co. (C. C. A.)* 79.

In a suit in equity for infringement of a patent, the defenses of lack of invention and infringement cannot be made by plea, but only by answer.—*Western Electric Co. v. North Electric Co. (C. C. A.)* 79.

Proof of infringement by a joint-stock association organized under the laws of New York will not sustain a bill for infringement against its president individually, who is not shown to be a stockholder.—*National Casket Co. v. Stoltz (C. C. A.)* 534.

A denial of invention in a suit for infringement *held* sufficient.—*Robinson v. American Car & Foundry Co. (C. C. A.)* 693.

Service of a copy of an injunction on defendant's attorneys, and inclosure of a copy in a properly addressed letter mailed to defendant, *held* sufficient to sustain a proceeding for contempt for violation thereof.—*Christensen Engineering Co. v. Westinghouse Air Brake Co. (C. C. A.)* 774.

In a proceeding to punish defendant for contempt in violating an injunction restraining the sale of certain infringing valves, a finding that the valves were infringing *held* justified.—*Christensen Engineering Co. v. Westinghouse Air Brake Co. (C. C. A.)* 774.

An objection that a notice of the commencement of proceedings to punish defendant for contempt in violating an injunction restraining the infringement of a patent was not properly served *held* unsustainable.—*Christensen Engineering Co. v. Westinghouse Air Brake Co. (C. C. A.)* 774.

An order awarding one-half of a fine assessed in a contempt proceeding to complainant *held* reviewable on appeal, though, if the entire fine had been so awarded, review could be had only on writ of error.—*Christensen Engineering Co. v. Westinghouse Air Brake Co. (C. C. A.)* 774.

In proceedings for contempt in violating an injunction restraining infringement of a patent, only so much of the fine imposed should be awarded to the complainant as the evidence disclosed was necessary to indemnify it for its expenses in the contempt proceeding.—*Christensen Engineering Co. v. Westinghouse Air Brake Co. (C. C. A.)* 774.

Where a patent deals with a metallurgical process, with regard to which there is not only a difference of opinion, but some obscurity, it would destroy the value of the patent by which the process is protected if, while pursuing its terms, the charge of infringement could be successfully met simply by assigning the attainment of the different object.—*United States Mitis Co. v. Midvale Steel Co. (C. C.)* 103.

The president of a corporation not alleged to be insolvent cannot properly be joined with the corporation as defendant in a bill for an injunction and accounting for an alleged infringement of a patent by the corporation merely because as such president he directs the business of the corporation.—*Glucose Sugar Refining Co. v. St. Louis Syrup & Preserving Co. (C. C.)* 540.

An application for preliminary injunction against infringement of the Custodis patent, No. 512,504, for a chimney, denied.—*Alphons Custodis Chimney Const. Co. v. H. R. Heinicke (C. C.)* 552.

**PATENTS ENUMERATED.**

**ENGLISH.**

16,940. Automatic lubricator ..... 525  
1894.

1,478. Process for duplicating phonographic records ..... 810

**GERMAN.**

20,349. Water closet valve ..... 101  
43,908. Bicycle bell ..... 98

**UNITED STATES.**

**ORIGINAL.**

23,636. Artificial limbs ..... 363  
41,238. Artificial limbs ..... 363  
48,660. Artificial limbs ..... 364  
52,057. Artificial limbs ..... 364  
58,351. Artificial limbs ..... 364  
98,599. Water closet valve ..... 101  
117,555. Chimney ..... 552

126,270. Water closet valve .....	101	626,927. Incandescent lamp socket .....	90
140,799. Method of constructing doors .....	118	627,898. Car truck .....	72
175,728. Water closet valve .....	101	627,900. Car truck .....	72
187,528. Baseboard and wainscoting .....	118	631,545. Hydrant .....	537
190,304. Water closet valve .....	101	633,941. Improvement in dredger's for pul- verulent material .....	751, 752
205,903. Water closet valve .....	101	644,464. Artificial limbs .....	353
215,271. Automatic lubricator .....	527	667,662. Process for duplicating cylindri- cal phonographic records .....	809, 813
274,284. Carpet strips for repelling and destroying vermin .....	118	669,011. Method of making flat knit cap .....	532
295,675. Artificial limbs .....	364	682,991. Process for duplicating cylindrical phonographic records .....	809, 814
295,919. Automatic lubricator .....	525	682,992. Process for duplicating cylindrical phonographic records .....	809, 814
303,976. Process for casting rollers .....	811	684,165. Method of regulating electric cur- rent .....	785
333,373. Process for making wrought iron and steel castings .....	104	684,340. Regulator for arc light circuits .....	785, 801
341,214. Process for duplicating cylindrical phonographic records .....	810	694,534. Rock-drilling machinery .....	119
346,899. Baseboard and wainscoting .....	112, 113	694,535. Process for boring rock .....	119
357,538. Spring jack telephone switches .....	79-81, 83, 86	701,776. Molds for biscuit cups .....	544
368,702. Automatic lubricator .....	526	702,560. Oil burner .....	379
371,239. Artificial limbs .....	364	710,050. Regulator for arc light circuits .....	804
371,431. Water closet valve .....	101	713,209. Process for duplicating phono- graphic records .....	809, 812
377,217. Regulator for arc light circuits .....	793		
382,417. Process for duplicating phono- graphic records .....	811		
397,616. Regulator for arc light circuits .....	793		
401,426. Artificial limbs .....	364		
406,146. Method of forming lead trap .....	546		
413,293. Regulator for arc light circuits .....	794		
416,374. Process for making tubing .....	354, 357		
416,710. Artificial musk .....	102		
421,244. Method of hulling peas .....	815, 816		
424,605. Traveling contact for electric rail- ways .....	759-761		
444,556. Traveling contact for electric rail- ways .....	763		
451,847. Artificial musk .....	102		
484,532. Process for duplicating phono- graphic records .....	810		
488,033. Telephone switch .....	79-81, 85		
491,012. Bicycle bell .....	95		
491,234. Method of making starch .....	540		
495,443. Traveling contact for electric rail- ways .....	759		
511,559. Electric motor .....	365		
511,560. Electric motor .....	365		
512,504. Chimney .....	552		
516,846. Regulator for arc light circuits .....	795, 802		
516,847. Regulator for arc light circuits .....	797, 804		
517,271. Gas producer .....	581, 582		
521,722. Cream separator .....	772		
528,273. Process for duplicating phono- graphic records .....	810		
537,629. Pneumatic tool .....	783		
552,729. Telephone switch .....	80, 81, 87		
554,896. Incandescent lamp socket .....	91		
555,640. Rock-drilling machinery .....	119, 120		
560,067. Incandescent lamp socket .....	91		
563,572. Process for casting printers' rolls .....	811		
564,502. Automatic lubricator .....	530		
565,541. Incandescent lamp socket .....	91		
568,919. Incandescent lamp socket .....	91		
581,251. Method of making tubing .....	351, 353		
583,585. Regulator for gas engines .....	767		
588,610. Regulator for arc light circuits .....	800		
589,342. Acetylene gas burner .....	121		
590,297. Automatic lubricator .....	521		
598,452. Artificial limbs .....	364		
620,036. Multiplying camera .....	550		
623,741. Artificial limbs .....	364		
		11,597. Core-boring apparatus .....	120
		11,872. Traveling contact for electric rail- ways .....	759

## REISSUE.

11,597. Core-boring apparatus .....	120
11,872. Traveling contact for electric rail- ways .....	759

## PAYMENT.

## See "Compromise and Settlement."

## § 1. Recovery of payments.

An amended declaration and the original held to state a similar cause of action to recover money under quasi contract.—*Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency* (C. C.) 613.

## PERJURY.

## § 1. Offenses and responsibility therefor.

Defendant, being charged with having taken a false oath as to his qualifications as a surety on a distiller's bond before a deputy internal revenue collector, held properly indicted for perjury, under Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], though such offense under the state law constituted false swearing only.—*United States v. Hardison* (D. C.) 419.

Under Rev. St. § 3165, as amended by Act Cong. March 1, 1879, c. 125, § 2, 20 Stat. 329 [U. S. Comp. St. 1901, p. 2057], Internal Revenue Laws 1900, p. 47, § 321 (Rev. St. U. S. § 321 [U. S. Comp. St. 1901, p. 186]) and Internal Revenue Regulations, an oath taken by a distiller's surety as to his qualifications, before a deputy collector, held an oath taken in a case in which "a law of the United States authorizes the oath to be administered," within Rev. St. U. S. § 5392 [U. S. Comp. St. 1901, p. 3653].—*United States v. Hardison* (D. C.) 419.

Under Act March 15, 1876, c. 304, 19 Stat. 206 [U. S. Comp. St. 1901, p. 662], and Act May 28, 1896, c. 252, 29 Stat. 184 [U. S. Comp.

St. 1901, pp. 499, 500], an indictment for perjury committed in the execution of an affidavit of justification by a surety on a liquor distiller's bond *held* not objectionable on the ground that the officer taking the same styled himself "notary public and ex officio justice of the peace."—*United States v. Hardison* (D. C.) 419.

## PERSONAL INJURIES.

See "Negligence."

Diverse citizenship ground of federal jurisdiction, see "Courts," § 4.

Grounds for compensatory damages, see "Damages," § 1.

Measure of damages, see "Damages," § 2.

To employe, see "Master and Servant," §§ 1-3.

To passenger, see "Carriers," § 3.

To person on or near railroad tracks, see "Railroads," § 1.

## PETITION.

For removal of cause to federal court, see "Removal of Causes," § 4.

In bankruptcy, see "Bankruptcy," §§ 1-3.

In pleading, see "Pleading," § 4.

## PHYSICIANS AND SURGEONS.

Fraudulent use of mails by, see "Post Office," § 1.

## PILOTS.

The owner of a vessel is not debarred from maintaining a suit against her pilot to recover the amount of damages paid on account of a collision which occurred through the pilot's negligence by the fact that such damages were paid without suit; nor is his right of action barred by laches, where suit is commenced within the time allowed by the statute of the state to sue at law on similar claims.—*Donald v. Guy* (D. C.) 429.

New York City Consolidation Act, Laws 1882, p. 511, c. 410, §§ 2101, 2105, 2107, and by-laws Nos. 17, 21, and 36 of the board of commissioners of pilots for the port of New York, construed, and *held* to entitle a pilot to extra compensation for detention, and for moving the vessel on the day following that on which she was brought into the harbor and anchored.—*The Cervantes* (D. C.) 573.

## PLEA.

In civil actions, see "Pleading," §§ 2, 5.

## PLEADING.

In federal courts, see "Courts," § 5.

Petition in bankruptcy, see "Bankruptcy," § 2.

*Allegations as to particular facts, acts, or transactions.*

Diverse citizenship as ground for removal of causes, see "Removal of Causes," § 2.

Federal jurisdiction, see "Courts," § 3.

*In actions by or against particular classes of parties.*

See "Factors."

*In particular actions or proceedings.*

See "Equity," § 2; "Injunction," § 2; "Libel and Slander," § 1; "Negligence," § 1.

For infringement of patent, see "Patents," § 10.

For recovery of payment, see "Payment," § 1.

Indictment or criminal information or complaint, see "Indictment and Information."

On insurance policy, see "Insurance," § 1.

To rescind contract of life insurance, see "Insurance," § 2.

§ 1. *Form and allegations in general.*

In pleading, a general averment is always controlled by specific allegations on the same subject.—*Boatmen's Bank of St. Louis v. Fritzlen* (C. C. A.) 650.

A statement in a pleading that merchandise is "entitled to debenture" under section 3030, Rev. St. [U. S. Comp. St. 1901, p. 1935], is insufficient, as being the statement of a legal conclusion.—*W. H. Thomas & Son Co. v. Barnett* (C. C.) 172.

§ 2. *Plea or answer, cross complaint, and affidavit of defense.*

A separate affirmative defense in the nature of a confession and avoidance defeats the action, notwithstanding a general denial accompanying the same.—*Stratton's Independence v. Dines* (C. C. A.) 449.

The office of an affidavit of defense under the law of Pennsylvania is to prevent a summary judgment, and it is not to be subjected to close technical examination.—*Mutual Life Ins. Co. v. Keen* (C. C. A.) 677.

Allegations of a bill as to the citizenship of the members of plaintiff firm may be challenged by plea in abatement, under Illinois practice, unless waived by a plea to the merits.—*Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency* (C. C.) 613.

§ 3. *Replication or reply and subsequent pleadings.*

A replication which does not avoid the legal effect of an affirmative defense presents no issue.—*Stratton's Independence v. Dines* (C. C. A.) 449.

§ 4. *Amended and supplemental pleadings and replender.*

Amendment of petition *held* properly allowed by the trial court in the exercise of its discretion.—*Moore v. Petty* (C. C. A.) 668.

§ 5. *Motions.*

Judgment on the pleadings may be entered on motion, where a party is, on all the pleadings, entitled to judgment.—*Stratton's Independence v. Dines* (C. C. A.) 449.

An election to stand by a count in money lent *held* not a waiver of the right to use as evidence a bond declared on in another count.—*Aetna Indemnity Co. v. Ladd* (C. C. A.) 636.

A plea in abatement may be stricken off on motion, where not supported by depositions taken in conformity to the rules of the court.—*Scott v. Stockholders' Oil Co.* (C. C.) 802.

## POLICY.

Of insurance, see "Insurance."

## POST OFFICE.

### § 1. Offenses against postal laws.

Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3697], makes no discrimination, with respect to the right of persons whose vocation is healing to the use of the mails, between those who profess to cure by the use of mental science and those who use drugs; the only question in either case being that of good faith.—*Post v. United States* (C. C. A.) 1, 1022.

Where an indictment for fraudulent use of the mails under Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3697], charged that defendant advertised to practice mental healing, and receive pay to treat patients, "when she did not intend to administer any treatment," such intention is the gist of the offense, and must be proved to warrant a conviction.—*Post v. United States* (C. C. A.) 1, 1022.

Where, on a trial for fraudulently using the mails by the practice of an alleged power of mental healing, under the plea of not guilty, defendant introduced evidence tending to show that she possessed the power claimed, an instruction that the burden rested on her to satisfy the jury that she possessed such power was erroneous and misleading.—*Post v. United States* (C. C. A.) 1, 1022.

## POWERS.

Of attorney, see "Principal and Agent."

## PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 5.

In patent office, see "Patents," § 3.

Prosecution of actions in general, see "Action," § 1.

### *In particular civil actions or proceedings.*

See "Interpleader."

Condemnation proceedings, see "Eminent Domain," § 1.

### *Particular proceedings in actions.*

See "Abatement and Revival"; "Depositions"; "Evidence"; "Exceptions, Bill of"; "Judgment"; "Jury"; "Limitation of Actions"; "Motions"; "Pleading"; "Removal of Causes"; "Trial."

Verdict, see "Trial," § 3.

### *Particular remedies in or incident to actions.*

See "Injunction"; "Receivers."

### *Procedure in criminal prosecutions.*

See "Criminal Law."

### *Procedure in exercise of special jurisdictions.*

In admiralty, see "Admiralty"; "Collision," § 6; "Maritime Liens," § 2.

In bankruptcy, see "Bankruptcy," §§ 1-3.

In equity, see "Equity."

Particular courts, see "Courts."

### *Procedure on review.*

See "Appeal and Error."

## PRE-EMPTION.

Of public lands, see "Public Lands," § 2.

## PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 6.

## PREJUDICE.

Ground for removal of cause, see "Removal of Causes," § 3.

Ground for reversal in civil actions, see "Appeal and Error," § 5.

## PRINCIPAL AND AGENT.

See "Brokers"; "Factors."

Admissions by agent, see "Evidence," § 2.

### § 1. The relation.

Evidence held sufficient to establish that a member of defendant firm, who negotiated a modification of a contract with plaintiff, had authority to act for the firm.—*Foster v. Murphy & Co.* (C. C. A.) 47.

### § 2. Mutual rights, duties, and liabilities.

Sale made by defendants held in fact made as plaintiffs' agents, and plaintiffs were entitled to the profits thereof.—*Moore v. Petty* (C. C. A.) 668.

Principals held entitled to sue their agents at law for profits made by the agents out of a deal with their principals' property.—*Moore v. Petty* (C. C. A.) 668.

A contract between a bankrupt mercantile company and a sales agent for commissions on orders for goods construed.—*In re Ladue Tate Mfg. Co.* (D. C.) 910.

### § 3. Rights and liabilities as to third persons.

On the issue of the authority of general agents of a surety company, a charge defining general agent held not misleading.—*Attna Indemnity Co. v. Ladd* (C. C. A.) 638.

In an action against a surety company to recover money loaned to it through its general agent, evidence held sufficient to authorize the submission to the jury of the issue of ratification by the company of the agent's act in borrowing the money.—*Attna Indemnity Co. v. Ladd* (C. C. A.) 638.

Act of principal in protesting its agent's draft for funds to complete a contract held not a

repudiation of the agent's assumption of the contract.—*Ætna Indemnity Co. v. Ladd* (C. C. A.) 636.

Third persons are justified in relying on the apparent authority of a general agent, and the principal is bound for acts of the agent within the scope of such authority.—*Ætna Indemnity Co. v. Ladd* (C. C. A.) 636.

An agent may testify that he acted for and in behalf of a principal in borrowing money, but such testimony does not bind his principal, nor prejudice its rights.—*Ætna Indemnity Co. v. Ladd* (C. C. A.) 636.

Both under the general authorities and under the decisions of the Supreme Court of Oregon, a principal for whose benefit a written contract was made by an agent, and who paid the consideration therefor, both the agency and the source of the consideration being known to the other party, may maintain an action directly for the enforcement of the contract, although not named therein.—*Rea v. Barker* (C. C.) 890.

## PRINCIPAL AND SURETY.

See "Guaranty."

Liabilities of sureties on bond of government contractor, see "United States," § 2.

### § 1. Creation and existence of relation.

In an action on a contract of suretyship for corporate indebtedness, allegations that plaintiff, with knowledge of the falsity of representations made to induce defendant to sign the contract, permitted such representations to be made in its presence to induce defendant to sign the agreement, *held* to state a defense.—*First Nat. Bank v. Terry* (C. C.) 621.

### § 2. Discharge of surety.

Railroad contracting company *held* entitled, as against materialman, to select any reasonable route between the termini, and the selection of such a route did not relieve the materialman's surety from liability for the materialman's default.—*American Surety Co. v. Choctaw Const. Co.* (C. C. A.) 487.

### § 3. Remedies of creditors.

In an action for the failure of a contractor to furnish railroad ties, evidence *held* sufficient to present the defense of plaintiff's violation of its obligation to furnish the motive power to transport the ties.—*American Surety Co. v. Choctaw Const. Co.* (C. C. A.) 487.

## PRIORITIES.

Of claims against bankrupt estate, see "Bankruptcy," § 9.

## PROCESS.

Particular writs, see "Injunction."

## PROOF.

Taking and filing proof in equity, see "Equity," § 3.

## PROPERTY.

See "Copyrights"; "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."

Dedication to public use, see "Dedication."

Protection of rights of property by injunction, see "Injunction," § 1.

Taking for public use, see "Eminent Domain."

## PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 2.

## PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.

Of injury, see "Negligence," § 2.

## PUBLIC BUILDINGS.

County buildings, see "Counties," § 1.

## PUBLIC LANDS.

### § 1. Survey and disposal of lands of United States.

Complainant *held* barred by laches from maintaining a bill to compel defendant to convey land granted to the state by Act Cong. March 3, 1869, c. 150, 15 Stat. 340, as specified in such grant.—*Nichols v. Southern Oregon Co.* (C. C.) 232.

Public lands granted to the state of Oregon in aid of military road, having been conveyed in bulk to the road company in violation of a condition in the granting act (Act Cong. March 3, 1869, c. 150, 15 Stat. 340), the government (Act June 18, 1874, c. 385, 18 Stat. 80 [U. S. Comp. St. 1901, p. 1517]), and not a subsequent applicant to purchase, was the only authority entitled to object to the nonperformance of such condition.—*Nichols v. Southern Oregon Co.* (C. C.) 232.

### § 2. Disposal of lands of the states.

Pre-emption rights cannot be acquired under Acts La. 1888, p. 31, No. 21, in lands which have been granted to one of the levee boards of the state.—*West v. Roberts* (C. C. A.) 350.

## PUBLIC USE.

Dedication of property, see "Dedication."

Taking property for public use, see "Eminent Domain."

## PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 2.

## QUANTUM MERUIT.

See "Work and Labor."

## QUESTIONS FOR JURY.

In civil actions, see "Trial," § 1.

### RAILROADS.

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Condemnation proceedings against, see "Eminent Domain," § 1.

Establishment of trust in railroad property, see "Trusts," § 1.

Exemption from taxation, see "Taxation," § 1.

Ex post facto laws relating to taxation of, see "Constitutional Law," § 2.

Impairment of contract rights to exemption from taxation, see "Constitutional Law," § 1.

#### § 1. Operation.

A woman who stepped upon a railroad track in the daytime a short distance in front of an approaching train for the purpose of crossing over a cattle guard, and was struck and injured by the train, *held* guilty of contributory negligence, which precluded a recovery from the railroad company for the injury.—*St. Louis Southwestern Ry. Co. v. Purcell* (C. C. A.) 499.

A railroad company *held* not chargeable with negligence in the injury of a woman on its track by a passing train, where she stepped upon the track in front of the train, and all possible was done thereafter to stop the train before it reached her.—*St. Louis Southwestern Ry. Co. v. Purcell* (C. C. A.) 499.

Under Rev. St. Mo. 1899, § 1060, a domestic railroad corporation which leases its road to a foreign corporation is liable for injuries inflicted by the lessee in the operation of the road.—*Keller v. Kansas City, St. L. & C. R. Co.* (C. C.) 202; *Harmon v. Louisiana & M. R. R. Co.*, *Id.*

Placing a "M. C. B. defect card," noting defects forbidden by the safety appliance act, *held* not to relieve the railway company using it for responsibility.—*United States v. Southern Ry. Co.* (D. C.) 122.

Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], relating to the use of cars not equipped with couplers acting automatically in moving interstate traffic, forbids the use of cars which cannot be coupled by impact and uncoupled without men going between them.—*United States v. Southern Ry. Co.* (D. C.) 122.

Where government inspectors found nine cars with defective coupling appliances among those cut out by defendant railroad company at one time for delivery to a connecting carrier, defendant cannot be held to have exercised reasonable care and diligence to discover and remedy the defects.—*United States v. Southern Ry. Co.* (D. C.) 122.

A car loaded with coal to be delivered to a consignee in another state is "used in moving interstate traffic," within the meaning of Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], by the railroad com-

pany, which takes it from the place of loading, although such company only undertakes to deliver it to a connecting carrier within the same state.—*United States v. Southern Ry. Co.* (D. C.) 122.

It is no defense to an action for violation of Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], making it unlawful to haul cars used in moving interstate traffic without safety couplers, to show that defendant railroad company equipped its cars with such couplers and used reasonable care and diligence to keep them in repair.—*United States v. Southern Ry. Co.* (D. C.) 122.

### RATIFICATION.

Of act of agent, see "Principal and Agent," § 3.

### REBATES.

Of internal revenue, see "Internal Revenue."

### RECEIVERS.

Condemnation proceedings against, see "Eminent Domain," § 1.

In bankruptcy proceedings, see "Bankruptcy," § 3.

Of corporations, see "Corporations," § 3.

#### § 1. Title to and possession of property.

When a receiver of specific property has been appointed by a court of competent jurisdiction, his appointment is for the benefit of all concerned, and the status of the property and all interests are preserved as of the date of the appointment.—*Commonwealth Roofing Co. v. North American Trust Co.* (C. C. A.) 984.

While the appointment of a receiver for the property of a corporation entitles one engaged in the performance of a building contract with the corporation to treat such contract as abandoned as of the date of the receiver's appointment, he is also entitled to a reasonable time, before electing to do so, for the purpose of ascertaining what may be done by the parties in interest or the receiver with respect to completion of the work.—*Commonwealth Roofing Co. v. North American Trust Co.* (C. C. A.) 984.

A building contractor *held* not to have lost its right to mechanics' liens, under Pub. St. N. H. 1901, c. 141, § 17, by failing to institute proceedings for their enforcement within the statutory time, where such proceedings were prevented by the appointment of a receiver for the property by a federal court, but to be entitled to their enforcement by such court.—*Commonwealth Roofing Co. v. North American Trust Co.* (C. C. A.) 984.

The subscribers to an agreement to underwrite the bonds of a corporation *held* necessary parties to a petition against the receivers in insolvency of the corporation, by a creditor to whom the corporation had pledged the bonds together with an assignment of the contract, to require the receivers to turn over certain stock, which was to go with the bonds, to enable

such creditor to enforce the contract.—*Kirkpatrick v. Eastern Milling & Export Co. (C. C.)* 144.

On petition for order on receivers of insolvent corporation to turn over property claimed by petitioners, the only question is whether petitioners have shown such title that the court ought to direct receivers to surrender it.—*Kirkpatrick v. Eastern Milling & Export Co. (C. C.)* 146.

Where, on petition for an order on receivers of insolvent corporation to turn over to petitioners stock certificates made out to subscribers to an agreement to take bonds, to which the stock was a bonus, which agreement and bonds had been transferred to the petitioners as collateral for a loan, subscribers to the agreement were not entitled to have determined defenses on the merits to the enforcement of the agreement against them.—*Kirkpatrick v. Eastern Milling & Export Co. (C. C.)* 146.

On petition for an order requiring receivers of an insolvent corporation to turn over to petitioners certificates of stock of a corporation, other parties joined as respondents are entitled to appeal, giving bail on obtaining supersedeas.—*Kirkpatrick v. Eastern Milling & Export Co. (C. C.)* 151.

Receivers for an insolvent corporation are not entitled to appeal from an order of the court by which they were appointed, directing them to deliver to an intervenor certificates of stock of the corporation which have come into their hands but are admittedly worthless; the estate having no rights to protect.—*Kirkpatrick v. Eastern Milling & Export Co. (C. C.)* 151.

## § 2. Actions.

The refusal of the receiver of a railroad company appointed by a federal court to consent to a railroad crossing over its right of way held not to constitute an "act or transaction" by the receiver, with Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 554, and Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582].—*Buckhannon & N. R. Co. v. Davis (C. C. A.)* 707.

Act March 3, 1887, c. 373, § 3, 24 Stat. 554, and Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582], authorizing suits against a receiver appointed by any court of the United States, without leave thereof, held not to authorize the bringing of a suit to condemn a crossing over the right of way of a railroad company in the hands of a receiver appointed by the federal court without leave thereof.—*Buckhannon & N. R. Co. v. Davis (C. C. A.)* 707.

The federal court, on granting permission to sue its receiver of a railroad company, held entitled to reserve the question as to the forum in which the suit should be brought, or modify or revoke any order improvidently granted.—*Buckhannon & N. R. Co. v. Davis (C. C. A.)* 707.

## RECITALS.

In municipal bonds, see "Municipal Corporations," § 1.

## RECORDS.

On appeal in bankruptcy, see "Bankruptcy," § 11.

Transcript on appeal or writ of error, see "Appeal and Error," § 3.

## REFERENCE.

In bankruptcy proceedings, see "Bankruptcy," § 7.

## REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

## REGISTRATION.

By foreign corporations, see "Corporations," § 5.

## REISSUE.

Of patent, see "Patents," § 5.

## RELEASE.

See "Compromise and Settlement"; "Payment."

## REMAINDERS.

Creation by will, see "Wills," § 2.

## REMAND.

Of cause removed from state court, see "Removal of Causes," § 5.

## REMEDY AT LAW.

Effect on jurisdiction of equity, see "Cancellation of Instruments," § 1; "Equity," § 1.

## REMOVAL OF CAUSES.

### § 1. Power to remove and right of removal in general.

A judgment in favor of plaintiff on a main cause of action having been affirmed, but reversed as to a counterclaim, the action could not thereafter be removed to the federal courts for retrial of the issues raised on the counterclaim.—*Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co. (C. C.)* 837.

### § 2. Citizenship or alienage of parties.

Separate causes of action, disclosed by the bill or complaint in a single suit, on either of which a separate suit could be maintained, constitute separate controversies, within Act March 3, 1887, c. 373, § 2, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [1 U. S. Comp. St. 1901, p. 509].—*Boatmen's Bank of St. Louis v. Fritzlen (C. C. A.)* 650.

In determining questions as to removal of causes, the court should ascertain the real matter in dispute and arrange the parties according

to their respective interests.—*Boatmen's Bank of St. Louis v. Fritzlen* (C. C. A.) 650.

Where the fact is clear on the pleadings that an improper party has been joined or an assumed cause of action injected to defeat the jurisdiction of the federal court, the court may find the attempted fraud from the record alone.—*Boatmen's Bank of St. Louis v. Fritzlen* (C. C. A.) 650.

In the determination of questions involving the jurisdiction of the federal court or the removal of causes, indispensable parties only should be considered.—*Boatmen's Bank of St. Louis v. Fritzlen* (C. C. A.) 650.

An allegation that plaintiff was a citizen of the state of Michigan *held* insufficient to establish plaintiff's citizenship for the purposes of federal jurisdiction, where plaintiff was otherwise styled as a partnership existing under the laws of that state, unless plaintiff was in fact a corporation.—*Fred Macey Co. v. Macey* (C. C. A.) 725.

A joint action against a railroad company and certain of its servants to recover for the death of a person caused by the negligent acts of the servants committed in the course of their employment *held* not to state a separable cause of action, which rendered the cause removable by the company alone.—*Davenport v. Southern Ry. Co.* (C. U. A.) 960.

Where a domestic corporation is joined as defendant with a foreign corporation, plaintiff has a right to a trial in the state court, if the liability of the former is even debatable.—*Keller v. Kansas City, St. L. & C. R. Co.* (C. C.) 202; *Harmon v. Louisiana & M. R. R. Co.*, *Id.*

A complaint in an action for services against two defendants *held* not to state a separable controversy, so as to justify removal of the cause to the federal courts; the citizenship of one of the defendants only being diverse.—*Lathrop, Shea & Henwood Co. v. Pittsburg, S. & N. R. Co.* (C. C.) 619.

### § 3. Prejudice, local influence, or denial of civil rights.

A defendant who is a citizen of a state other than that in which the suit is brought may remove it for prejudice, though plaintiff and some of the defendants are citizens of the state in which the action was begun.—*Boatmen's Bank of St. Louis v. Fritzlen* (C. C. A.) 650.

Amendment of a counterclaim after reversal of the judgment thereon, and the affirmation of a judgment in favor of plaintiff on the main cause of action, *held* not to change the position of the parties, plaintiff and defendant, so as to entitle plaintiff to remove the cause to the federal courts for prejudice and local influence, under Act Cong. 1887-88 (Act March 3, 1887, c. 373, § 1, 24 Stat. 553, and Act Aug. 13, 1888, c. 803, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509]).—*Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co.* (C. C.) 837.

### § 4. Proceedings to procure and effect of removal.

Whenever, on the filing of a petition for removal, the record discloses a removable cause,

the jurisdiction of the state court ceases and that of the federal court vests.—*Boatmen's Bank of St. Louis v. Fritzlen* (C. C. A.) 650.

A contention that a suit against a domestic and foreign corporation presents a separable controversy, removable under Judiciary Act March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 803, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], cannot be considered, where the petition for removal does not raise the question.—*Keller v. Kansas City, St. L. & C. R. Co.* (C. C.) 202; *Harmon v. Louisiana & M. R. R. Co.*, *Id.*

### § 5. Remand or dismissal of cause.

Motions to remand and for removal should be decided by the preponderance of the facts.—*Boatmen's Bank of St. Louis v. Fritzlen* (C. C. A.) 650.

### § 6. Proceedings in cause after removal.

A suit begun in a state court by attachment of property and removed into a federal court will not there be dismissed for want of jurisdiction because there has been no personal service on defendant, custody of the res being recognized as giving jurisdiction.—*Hubbard v. Central of Georgia Ry. Co.* (C. C.) 256.

## REPLICATION.

See "Equity," § 2; "Pleading," § 3.

## REQUESTS.

For instructions in criminal prosecutions, see "Criminal Law," § 2.

For instructions to jury in civil actions, see "Trial," § 2.

## RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

Of contract for life insurance, see "Insurance," § 2.

## RES JUDICATA.

See "Judgment," §§ 2, 3.

## RESTRAINT OF TRADE.

Validity of contracts, see "Contracts," § 1.

## RETROSPECTIVE LAWS.

Constitutional restrictions, see "Constitutional Law," § 2.

## REVENUE.

See "Customs Duties"; "Internal Revenue"; "Taxation."

## REVIEW.

See "Appeal and Error"; "Criminal Law," § 3.



## REWARDS.

A reward offered "for the arrest of each of the parties convicted" of a stated crime is not earned by merely giving information to an officer which leads to the arrest of a person subsequently convicted.—*McClaughrey v. King* (C. C.) 185.

## RISKS.

Assumed by employé, see "Master and Servant," §§ 1-3.

## ROYALTIES.

For license to sell or use patented article, see "Patents," § 8.

## RULES OF COURT.

Orders, see "Motions."

## SALES.

Of assets of bankrupt's estate, see "Bankruptcy," § 7.

Of realty, see "Vendor and Purchaser."

### § 1. Construction of contract.

Where a contract for furnishing, for the equipment of a pottery, "machinery as follows," enumerated, among other things, kiln doors, such doors are "machinery" for the purposes of the contract, and the purchaser cannot complain that they were too light or of improper design, where they conformed to plans and drawings which he approved as required by the contract in the case of all machinery.—*Thomas China Co. v. O. W. Raymond Co.* (C. C. A.) 25.

### § 2. Modification or rescission of contract.

A contract for a sale of property may, while still executory, be changed to a bailment with an alternative of future conversion into a sale; and an agreement therefor is valid, although verbal and reduced to writing after delivery has been made.—*In re Naylor Mfg. Co.* (D. C.) 206.

### § 3. Performance of contract.

In an action for the price of machinery which has been accepted, retained, and used by the purchaser, it is not necessary to allege or prove compliance with a provision of the contract requiring the seller to submit the drawings and plans to an agent of the purchaser for approval before the machinery was built.—*Thomas China Co. v. O. W. Raymond Co.* (C. C. A.) 25.

### § 4. Warranties.

A provision in a contract for the sale of machinery, containing a general warranty that the seller will replace parts breaking from defective material or improper workmanship, does not make such remedy of the purchaser exclusive, but he may replace defective or

broken parts elsewhere and recover the reasonable cost from the seller.—*Thomas China Co. v. C. W. Raymond Co.* (C. C. A.) 25.

Where a purchaser of machinery which does not comply with the contract of sale retains and uses the same, he loses the right to rescind, and his only remedy is the recovery of damages for the breach of warranty.—*Thomas China Co. v. O. W. Raymond Co.* (C. C. A.) 25.

### § 5. Remedies of seller.

Expense incurred by a purchaser of machinery by reason of having been misled as to its dimensions by blue prints furnished by the seller, making it necessary to rebuild the foundations, *held* recoverable by way of counterclaim in an action for the purchase price.—*Thomas China Co. v. C. W. Raymond Co.* (C. C. A.) 25.

## SALVAGE.

### § 1. Amount and apportionment.

A salvage award of \$600 to two tugs for services in towing to a place of safety a barge, worth with her cargo \$30,000, which was anchored inside the old Delaware Breakwater, but was dragging her anchor and was drifting toward the cape, increased to \$1,200, in view of the danger attending the service and the peril of the barge.—*The Marcus Hook* (C. C. A.) 744.

Compensation for towing a scow picked up in the harbor *held* to be based on a very low order of salvage.—*The Hughes Brothers and Bangs*, No. 49 (C. C. A.) 748.

In making a salvage award for the bringing into port of a derelict, the danger to navigation from her remaining afloat should be taken into consideration, and the award should be liberal, and such as to encourage the rendering of such services.—*The Theta* (D. C.) 129.

A steamship deviating from her voyage to tow a derelict schooner into port *held* entitled to a salvage award of 50 per cent. of the saved value of schooner and cargo, after paying the expenses incurred in the service.—*The Theta* (D. C.) 129.

## SATISFACTION.

See "Compromise and Settlement"; "Payment."

## SEALS.

Corporate seals, see "Corporations," § 2.  
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## SEPARABLE CONTROVERSY.

Removal from state court, see "Removal of Causes," § 2.

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## SET-OFF AND COUNTERCLAIM.

Counterclaim in action for price of goods sold, see "Sales," § 5.  
 Restraining action in order to establish set-off, see "Injunction," § 1.

## SETTLEMENT.

See "Compromise and Settlement"; "Payment."  
 Of bill of exceptions, see "Exceptions, Bill of," § 2.

## SHIPPING.

See "Admiralty"; "Collision"; "Maritime Liens"; "Pilots"; "Salvage"; "Towage."  
 Parol or extrinsic evidence in action for breach of charter party, see "Evidence," § 4.  
 Vessel owners as employers, see "Master and Servant," § 2.

### § 1. Charters.

A charter party describing the capacity of a ship *held* to contemplate the long, instead of the short, ton.—*Sewall v. Wood* (C. C. A.) 12.

Where the master of a vessel refused to receive all the cargo contracted for, the shippers were entitled to recover the extra expense of shipping the balance to destination.—*Sewall v. Wood* (C. C. A.) 12.

A charter party, providing for a load of "about 3,400 tons," *held* not fulfilled by a shipment of 3,258 tons.—*Sewall v. Wood* (C. C. A.) 12.

In an action for breach of a charter party, evidence *held* to sustain a finding as to the weight of cargo for the purpose of determining the freight.—*Sewall v. Wood* (C. C. A.) 12.

### § 2. Master.

A master has authority to bind his vessel to pay for extra pilotage service rendered at his request.—*The Cervantes* (D. C.) 573.

### § 3. Liabilities of vessels and owners in general.

An injury to a contractor's employé, when attempting to climb from the wharf to the deck of a ship by means of a ladder which was obviously not in position for use, and after he had been told to use the gangway, *held* to have been due to his own negligence, and one for which the ship was not liable.—*The Patria* (D. C.) 255.

### § 4. Carriage of goods.

A provision of a charter party fixing the freight for the carriage of timber from a Cuban port per thousand feet, "Cuban invoice," *held* to bind the owners to accept the system of measurement known as "Cuban invoice measure."—*Arenburg v. Grupe* (D. C.) 238.

A barge laden with coal, for carrying which she was to receive the market rate of freight, delayed by an injury due to floating ice after

she had proceeded two or three miles, *held* protected by her bill of lading from liability for the delay, and entitled to the rate of freight current when the voyage was begun, unless the delay was due to her own negligence.—*Philadelphia & R. Ry. Co. v. Peale, Peacock & Kerr* (D. C.) 606.

A barge laden with coal, which was to be carried from Philadelphia to Boston, *held*, under the evidence, not negligent in beginning the voyage on account of the presence of some floating ice in the Delaware river.—*Philadelphia & R. Ry. Co. v. Peale, Peacock & Kerr* (D. C.) 606.

A vessel *held* liable for injury to perishable goods after landing the same on a deck, where, although having no claim against them for freight, she refused to allow their removal by the consignee.—*The Alnwick* (D. C.) 884.

### § 5. Carriage of passengers.

A passenger on a steamship, whose ticket had been accepted and who had been installed on board, *held* entitled to remain, notwithstanding a previous cancellation of his ticket of which he was not notified, and his ejection just before sailing to entitle him to damages.—*La Gascogne* (D. C.) 577.

### § 6. Demurrage.

A ship *held* not entitled to collect demurrage for delay occasioned by the master's wrongful refusal to accept all of the cargo contracted for.—*Sewall v. Wood* (C. C. A.) 12.

Under a bill of lading requiring a vessel to deliver a cargo of coal at a specified dock, the voyage is not completed, and the lay days for discharging do not commence to run, until she reaches such dock and is in condition to discharge, unless she is prevented from reaching it through the active fault of the charterer or consignee.—In re 2,098 Tons of Coal (C. C. A.) 317; *The Ionia*, Id.

Where a charter party or bill of lading contains no provision with respect to the lay days for discharging, an implied obligation arises on the part of the charterer or consignee to give the vessel reasonable dispatch, determined by the circumstances then existing.—In re 2,098 Tons of Coal (C. C. A.) 317; *The Ionia*, Id.

A charterer *held* not liable for a delay in unloading, caused by the mislaying of a custom house permit.—2000 Tons of Coal ex *The Michigan* (C. C. A.) 734; *Jones v. W. K. Niver Coal Co.*, Id.

A delay in berthing a vessel *held* chargeable to the shipowner and his agents, and not to the charterer.—2000 Tons of Coal ex *The Michigan* (C. C. A.) 734; *Jones v. W. K. Niver Coal Co.*, Id.

Where the stavedoring, in discharging a vessel, was done by an employé of the ship's agent, the charterer was not responsible for his delays in unloading.—2000 Tons of Coal ex *The Michigan* (C. C. A.) 734; *Jones v. W. K. Niver Coal Co.*, Id.

Evidence *held* insufficient to establish that a failure to furnish lighters to discharge on both sides of the vessel was due to the fault of the

charterer.—2000 Tons of Coal ex The Michigan (C. C. A.) 734; Jones v. W. K. Niver Coal Co., Id.

**§ 7. General average.**

The stranding of a steamship on a reef, making it necessary to jettison a part of the coal and cargo, *held*, under the evidence, to have been due to negligent navigation, which did not entitle the shipowners to a general average contribution from the cargo.—*Tarabochia v. American Sugar Refining Co.* (D. C.) 424.

**SLANDER.**

See "Libel and Slander."

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See "Statutes," § 1.

**SPECIFIC PERFORMANCE.**

**§ 1. Good faith and diligence.**

A unilateral agreement to sell the coal under a tract of land construed, and *held* merely an option to the purchaser, in which time was of the essence, and which would not be specifically enforced against the owner of the land, where it had not been accepted nor payment made thereon, as required by its terms.—*Standiford v. Thompson* (C. C. A.) 991.

**STATEMENT.**

Of plaintiff's claim, see "Pleading," § 4.

**STATES.**

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**§ 1. General and special or local laws.**

The mere fact that a special legislative act authorizing the appointment of road commis-

sioners for a district declares that they shall be a body corporate does not render the act void, as in violation of Const. Ohio, art. 13, § 1, as a special act conferring corporate powers, where the powers conferred thereby are only those ordinarily conferred on officers charged with the supervision of public improvements.—*Rees v. Olmsted* (C. C. A.) 296.

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**STAY.**

Of proceedings in general where separate actions are pending for same cause of action, see "Action," § 1.  
Of proceedings pending proceedings in court of concurrent jurisdiction, see "Courts," § 8.

**STIPULATIONS.**

Security in suits in admiralty, see "Admiralty," § 2.

**STOCK.**

Corporate stock, see "Corporations," § 1.

**STOCKBROKERS.**

See "Brokers," § 1.

**STOCK EXCHANGES.**

Right to seat in as property passing to trustee in bankruptcy, see "Bankruptcy," §§ 5, 7.

**STOCKHOLDERS.**

In national banks, see "Banks and Banking," § 1.

**STREET RAILROADS.**

Impairment of contracts created by ordinances relating to, see "Constitutional Law," § 1.

**SUBSCRIPTIONS.**

To corporate stock, see "Corporations," §§ 1, 8.

**SUIT.**

See "Action."

**SUPPLEMENTAL PLEADING.**

See "Equity," § 2.

**SURETYSHIP.**

See "Principal and Surety."

**SURRENDER.**

Of written instrument for cancellation, see "Cancellation of Instruments."

**TARIFF.**

See "Customs Duties."

**TAXATION.**

See "Customs Duties"; "Internal Revenue."  
Impairment of contract right to exemptions, see "Constitutional Law," § 1.

Licenses to trade with Indians, see "Indians."  
Validity of ex post facto laws relating to, see "Constitutional Law," § 2.

**§ 1. Liability of persons and property.**

A railroad company, succeeding to the rights of another through foreclosure, held to have also succeeded, under Code Pub. Gen. Laws Md. 1888, art. 23, §§ 187, 188, to an exemption from taxation granted to the original company for a term of years.—*Wicomico County Com'rs v. Bancroft* (C. C. A.) 977.

**§ 2. Levy and assessment.**

A holder of mortgage bonds of a railroad company has such an interest in its property as entitles him to maintain a suit to enjoin its illegal taxation where a proper showing is made of the refusal of the mortgage trustee to prosecute such suit.—*Wicomico County Com'rs v. Bancroft* (C. C. A.) 977.

**TESTAMENT.**

See "Wills."

**THEFT.**

See "Larceny."

**TICKETS.**

For carriage of passengers by vessel, see "Shipping," § 5.

**TIME.**

For application for discharge in bankruptcy, see "Bankruptcy," § 10.

**TITLE.**

To patents, see "Patents," § 8.

**TORTS.**

Causing death, see "Death," § 1.

*By particular classes of parties.*

United States officers, see "United States," § 1.

*Particular torts.*

See "Fraud"; "Libel and Slander"; "Negligence."

Maritime torts, see "Collision."

**TOWAGE.**

Collisions with tugs and vessels in tow, see "Collision," § 4.

Where the striking of a barge in tow against the cribbing of a city bridge was due to the fault of the tug, she cannot shift the liability upon the city on the ground that, if the cribbing had been in perfect condition, the collision would not have injured the barge.—*The Maurice* (C. C. A.) 516.

The sinking of a barge in tow in the Schuylkill river by striking against the cribbing of a bridge while passing through the draw *held* due solely to the fault of the tug for towing with too long hawsers.—*The Maurice* (C. C. A.) 516.

A tug *held* liable for loss of a tow on the ground of negligence in starting out, in view of the condition of the weather, with such vessels as composed its tow.—*The Ganoga* (C. C. A.) 747.

## TOWNS.

See "Municipal Corporations."

## TRADE-MARKS AND TRADE-NAMES.

See "Names."

### § 1. Marks and names subjects of ownership.

Series of numbers used by a manufacturer of labels in its catalogues and on its boxes to designate its different styles of labels, each being given a different number, do not constitute trade-marks; nor is their use by another in the same way and for the same purpose, in connection with its own name, unfair competition, where there is no imitation of dress.—*Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.* (C. C. A.) 625.

The words "Toothache Gum" *held* to indicate quality of the article, rather than its origin or ownership, and not subject to appropriation as a technical trade-mark.—*Devlin v. McLeod* (C. C.) 164.

### § 2. Infringement and unfair competition.

Similarity in the shape of a confection and in the descriptive name under which it was sold *held* not to constitute unfair competition, where the boxes in which it was retailed were distinctive.—*Heide v. Wallace & Co.* (C. C. A.) 846.

The fact that defendant's use of a label similar to complainant's, constituting unfair competition, had been inconsiderable at the time suit was brought, did not preclude an injunction, though an accounting was not warranted.—*Devlin v. McLeod* (C. C.) 164.

In a suit to restrain defendant from alleged unfair competition in the sale of "Toothache Gum" in packages similar to complainant's packages, evidence *held* to show such a similarity as to entitle complainant to an injunction.—*Devlin v. McLeod* (C. C.) 164.

In a suit to restrain defendant from unfair competition, complainant *held* not barred from relief by laches.—*Devlin v. McLeod* (C. C.) 164.

Where, in a suit for unfair competition, it was apparent that confusion was likely to arise by defendant's imitation of plaintiff's package, an intent to defraud would be presumed.—*Devlin v. McLeod* (C. C.) 164.

The use of a descriptive name of an article in connection with similar type and label *held*

to be enjoined, on the ground of unfair competition.—*Devlin v. Peek* (C. C.) 167.

The adoption and use by defendant corporation of the name "John Coates Thread Company," under which it made and sold thread, *held* to constitute unfair competition with complainant, which, with its predecessors, had sold thread in the United States since 1840 under the name of "Coats" thread, by which it had become known and was usually called for.—*J. & P. Coats v. John Coates Thread Co.* (C. C.) 177.

While a person has the right to use his own name to designate articles which he manufactures and deals in, a corporation has not the right to use the name of one of its incorporators, where it is the name by which an article made and sold by an older dealer is usually called for and described, so as to cause deception of purchasers and injury to the older manufacturer.—*J. & P. Coats v. John Coates Thread Co.* (C. C.) 177.

Complainant, owner of a mail order business in New York, *held* entitled to an injunction restraining defendant from using a similar name and designation in connection with a competing business later established in Chicago.—*Ball v. Best* (C. C.) 484.

Complainants *held* to have a right of trade-mark in the word "Hunter," as the name of a whisky, and to be entitled to an injunction against its infringement.—*Lanahan v. John Kissel & Son* (C. C.) 899.

The infringement of a trade-mark implies injury, and where it is of such character as is calculated to deceive purchasers, the owner is not bound to wait until injury has actually resulted before he can maintain a suit for relief by injunction.—*Lanahan v. John Kissel & Son* (C. C.) 899.

## TRADING STAMPS.

Restraining collection and reissuance of, see "Injunction," § 1.

## TREATIES.

An hereditary franchise, granted by the Spanish crown and appurtenant to the office of Alguacil Mayor of Havana, giving the exclusive right of slaughtering cattle in the city of Havana, *held* to constitute private property, within the protection of the treaty with Spain of 1899, under which the United States assumed the temporary occupation of Cuba, of which the owner could not lawfully be deprived without compensation by the military governor.—*O'Reilly De Camara v. Brooke* (D. C.) 884.

## TRESPASS.

By United States officers, see "United States," § 1.

Restraining by injunction, see "Injunction," §§ 1, 2.



## TRIAL.

See "Witnesses."

Instructions as to authority of agent, see "Principal and Agent," § 8.

*Trial of particular civil actions or proceedings.*

For causing death, see "Death," § 2.

For personal injuries, see "Carriers," § 8; "Master and Servant," § 8.

*Trial of criminal prosecutions.*

See "Criminal Law," § 2.

### § 1. Taking case or question from jury.

Where both parties move for direction of a verdict, it is an affirmation on the part of each that there is no disputed question of fact which could operate to deflect or control the questions of law.—*West v. Roberts* (C. C. A.) 350.

The test to determine whether a case shall be taken from the jury is whether or not the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict rendered in opposition to it.—*Aetna Indemnity Co. v. Ladd* (C. C. A.) 636.

### § 2. Instructions to jury.

The failure of the court to specifically define proximate cause, in its charge in an action for negligence, *held* not reversible error.—*Texas & P. Ry. Co. v. Coutourie* (C. C. A.) 465.

Instructions requested, although technically correct, are properly refused, where the court in its general charge has covered the ground in different language.—*Texas & P. Ry. Co. v. Coutourie* (C. C. A.) 465.

Instructions requested in an action for negligence considered, and *held* properly refused, either as covered by the general charge, or as omitting pertinent facts shown by the evidence.—*Texas & P. Ry. Co. v. Coutourie* (C. C. A.) 465.

A trial court is not required to instruct a jury at the instance of defendant concerning a defense which as a matter of law is insufficiently supported by the evidence.—*American Surety Co. v. Choctaw Const. Co.* (C. C. A.) 487.

Instructions on the issue of general agent *held* not erroneous, nor inconsistent with previous instructions.—*Aetna Indemnity Co. v. Ladd* (C. C. A.) 636.

### § 3. Verdict.

Where the court directs a verdict, the usual and better practice is for the jury to return a formal verdict in writing; but the absence of such a verdict is not fatal to the validity of the judgment.—*Moore v. Petty* (C. C. A.) 668.

## TRUSTS.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

### § 1. Establishment and enforcement of trust.

A suit in equity to establish and enforce a trust in favor of a railroad company in prop-

erty which had been conveyed to its president, not begun until more than nine years after defendant's resignation, *held* barred by laches.—*Kansas City Southern Ry. Co. v. Stevenson* (C. C.) 553.

## TUGS.

See "Towage."

## ULTRA VIRES.

Acts of national bank, see "Banks and Banking," § 1.

## UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 2.

## UNITED STATES.

See "Customs Duties"; "Post Office."

Conspiracy to defraud, see "Conspiracy," § 1. Courts, see "Courts," §§ 2-8; "Removal of Causes."

Indians, see "Indians."

Public lands, see "Public Lands," § 1.

### § 1. Government and officers.

If an officer of the United States takes the property of a private person for public use without compensation, he is liable in tort for the trespass, although the government may also be liable on an implied contract.—*O'Reilly De Camara v. Brooke* (D. C.) 384.

The military governor of Cuba, appointed by and representing the United States during its temporary occupation of the island after the conclusion of peace, pursuant to the treaty of Paris, is not exempt from personal liability for a tort committed in his official capacity against an individual in the course of the civil administration of the affairs of the country.—*O'Reilly De Camara v. Brooke* (D. C.) 384.

### § 2. Property, contracts, and liabilities.

In the distribution of the proceeds recovered on the bond of a contractor for government work, conditioned as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], the United States is not entitled to priority over laborers or materialmen, who are also secured by the bond.—*United States v. American Surety Co. of New York* (C. C. A.) 78.

The liability of the sureties on the bond of a contractor for government work, conditioned as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], is limited to the penalty therein named.—*United States v. American Surety Co. of New York* (C. C. A.) 78.

The furnishing of scows to defendant, to be used in transporting stone under a government contract and in other work, *held* not the furnishing of labor and materials, within a bond executed by defendant, under Rev. St. § 8747 [U. S. Comp. St. 1901, p. 2523].—*United States v. Conkling* (C. C. A.) 508.

## USE AND OCCUPATION.

Complainant having rescinded a contract for the sale of land, and released to the vendor all right to the profits thereof, and the latter having demanded that defendant attorn to him therefor, complainant was not entitled to recover the same.—*Graham v. Beaver Hill Coal Co.* (C. C.) 611.

Where complainant constructed certain improvements on land held by him under a contract of purchase, while he was defendant's agent and with defendant's money, he could not recover for use and occupation thereof from defendant.—*Graham v. Beaver Hill Coal Co.* (C. C.) 611.

## USURY.

See "Building and Loan Associations."

## VALUE.

Limits of jurisdiction, see "Courts," § 4.

## VENDOR AND PURCHASER.

See "Sales."

Specific performance of contract, see "Specific Performance."

### § 1. Requisites and validity of contract.

Where an instrument purporting by its terms to be a contract for the sale of the coal underlying certain land was signed only by the owner of the land, and was thereafter referred to in all communications between the parties and in assignments of the instrument, and treated by all parties connected with the matter as an option only, it will be so construed.—*Standford v. Thompson* (C. C. A.) 891.

## VERDICT.

Directing verdict in civil actions, see "Trial."  
In civil actions, see "Trial," § 8.

## VESTED REMAINDERS.

Creation, see "Wills," § 2.

## VICE PRINCIPALS.

See "Master and Servant," § 2.

## VILLAGES.

See "Municipal Corporations."

## WAIVER.

See "Estoppel."

Of exemptions of bankrupt, see "Bankruptcy," § 10.

Of right to appeal, see "Appeal and Error," § 1.

## WAREHOUSEMEN.

Carrier as warehouseman, see "Carriers," § 1.  
Warehouses for imported goods, see "Customs Duties," § 8.

## WARRANT.

Impairment of contract rights under city warrants, see "Constitutional Law," § 1.  
Orders for payment from public funds, see "Municipal Corporations," § 1.

## WARRANTY.

On sale of goods, see "Sales," § 4.

## WATERS AND WATER COURSES.

See "Navigable Waters."

Irrigation companies as corporations subject to bankruptcy laws, see "Bankruptcy," § 2.

### § 1. Appropriation and prescription.

Right to divert running water for irrigation is the same in all states through which the stream so diverted may pass.—*Hoge v. Eaton* (C. C.) 411.

An appropriation of water in Wyoming from a stream in Colorado for irrigation in Wyoming held valid, as against subsequent appropriation in Colorado from the same stream.—*Hoge v. Eaton* (C. C.) 411.

In a suit by settlers on a stream in Wyoming rising in Colorado to restrain diversion of water in Colorado, complainants need not prove that they have conformed to regulations in Wyoming as to distribution of water.—*Hoge v. Eaton* (C. C.) 411.

### § 2. Public water supply.

A water company held not relieved from compliance with an agreement to sell its plant to the city, which was a condition to the grant of its franchise, on the ground that its directors did not formally assent to the substitution of another appraiser to value the property for the one appointed by them, where the substitution was made by its officers, who with its counsel participated in the appraisement.—*City of Fayetteville v. Fayetteville Water, Light & Power Co.* (C. C.) 400.

## WELLS.

Oil or gas wells, see "Mining and Minerals," § 1.

## WILLS.

See "Executors and Administrators."

War revenue taxes on legacies, see "Internal Revenue."

### § 1. Contracts to devise or bequeath.

Evidence considered, and held insufficient to establish a verbal agreement between a husband and his wife, such as to bind him, as his wife's residuary legatee, to bequeath the property re-

maintaining at his death to the wife's sister, or to show such fraud on his part as to authorize a court to enforce the sister's claim against his estate in the hands of his executors.—*Russell v. Jones* (C. C. A.) 929.

### § 2. Construction.

Under the will of a testatrix bequeathing her residuary estate to her husband for life, with remainder to her two daughters equally, with a provision that, "should either of them die leaving issue, such issue to take and receive the share of its parent, the estate in remainder vested in the daughters by the rule in Pennsylvania.—*Heberton v. McClain* (C. C.) 226.

## WITNESSES.

See "Depositions"; "Evidence."  
Experts, see "Evidence," § 5.  
Opinions, see "Evidence," § 5.

### § 1. Competency.

Where a severance was granted in a prosecution for conspiracy, the evidence of a co-conspirator was admissible for the government, in the absence of statute, and its weight was for the jury.—*Wong Din v. United States* (C. C. A.) 702.

### § 2. Examination.

The answer of a witness to a question held responsive.—*Texas & P. Ry. Co. v. Coutourie* (C. C. A.) 465.

### § 3. Credibility, impeachment, contradiction, and corroboration.

Where the reputation of a witness for truthfulness is assailed, the party calling him has the right to introduce testimony to show that his reputation not only is good at the time, but that it has always been good.—*Dimmick v. United States* (C. C. A.) 257.

A newspaper account of an interview had between the publisher of a paper and a witness, with reference to a cloud-burst which was the subject of the witness' evidence, held inadmissible to affect his credibility or otherwise.—*Southern Pac. Co. v. Schuyler* (C. C. A.) 1015.

## WORK AND LABOR.

The price agreed to be paid certain architects for plans and specifications for a courthouse held no evidence of the reasonable value of the use of certain plans furnished.—*Kinney v. Manitowoc County* (C. C. A.) 491.

Plaintiffs held not entitled to recover for the use of plans furnished for the erection of a courthouse under an invalid contract, in the absence of proof of the value of the use made.—*Kinney v. Manitowoc County* (C. C. A.) 491.

## WRITS.

*Particular writs.*

See "Injunction."

Writ of error, see "Appeal and Error."









